**DRAFT**
Final Panel Working DRAFT
December 2006

# CHAPTER 1

# COMMERCIAL PRACTICES

## REPORT OF THE ACQUISITION ADVISORY PANEL

December 2006

**DRAFT**
Final Panel Working DRAFT
December 2006

## TABLE OF CONTENTS


Part I – Background. Government Efforts to Use Commercial Practices

A. Introduction
B. "Commercial Items" and Commercial Practices: Definition and Procurement Policies

1. Statutory Definition: "Commercial Items"
2. Statutory Preferences and Exemptions for "Commercial Items"

C. Legislative and Regulatory Origins

1. The Origins of Current Government "Commercial" Practices
2. The Commercial Item Exemption from the Original Truth in Negotiations Act
3. The Commission on Government Procurement
4. DoD Directive 5000.37
5. 1984 Congressional Reforms
6. The President's Blue Ribbon Commission on Defense Management
7. Congressional Directives of the Late 1980s and Early 1990s
8. DFARS Parts 210 and 211
9. The Section 800 Acquisition Advisory Panel
10. The Federal Acquisition Streamlining Act of 1994
11. The Regulatory and Practical Implementation of FASA
12. The Federal Acquisition Reform ("Clinger-Cohen") Act of 1996
13. Recent Congressional and Executive Changes
14. The Services Acquisition Reform Act of 2003
15. Restrictions on Use of Commercial Items

D. Time and Materials and Labor Hour Contracts

1. Definition and Description – The Current Rule
2. Recent Legislative Developments
3. OFPP's Rule

E. Competition

1. A History of Difficulty in Achieving Competition
2. The Current Situation
3. The Competition in Contracting Act

a. Background
b. Competition Under CICA Procedures

(i) Acquisition Planning
(ii) Synopsis
(iii) Solicitation
(iv) Negotiations
(v) Award
(vi) Post-Award

4. The Use of Interagency Vehicles
5. Indefinite Delivery Indefinite Quantity (IDIQ) Contracts

a. Background
b. "Fair Opportunity"
c. Section 803 Revisions to "Fair Opportunity"
d. Competition under Multiple Award IDIQ Contracts

7. GSA Federal Supply Schedule

a. Background
b. Market Prices
c. Streamlined Ordering Process

(i) Policies and Procedures for Ordering Services
(ii) Schedule BPAs
(iii) Brand Name

F. Pricing – The Current Regulatory and Oversight Scheme

1. Overview
2. The Current Truth in Negotiations Act

a. What is Cost or Pricing Data?
b. Information Other Than Cost or Pricing Data

G. GSA Schedule Pricing Policies

Part II – Findings

1. Commercial "Best Practices" Generally
2. Defining Requirements
3. Competition in the Commercial Marketplace
4. Contract Terms and Conditions Used in Commercial Contracts
5. Pricing of Commercial Contracts by Commercial Buyers
6. "Commercial Practices" Adopted by the Government
7. Time & Materials Contracts
8. Statutory and Regulatory Definitions of Commercial Services

9. Time Required for Commercial Services Contracts
10. Impact of the Annual Budget and Appropriations Processes
11. Unequal Treatment of the Contracting Parties

PART III – RECOMMENDATIONS

1. Definition of Commercial Services
2. Improving the Requirements Process
3. Improving Competition
4. New Competitive Services Schedule
5. Improving Transparency and Openness
6. Time & Materials Contracts
7. Protest of Task & Delivery Orders
8. Pricing When No or Limited Competition Exists
9. Improving Government Market Research
10. Unequal Treatment of the Contracting Parties

Appendix A – Proposed Changes to FAR Parts 12 and 15 to Implement Recommendation 8, Pricing When No or Limited Competition Exists

Appendix B – Statutory Evolution of "Commercial Item"

**DRAFT**
Final Panel Working DRAFT
December 2006

## Commercial Practices Working Group Report

## Part I – Background

## Government Efforts to Use Commercial Practices

### A. Introduction

Acquisition and process reform has been the subject of numerous studies and implementation efforts over the past four and a half decades.[1] A decade ago, following up on the Packard Commission Report, internal Department of Defense (DoD) initiatives and the work of the Section 800 Panel, and the National Performance Review ("NPR") Report, the Federal Acquisition Streamlining Act of 1994 ("FASA")[2] and the Federal Acquisition Reform Act ("FARA")[3] were enacted. The studies, FASA and FARA, were an effort to make the federal procurement process more commercial-like and to simplify the federal procurement process with the expectation that a simpler and more commercial-like process would increase government access to private sector technology and the growing private sector development of technology-related services. The reforms of the mid-90's adopted some commercial practices in government procurement and encouraged the purchase of commercial products and services rather than acquisitions tailored to unique government specifications in the belief that this approach would give the Government access to commercial solutions, reduce the cost of major systems, improve the overall quality of contractor performance and shorten the time it takes to purchase goods and services that support agency missions. Those reforms have expanded the definition of commercial items to encompass not only goods but virtually all types of services.[4]

The most significant acquisition reform involving commercial items and services was FASA, which became law on October 13, 1994, following the 800 Panel Report and the NPR. This law was intended, among other purposes, to make it easier for the Government to acquire goods and services from the commercial marketplace. FASA made a wide range of changes in acquisition policy and procurement law by exempting purchases of commercial products from several statutes, while expanding the definition of a "commercial product." FARA made additional statutory changes, such as exempting commercial items from certain cost disclosure and cost-accounting standards that, discouraged commercial companies from doing business with the Government. Building on more than 20 years of work by the Commission on Government Procurement,[5] the Packard Commission,[6] the Section 800 Panel,[7] and the NPR,[8]

---

[1] *See* Def. Acquisition Performance Assessment Report, App. E (Jan. 2006). (Citing 128 acquisition-related studies that preceded it.).
[2] Pub. L. No. 103-355, 108 Stat. 3243 (1994); codified at 41 U.S.C. § 403.
[3] Pub.L. No. 104-106, 110 Stat. 186 (1996).
[4] Ashton B. Carter & John P. White, *Keeping the Edge, Managing Defense for the Future* 170-71 (MIT Press 2001).
[5] Report of the Comm'n on Gov't Procurement (Dec. 1972). For specific discussion of commercial products, *see id.* Vol. 3, Pt. D, *Acquisition of Commercial Products.*
[6] The President's Blue Ribbon Comm'n on Def. Mgmt, *A Quest for Excellence: Final Report to the President and Appendix* (June 1986) (hereinafter referred to as the "Packard Commission. Report")

FASA and FARA set the stage for simplifying the process for entering into contracts, and attempting to align government contracting more closely with commercial practices.[9]

In the late 1980's and early 1990's, senior government officials, including the Secretary of Defense and the Vice-President, were concerned that the Government was paying too much and not obtaining the latest technology because of regulatory impediments.[10] Key concerns cited were military unique requirements and complex regulatory requirements associated with cost-based contracting such as the Truth in Negotiations Act ("TINA"), government specific Cost Accounting Standards ("CAS"), and associated reporting, auditing, and oversight mechanisms.[11] Other concerns cited in the NPR were burdensome rules for smaller purchases.[12] As discussed below, for acquisitions of commercial items the presumption in FASA and FARA is that a fair and reasonable price should be determined by reference to the market, rather than by examination of a seller's costs. FASA and FARA focused on obtaining the benefits of the commercial marketplace through competition, historical pricing, benchmark pricing, *etc.* However, in circumstances where market forces are not active, this presumption is questionable.[13]

In 1986, the Blue Ribbon Commission on Defense Management, chaired by former Deputy Secretary of Defense David Packard, highlighted the need for DoD to expand its use of commercial products and processes and to eliminate barriers that discouraged application of innovative technology to DoD contracts.[14] The Packard Commission's recommendations clearly focused on the power of the commercial marketplace to produce more cheaply than the defense acquisition system.[15] The report also contained a separate section on competition wherein the Commission noted that foremost among commercial practices is competition, "which should be used aggressively in the buying of systems, products and professional services."[16]

In January 1993, the Section 800 Panel, which specifically focused on laws affecting defense procurement, published its 1800-page report that made recommendations in the areas of procurement reform, electronic commerce, and military specifications, among others. The 800 Panel proposed a new approach to the acquisition of commercial items, both as end-items and as

---

[7] The Advisory Panel on Streamlining and Codifying Acquisition Laws (known as the Section 800 Panel) was created in response to Section 800 of the National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510.
[8] Report of the Nat'l Performance Review, *Reinventing Procurement PROC 13,* Ch. 3 (Sept. 7, 1993).
[9] Carter, *supra* note 4, at 170-71.
[10] See National Performance Review Report: Foster Reliance on the Commercial Marketplace (Sept. 14, 1993).
[11] This concern is reflected in the Packard Commission Report, the Section 800 Panel, created by Congress, and the National Performance Review Report.
[12] Report of the Nat'l Performance Review, *PROC09: Lower Costs and Reduce Bureaucracy in Small Purchases through the Use of Purchase Cards (*1993*).*
[13] *See* U.S. GAO, *DOD Contracting: Efforts Needed to Address Air Force Commercial Acquisition Risk,* GAO-06-995, 2-3 (Sept. 2006).
[14] *See* Packard Comm'n Report.
[15] Packard Comm'n Report at 60.
[16] Packard Comm'n Report at 62.

components in defense-unique products. The Panel specifically proposed: stronger policy language favoring the use of commercial and nondevelopmental items; a new statutory definition of commercial items; an expanded exemption for "adequate price competition" in the Truth in Negotiations Act, and relief from inappropriate requirements for cost or pricing data when a competitively awarded contract for commercial items or services is modified; new exemptions to technical data requirements in commercial item acquisitions; and relief from "Buy American" restrictions. The Panel also proposed creation of new subpart in Title 10 for commercial item acquisitions providing for exemptions from statutes that create barriers to the use of commercial items and including provisions on pricing, documentation, and audit rights tailored for commercial item acquisition.[17]

The Defense Science Board issued a report entitled "Defense Acquisition Reform" in July 1993. The report urged adoption of the recommendations of the Section 800 Panel. The Board also recommended: moving away from cost-based acquisition; using functional specifications to encourage commercial solutions; and adopting commercial practices for treatment of intellectual property.[18]

Later, on February 24, 1994, Defense Secretary William Perry set forth his vision for simplification of the way the Pentagon buys military systems in a report titled "Acquisition Reform: A Mandate for Change."[19] Dr. Perry was particularly concerned that the use of detailed military specifications limited competition, stifled innovation, increased costs, and delayed the fielding of new systems.[20] To correct that, Dr. Perry issued a memorandum entitled "Specifications and Standards—A New Way of Doing Business" on June 29, 1994. Also known as the "Perry Memo," it reversed DoD policy by directing the military services to "use performance and commercial specifications and standards instead of military specifications and standards, unless no practical alternative exists to meet the user's needs." It also directed military acquisition programs to reduce their oversight, employing process controls in place of extensive testing and inspection.[21]

The Panel's Commercial Practices Working Group was privileged to meet with Dr. Perry and to discuss his experience on the Packard Commission, his memorandum and his efforts to implement commercial practices. He explained that as a member of the Packard Commission he became concerned about the inability of the defense acquisition system to obtain current technology for semi-conductors. He said that when he became Secretary of Defense and issued his memorandum, his focus was on semi-conductors. He noted that when he was Secretary of Defense, DoD was behind in its use of semi-conductors. Dr. Perry was focused on how to buy

---

[17] *See Streamling Defense Acquisition Laws: Report of the Acquisition Law Advisory Panel to the United States Congress* 18 (1993).
[18] *See Report of the Defense Science Board Task Force on Defense Acquisition Reform* (July 1993).
[19] Carter, *supra* note 4, at 171-72.
[20] William Perry, DoD, AAP Commercial Practices Working Group meeting (May 22, 2006).
[21] Memorandum from Secretary of Defense William Perry to Secretaries of the Military Departments, et al., *Specifications & Standards – A New Way of Doing Business* (June 29, 1994).

semi-conductors and related technology without paying exorbitant prices for them. He had observed that industry had already created semi-conductors that were adequately rugged. Therefore, he was particularly concerned about the impact of military specifications on the cost of technology – he saw potential savings of one to two billion dollars per year, just in semi-conductors.[22]

Around the same time, the manner in which the DoD acquired information technology (IT) changed. The Information Technology Management Reform Act of 1996 (Division E of the Clinger-Cohen Act) sought to leverage commercial IT advances by calling for "modular contracting" in which acquisitions are "divided into smaller acquisition increments that (1) are easier to manage individually…, (2) enhance the likelihood of achieving workable solutions…, (3) [are] not dependent on any subsequent increment…, and (4) take advantage of any evolution in technology or needs."[23]

While FASA and FARA changed the federal acquisition landscape to improve access to commercial markets and to allow the Government to function more like a commercial buyer in some respects by reducing regulatory barriers, as discussed further below, the Government is nonetheless not a commercial buyer. The ways in which the Government differs from a commercial buyer are many, but to take some obvious examples:

- As discussed above, the Government's source of funding is taxpayer – public funds. That source of funding is subject to Constitutional and legal restrictions that impose burdens on government managers to which the private sector is not subject. Annual appropriations, which frequently are not enacted into law after the fiscal year has already started, and fiscal procedures that distribute funds within an agency, often delay the availability of funds and shorten the time period that government managers have to conduct competitive procurements and obligate funds. Private sector buyers are not limited to annual appropriations for planning and implementing their acquisitions.

- The Government is not accountable from a profit and loss standpoint for its performance. Success in Government is measured by different standards; e.g., successful mission accomplishment, which features national security, defense, and homeland security missions. Market-based pressures that strongly influence commercial company performance are not present. Private companies can change and adapt their practices to reflect market trends as they evolve. The government changes its practices by statute and regulation.

---

[22] Perry meeting.
[23] Pub. L. No. 104-106, §.5202, 110 Stat. 690 (1996).

- Government is committed to a host of social and economic programs that are largely implemented through discretionary expenditures divided between grants and the procurement system, such as preference programs for small and disadvantaged businesses of various types; environmentally friendly products; handicap accessible products, services and buildings; and many others. This means the Government may purchase services or goods from a more costly provider in furtherance of broader social policy goals. And, compliance with some of these requirements is subject to an audit and compliance regime by a variety of Federal agencies.

- The Government has its own regulatory intellectual property (IP) regime that is significantly different from the private sector. The private sector focuses on development and protection of IP and has significant legal remedies for protecting the value of its IP. The Government, on the other hand, focuses on its rights to use IP without restriction for government purposes, which may involve giving a company's IP to a competitor, if necessary, for a government mission. The differing approaches often conflict when the Government acquires commercial items.

- The Government is subject to trade policy restrictions that limit the sources for its materials and products.

- The disputes mechanism for government contractors is limited to monetary remedies under the Contract Disputes Act. In the private sector, parties are free to bring claims in court, including seeking equitable remedies, or negotiate contract provisions for alternative resolution.

- Even in the "commercial" area, the Government has the right to audit, investigate, and bring civil or criminal fraud claims against a contractor.

It is in the context of the changes directed at making the Government's acquisition process more commercial that the Panel has done its analysis. The Panel began its efforts by reviewing relevant laws, regulations, and procurement policies relating to use of commercial practices by the Government. It further identified and reviewed reports and studies from the Government Accountability Office ("GAO"), the Inspectors General of DoD and General Services Administration. The Panel examined other studies and analyses such as the Defense Acquisition Performance Assessment and the study of Price-Based Acquisition performed by the Rand Corporation for the Air Force. The Panel also reviewed other literature and background studies on the topic of commercial practices in services acquisition. The Panel attempted to seek

the views of all stakeholders; *i.e.,* the government users and buyers, the holders of government contracting vehicles, and the contractor community.

Significantly, the Panel attempted to ascertain ***current*** commercial practices, particularly for services acquisition by large commercial buyers of services and the professionals that support the procurement process for those companies. The Panel gained a heightened awareness that there exists in the private sector a large, vigorous, and rapidly-growing market for the acquisition of professional services, particularly information technology ("IT"), and IT-heavy business management and financial services. When large, private-sector companies acquire services, they may engage in an "outsourcing" transaction. For example, a company may seek a vendor to manage its IT resources, its human resources department, or support financial institutions transaction processes. In some outsourcing transactions, a company may acquire vendor services to support its own performance of such functions.

American corporations are hiring services vendors, both domestic and foreign, at a rapid pace to drive down costs and improve their profitability. These companies are supported, both internally and externally, in their procurement processes by highly trained and experienced executives and consultants. Indeed, there are services acquisition specialists who work only in the private sector. Moreover, major private-sector buyers are acquiring services from many of the same companies who sell services to the Government. The Commercial Practices Working Group and the Panel set out to learn as much as possible about the acquisition processes used by large private sector buyers. The Working Group met over 40 times in the past 17 months. The full Panel also has heard directly from a number of private sector buyers about their acquisition practices. At the same time, the Panel recognized that the Government has created its own set of practices that it identifies as "commercial," characterized by FAR Part 12, use of interagency and indefinite delivery indefinite quantity (IDIQ) contracts, the GSA Multiple Award Schedule, and relief from submission of certified cost or pricing data.

The questions upon which the Panel has focused include: (1) how the Government can take advantage of commercial practices; (2) what is working and what is not in the current government "commercial" framework, and how that compares to what the commercial market is doing now; (3) how the Government's commercial-like practices can be refined and improved by reference to current commercial best practices; and (4) how to strike the right balance to obtain access to commercial markets while achieving mission performance, honoring various social policy goals, and obtaining a reasonable level of oversight to protect the Government from fraud and abuse (recognizing that the Government will never be a truly commercial buyer). These are significant questions to have tackled, and the expectation is that this debate will continue for some time. However, it is very useful, a decade out from FASA and FARA, to benchmark current commercial best practices based on the huge volume of private sector services transactions and to compare the current Government "commercial" approach.

### B. "Commercial Items" and Commercial Practices: Definition and Procurement Policies

The term "commercial items" has evolved as various acquisition reforms have attempted to simplify government procurement and to harness the efficiency of the commercial marketplace. As the Section 800 Acquisition Advisory Panel observed, "[T]he primary purpose of defining a commercial item [is] to be able to exempt items so defined from the reach of [statutes and regulations that] have created barriers to the acquisition of commercial items."[24] Accordingly, this categorical approach to procurement consists of four components: (1) the gateway definition of "commercial items;" (2) the application of the definition to a particular item or service; (3) the determination of the appropriate pricing mechanism; and (4) the preferences and exemptions afforded to such items as qualified supplies or services.

#### 1. Statutory Definition: "Commercial Items"

The current statutory definition for "commercial items" is set out in the Office of Federal Procurement Policy Act[25]. It includes tangible items of the type traditionally used by the public, but it also includes items that have evolved from tangible commercial items and items that have been modified through processes traditionally available to the general public or in such a way that does not significantly alter the nongovernmental function of the item. Notwithstanding the use of the term "items," the definition also embraces two forms of services: (1) services in support of tangible, commercial items and (2) standalone services, provided that such services are offered and sold competitively in substantial quantities based on established catalog or market prices. In full, the current statutory definition provides:

> The term "commercial item" means any of the following:
>
> (A) Any item, other than real property, that is of a type customarily used by the general public or by nongovernmental entities for purposes other than governmental purposes, and that—
> (i) has been sold, leased, or licensed to the general public; or
> (ii) has been offered for sale, lease, or license to the general public.
>
> (B) Any item that evolved from an item described in subparagraph (A) through advances in technology or performance and that is not yet available in the commercial marketplace, but will be available in the commercial marketplace in time to satisfy the delivery requirements under a Federal Government solicitation.

---

[24] 8 *Streamlining Defense Acquisition Laws: Report of the Acquisition Law Advisory Panel to the United States Congress* 18 (Jan. 1993).
[25] 41 U.S.C. § 403(12).

(C) Any item that, but for—
(i) modifications of a type customarily available in the commercial marketplace, or
(ii) minor modifications made to meet Federal Government requirements, would satisfy the criteria in subparagraph (A) or (B).

(D) Any combination of items meeting the requirements of subparagraph (A), (B), (C), or (E) that are of a type customarily combined and sold in combination to the general public.

(E) Installation services, maintenance services, repair services, training services, and other services if—
(i) the services are procured for support of an item referred to in subparagraph (A), (B), (C), or (D), regardless of whether such services are provided by the same source or at the same time as the item; and
(ii) the source of the services provides similar services contemporaneously to the general public under terms and conditions similar to those offered to the Federal Government.

(F) Services offered and sold competitively, in substantial quantities, in the commercial marketplace based on established catalog or market prices for specific tasks performed or specific outcomes to be achieved and under standard commercial terms and conditions.

(G) Any item, combination of items, or service referred to in subparagraphs (A) through (F) notwithstanding the fact that the item, combination of items, or service is transferred between or among separate divisions, subsidiaries, or affiliates of a contractor.

(H) A nondevelopmental item, if the procuring agency determines, in accordance with conditions set forth in the Federal Acquisition Regulation, that the item was developed exclusively at private expense and has been sold in substantial quantities, on a competitive basis, to multiple State and local governments.[26]

### 2. Statutory Preferences and Exemptions for "Commercial Items"[27]

In enacting FASA[28] in 1994 and FARA in 1996[29], Congress established a preference for the acquisition of "commercial items"[30] and provided exemptions from many of the cost-based

[26] 41 U.S.C. § 403 (12).
[27] *See* App. A for a redline tracing the evolution in the definition of "Commercial Items."

procurement requirements, including the Truth in Negotiation Act's ("TINA") cost or pricing data requirements[31] and certain cost accounting standards ("CAS").[32] In addition, Congress provided exemptions from many government-unique laws that were perceived as barriers to the procurement of "commercial items."[33]

### C. Legislative and Regulatory Origins

To fully understand the contemporary usage of the term "commercial items," it is necessary to consider its origins—as a component of the larger development of modern acquisition policy and as a reaction to perceived problems associated with those policies. Federal acquisition policy incorporates three core principals: (1) conducting procurements competitively whenever practicable so that the Government receives quality goods and services at a fair price and interested parties have a reasonable opportunity to compete; (2) maintaining the transparency of the acquisition process; and (3) ensuring that the Government's acquisition process has, and is seen as having, integrity.

#### 1. The Origins of Current Government "Commercial" Practices

The start of the modern acquisition era is appropriately demarcated by the end of the Second World War.[34] In the immediate aftermath, Congress enacted the framework for modern acquisition procedures: the Armed Services Procurement Act of 1947[35] and its civilian counterpart, the Federal Property and Administrative Services Act of 1949.[36] For the most part, current federal acquisition policy developed from this framework—though it was shaped, to a great extent, by the unique concerns of the second half of the twentieth century, including the large peacetime military establishments associated with the Cold War, the Federal Government's expanding role in the domestic sphere, the rapid development of civilian and military technologies, and the equally rapid expansion of government spending.[37]

---

[28] Pub. L. No. 103-355, 108 Stat. 3243 (1994).
[29] Pub. L. No. 104-106, div. D, tit. XLII, 110 Stat. 649.
[30] 10 U.S.C. § 2377 (codifying preferences).
[31] 10 U.S.C. § 2306a(b)(1)(B).
[32] 41 U.S.C. § 422(f)(2)(B)(i).
[33] *See* Pub. L. No. 103-355, § 8105, 108 Stat. 3243, 3392. *See also* Pub. L. No. 104-106, div. D, tit. XLII, § 4203, 110 Stat. 642, 654-55 (rendering inapplicable certain procurement laws regarding commercially available off-the-shelf items). The Federal Acquisition Reform Act was renamed the "Clinger-Cohen Act" by the Omnibus Consolidated Appropriations Act for Fiscal Year 1997, Pub. L. No. 104-208, tit. VIII, § 808, 110 Stat. 3009, 3009-393 (1996).
[34] It appears that the stresses of war are equally beneficial for the advancement of federal procurement policies as they are for medicine. As the 1972 Commission on Government Procurement explained, "The most significant developments in procurement procedures and policies have occurred during and soon after periods of large-scale military activity." Comm'n on Gov't Procurement Report VOL. 1 at 163 (1972).
[35] Pub. L. No. 80-413, 62 Stat. 21 (1948) (codified as amended at 10 U.S.C. § 2301 *et seq.*).
[36] Pub. L. No. 81-152, 63 Stat. 377 (1949) (codified as amended at 40 U.S.C. § 471 *et seq.*).
[37] S. Rep. No. 103-259, at 1-2 (1994), *reprinted in* 1994 U.S.C.C.A.N. 2561, 2562.

While the Government sought to acquire more services and supplies—in particular, the newly emerging aerospace and electronic technologies of the 1950s and 1960s—the procurement system was becoming exponentially more complex.[38] These trends proved prohibitive to achieving all of the Government's principal goals outlined above: the complexity discouraged competitive participants and there was concern that the volume of negotiated acquisitions made it increasingly difficult for the Government to safeguard itself against inflated cost estimates in negotiated contracts.[39]

### 2. The Commercial Item Exemption from the Original Truth in Negotiations Act

In 1962, Congress enacted Public Law 87-653 to facilitate fair price terms in noncompetitive contracts.[40] The law amended the Armed Services Procurement Act to require "oral or written discussions" with all firms "within a competitive range" and promoted the use of advertising over single-party negotiated contracts—all in an effort to increase competition. The law also contained a provision requiring contractors to submit and certify detailed cost or pricing data to provide the Government with sufficient information to negotiate a fair price—now popularly referred to as the Truth in Negotiations Act ("TINA").[41]

TINA exempted certain acquisitions from its requirements for certified cost or pricing data , including acquisitions that involved "commercial items sold in substantial quantities to the general public." In full, the exemption clause stated:

> *Provided*, That the requirements of this subsection need not be applied to contracts or subcontracts where the price negotiated is based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, prices set by law or regulation or, in exceptional cases where the head of the agency determines that the requirements of this subsection may be waived and states in writing his reasons for such a determination.[42]

---

[38] Comm'n on Gov't Procurement Report VOL. 1 at 177-78 (1972).

[39] *Id.* at 178. *See also* S. Rep. No. 87-1884 (1962), *reprinted in* 1962 U.S.C.C.A.N. 2476. [Note: prior to 1984 enactment of the Competition In Contracting Act, the Armed Services Procurement Act and the Federal Property and Administrative Services Act relied on sealed bidding for competition. Negotiated procurement was permitted , but as an exception to formal advertising requiring a written justification. While competition for negotiated procurements was required, if practicable, negotiated contracts were frequently non-competitive.] *See* S. Rep. No. 98-50 (1983), *reprinted in* 1984 U.S.C.C.A.N. 2174-84.

[40] S. Rep. No. 87-1884 (1962), *reprinted in* 1962 U.S.C.C.A.N. 2476.

[41] Public Law 87-653 may have actually discouraged increased participation and competition among vendors. The 1993 Report of the Acquisition Law Advisory Panel ("Section 800 Panel") argued that TINA "greatly impedes commercial buying." *Acquisition Law Advisory Panel Report* at 6.

[42] Pub. L. No. 87-653, 76 Stat. 528 (1962) (emphasis in original).

TINA was the first statute to use the term "commercial items." To qualify under the "commercial item" exemption—and avoid TINA's data submission requirements—a contractor had to proffer established catalog or market prices "sold in substantial quantities to the general public." The definition did not encompass modification or development, and it did not apply to items not yet sold to the general public, even if those items were being developed for use by the general public.

### 3. The Commission on Government Procurement

During the 1960s and 1970s, the federal acquisition system was perceived as being plagued by cost overruns, inefficiencies, and burdensome government specifications. A 1970 General Accounting Office study of 57 major Department of Defense ("DoD") systems found 38 systems with at least a 30 percent cost increase from the point of contract award.[43] Although this percentage was historically consistent with past cost overruns, the sheer volume of government contracting yielded staggering dollar amounts that proved unpalatable.[44] Government-unique specifications also proved a major impediment to the efficient procurement of otherwise suitable, commercially developed products and services. By way of a popular illustration, the military specifications for fruitcake once ran eighteen pages.[45]

In 1969, Congress established the Commission on Government Procurement to study and recommend to Congress methods "to promote the economy, efficiency, and effectiveness" of procurement by the executive branch.[46] The Commission's authority subsequently was extended,[47] and in 1972 it issued its report to Congress. Among its many recommendations, the Commission advocated for the creation of the Office of Federal Procurement Policy and the consolidation of federal acquisition regulations, leading to the passage of the Office of Federal Procurement Policy Act of 1974 and, ultimately, the promulgation of the Federal Acquisition Regulation ("FAR").[48]

The idea that the Federal Government could benefit from the broader use of commercial items did not go unnoticed by the Commission in its 1972 Report. In fact, the Commission urged Congress to promote the acquisition of commercial products over "Government-designed items to avoid the high cost of developing unique products."[49] This recommendation, however, did not lead to appreciable statutory reforms—at least, not in the 1970s.

---

[43] U.S. GAO, *Status of the Acquisition of Selected Major Weapon Systems*, B-163058, Chapter 2 12 (1970); Comm'n on Gov't Procurement Report VOL. 1 at 182.
[44] *Id.*
[45] Stephen Barr, *'Reinvent' Government Cautiously, Study Urges*, Wash. Post, July 28, 1993, at A17, citing Brookings Institute Study. Of course, that should be understood in the context that the Government buys fruitcakes by the truckload (quite different from the "Joy of Cooking" recipe identified in the article).
[46] Pub. L. No. 91-129, 83 Stat. 263 (1969).
[47] Pub. L. No. 92-47, 85 Stat. 102 (1971).
[48] Pub. L. No. 93-400, 88 Stat. 796 (1974).
[49] Acquisition Law Advisory Panel Report at 3 (citing Comm'n on Gov't Procurement Report, Pt. D).

### 4. DoD Directive 5000.37

In 1978, the DoD issued its Acquisition and Distribution of Commercial Products ("ADCOP") directive, "which sought to facilitate the acquisition of commercial products by eliminating Government specifications and contract clauses that did not reflect commercial practices."[50] During its implementation of ADCOP, DoD sought "to establish qualified commercial product lists," but "[t]his aspect of ADCOP was blocked by Congress because it would have precluded small businesses that sold only to DoD from continuing to sell their products as commercial products."[51] At the same time, "various elements within DoD began assessing how commercial and foreign subsystems and components might be used in weapons systems."[52]

### 5. 1984 Congressional Reforms

In 1984, Congress passed the Competition in Contracting Act ("CICA"),[53] which was designed "to establish a statutory preference for the use of competitive procedures in awarding federal contracts for property or services, to impose restrictions on the awarding of noncompetitive contracts, and to permit federal agencies to use the competitive method most conducive to the conditions of the contract."[54] In addition to representing the first major amendments to the Armed Services Procurement Act of 1947 and the Federal Property and Administrative Services Act of 1949, CICA contained a specific provision requiring federal agencies to "promote the use of commercial products whenever practicable."[55] Significantly, CICA also provided a statutory basis for multiple award schedule contracting, which became "a primary method for Government purchase of commercial products."[56] CICA deemed the GSA Schedules to meet the definition of "competitive procedures" provided that (1) participation in the program is open to all responsible sources, and (2) orders and contracts under the schedules result in the lowest overall cost alternative to meet the Government's needs.[57]

Following the passage of CICA, Congress enacted the Defense Procurement Reform Act as a component of the National Defense Authorization Act for Fiscal Year 1985.[58] The act was designed to curb abuses, then brought to light, regarding the acquisition of military parts and supplies.[59] For example, during the course of congressional investigations, the House

---

[50] *Id.* (citing DoD Directive 5000.37 (Sept. 29, 1978)).
[51] *Id.* at 3 n.6 (citing W.T. Kirby, *Expanding the Use of Commercial Products and "Commercial-Style" Acquisition Techniques in Defense Procurement: A Proposed Legal Framework,* Packard Comm'n Report). The small business restrictions from pre-qualification were lifted from the NDAA in 1986; however, qualified bidder lists remained impermissible pursuant to the passage of the Competition in Contracting Act in 1984.
[52] *Id.* at 3.
[53] Pub. L. No. 98-369, div. B, tit. VII, 98 Stat. 494, 1175 (1984).
[54] S. Rep. No. 98-50, at 1 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2174.
[55] Pub. L. No. 98-369, div. B, tit. VII, 98 Stat. 494, 1186 (1984).
[56] H. Rep. No. 98-861, at 1423, (1984), *reprinted in* 1984 U.S.C.C.A.N. at 2110-11.
[57] 41 U.S.C. § 259.
[58] Pub. L. No. 98-525, tit. XII, 98 Stat. 2492, 2588 (1984).
[59] *See id.*

Committee on Armed Services discovered an Air Force report that attempted to explain "how a diode which cost a contractor $0.04 was billed to the Government at $110.34."[60] In an effort to reduce these excessive payments, Congress directed DoD to use "standard or commercial parts . . . whenever such use is technically acceptable and cost effective."[61]

### 6. The President's Blue Ribbon Commission on Defense Management

In 1986, President Reagan established the Packard Commission to make recommendations to improve defense management.[62]

In a now familiar passage, the Packard Commission Report stated:

> DOD should make greater use of components, systems, and services available "off-the-shelf." It should develop new or custom-made items only when it has been established that those readily available are clearly inadequate to meet military requirements. [63]
>
> No matter how DoD improves its organization or procedures, the defense acquisition system is unlikely to manufacture products as cheaply as the commercial marketplace. DoD cannot duplicate the economies of scale possible in products serving a mass market, nor the power of the free market system to select and perpetuate the most innovative and efficient producers. Products developed uniquely for military use and to military specifications generally cost substantially more than their commercial counterparts. . . . [64]
>
> A case in point is the integrated circuit or microchip. . . . This year DoD will buy almost $2 billion worth of microchips, most of them manufactured to military specifications. The unit cost of a military microchip typically is three to ten times that of its commercial counterpart. This is a result of the extensive testing and documentation DoD requires and of smaller production runs (DoD buys less than ten percent of the microchips made in the U.S.) Moreover the process of procuring microchips made to military specifications involves substantial delay. As a consequence, military microchips typically lag a generation (three

---

[60] H.R. Rep. No. 98-690, at 10 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4237, 4241.
[61] Pub. L. No. 98-525, tit. XII, § 1202, 98 Stat. 2492, 2588-89 (1984).
[62] Packard Comm'n Report.
[63] Packard Comm'n Report, at 60 (emphasis removed).
[64] Packard Comm'n Report, at 60.

> to five years) behind commercial microchips."[65] The Packard Commission also noted that the same principle -- the expanded use of commercial items - could apply to a wide variety of products, but also to services, including professional services. [66]

As set forth in the Introduction, the Packard Commission contained a discussion of competition as a "foremost" commercial practice that should be aggressively used in the acquisition of "systems, products and professional services."[67]

### 7. Congressional Directives of the Late 1980s and Early 1990s

Shortly after the Packard Commission issued its final report in 1986, Congress amended Title 10 of the United States Code to add a provision mandating that DoD use "nondevelopmental items" where those items would meet DoD's needs.[68] The act defined "nondevelopmental items" to include "any item of supply that is available in the commercial marketplace."[69] The provision also required DoD to define its requirements and undertake research to determine "whether nondevelopmental items are available or could be modified to meet agency needs" before creating unique military specifications.[70] According to a committee report that accompanied this legislation, it was Congress's intent to break DoD's "long-standing bias to use detailed military specifications."[71]

Based on concerns over DoD's "lack of progress in eliminating barriers to the procurement of [nondevelopmental items],"[72] in 1989 Congress issued another set of directives—this time requiring DoD to issue streamlined regulations governing the acquisition of nondevelopmental and commercial items.[73] These mandates—part of the Defense Authorization Act for Fiscal Years 1990 and 1991—also required DoD to lessen TINA's cost or pricing data submission requirements.[74] However, Congress failed to amend TINA's statutorily defined exemptions, making it difficult for DoD to provide relief through regulatory changes.[75] Finally, in 1990, Congress again directed DoD to prioritize the use of nondevelopmental items.[76]

---

[65] *Id.*
[66] *Id.* at 61.
[67] *Id.* at 62.
[68] National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, § 907, 100 Stat. 3816, 3917 (1986).
[69] *Id.*
[70] *Id.*
[71] S. Rep. No. 99-331, at 265 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6413, 6460.
[72] H.R. Conf. Rep. No. 101-331, at 612 (1989), *reprinted in* 1989 U.S.C.C.A.N. 977, 1069.
[73] National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, § 824(b), 103 Stat. 1352, 1504-05 (1989).
[74] *Id.*
[75] *See id.*
[76] National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 814, 104 Stat. 1485, 1595 (1990).

### 8. DFARS Parts 210 and 211

In response to these Congressional directives, DoD promulgated Parts 210 and 211 of the Defense Federal Acquisition Regulation Supplement ("DFARS") in 1991.[77] Part 210 offered a definition and a preference for "nondevelopmental items,"[78] while Part 211 contained an early predecessor to the modern statutory definition of "commercial items."[79] In pertinent part, the definition in Part 211 provided:

> (a) Commercial items means items regularly used in the course of normal business operations for other than Government purposes which:
> (1) Have been sold or licensed to the general public;
> (2) Have not been sold or licensed; but have been offered for sale or license to the general public;
> (3) Are not yet available in the commercial marketplace, but will be available for commercial delivery in a reasonable period of time;
> (4) Are described in paragraph (1), (2), or (3) that would require only minor modification in order to meet the requirements of the procuring agency.[80]

The DFARS definition represented a departure from TINA's circumscribed conception of a commercial item. In contrast to TINA, which required that commercial items be based on established catalog or market prices "sold in substantial quantities to the general public,"[81] Part 211 included items that were "*offered* for sale or license to the general public" and items that *eventually* would "be available for commercial delivery."[82] In addition, Part 211 contained a general provision, which permitted an item to still qualify as a "commercial item" even if it required "minor modification in order to meet the requirements of the procuring agency."[83]

### 9. The Section 800 Acquisition Advisory Panel

Sensing the need for significant acquisition reform, in 1990, Congress established the Advisory Panel on Streamlining and Codifying Acquisition Laws ("Section 800 Panel").[84] The Section 800 Panel—popularly named after the section of the Act from which it derived authority—was to review existing defense acquisition laws, make recommendations for their

---

[77] 56 Fed. Reg. 36,315, 36,315-17 (July 31, 1991) (codified at 48 C.F.R. pts. 210, 211).
[78] *Id.* at 36,315 (defining "nondevelopmental items").
[79] *Compare* 56 Fed. Reg. at 36,317 (defining "commercial items"), *with* 41 U.S.C. § 403(12) (2000) (defining "commercial items"), *and* 48 C.F.R. § 2.101 (2004) (also defining "commercial items").
[80] 56 Fed. Reg. at 36,317.
[81] Pub. L. No. 87-653, 76 Stat. 528 (1962).
[82] 56 Fed. Reg. at 36,317 (emphasis added).
[83] *Id.*
[84] Pub. L. No. 101-510, § 800, 104 Stat. 1485, 1587.

repeal or revision, and prepare an acquisition code "with a view towards streamlining the defense acquisition process."[85]

In January of 1993, the Panel issued its final report to Congress. Among its many recommendations, the Panel proposed "a comprehensive new approach to address the acquisition of commercial items."[86] After explaining that the patch-work of congressional directives had failed to promote the broad use of commercial items in DoD systems, the Panel identified several reasons for this shortfall, including (1) the failure to enact a uniform definition for commercial items, (2) the burdens imposed by TINA's cost or pricing data requirements, (3) the arduous standards associated with unique socioeconomic laws applicable only to government contractors, and (4) the ever-increasing burdens that flowed from the myriad of federal statutes and regulations governing procurement.[87]

Drawing on Part 211 of the Defense Federal Acquisition Regulation Supplement,[88] the Panel proposed a uniform statutory definition for "commercial items"—

> (5) The term "commercial item" means
>
> (A) property, other than real property, which: (i) is sold or licensed to the general public for other than Government purposes; (ii) has not been sold or licensed to the general public, but is developed or is being developed primarily for use for other than Government purposes; or (iii) is comprised of a combination of commercial items, or of services and commercial items, of the type customarily combined and sold in combination to the general public;
>
> (B) The term "commercial item" also includes services used to support items described in subparagraph (A), such as installation, maintenance, repair and training services, whether such services are procured with the commercial item or under a separate contract; provided such services are or will be offered contemporaneously to the general public under similar terms and conditions and the Government and commercial services are or will be provided by the same workforce, plant, or equipment;
>
> (C) With respect to a specific solicitation, an item meeting the criteria set forth in subparagraphs (A) or (B) if unmodified will be deemed to be a commercial item when modified for sale to the

---

[85] *Id.*
[86] Acquisition Law Advisory Panel Report at 1.
[87] *Id.* at 5-6.
[88] *See id.* at 1, 17-18.

> Government if the modifications required to meet Government requirements (i) are modifications of the type customarily provided in the commercial marketplace or (ii) would not significantly alter the inherent nongovernmental function or purpose of the item in order to meet the requirements or specifications of the procuring agency;
>
> (D) An item meeting the criteria set forth in subparagraphs (A), (B), or (C) need not be deemed other than "commercial" merely because sales of such item to the general public for other than Governmental use are a small portion of total sales of that item; and
>
> (E) An item may be considered to meet the criteria in subparagraph (A) even though it is produced in response to a Government drawing or specification; provided, that the item is purchased from a company or business unit which ordinarily uses customer drawings or specifications to produce similar items for the general public using the same workforce, plant, or equipment.[89]

"The Panel believed that the primary purpose of defining a commercial item was to be able to exempt items so defined from the reach of those statutes and implementing regulations that have created barriers to the acquisition of commercial items."[90] To further this end and to eliminate many of the shortfalls identified above, the Panel expanded Part 211's definition to include items that were modified in a way "customarily provided in the commercial marketplace" or in a manner that "would not significantly alter the inherent nongovernmental function or purpose of the item."[91] More fundamentally, the definition was expanded to include "services," provided that those services were acquired in support of tangible commercial items.[92] The Panel tied its definition of services to a requirement that they be offered contemporaneously to the general public under similar terms and conditions and that the commercial and government services be provided by the same workforce, plant, or equipment. The Panel thus wanted to be sure that the services had a solid anchor in the commercial marketplace. However, the Panel did not include standalone, or "pure," services within the definition of a commercial item.[93]

---

[89] *Id.* at 17-18.
[90] *Id.* at 18.
[91] *Id.*
[92] *Id.* at 17.
[93] *Id.* at 19. The Panel concluded that "it did not have sufficient information to recommend exempting 'pure' service contractors from additional Government-specific statutes and regulations." *Id.* This would have been the natural effect of including "pure services" within the definition of a commercial item.

### 10. The Federal Acquisition Streamlining Act of 1994

Over the course of the 103rd Congress, various legislative proposals were offered in an effort to implement the Section 800 Panel's recommendations.[94] Eventually, these efforts yielded the Federal Acquisition Streamlining Act ("FASA") of 1994[95]—ushering in the largest federal procurement changes in almost a decade.

FASA included an expansive, uniform statutory definition for "commercial items," mostly tracking the Section 800 Panel's recommendations.[96] The definition did contain one significant revision, which was offered by the House of Representatives and acquiesced to by the Senate; it included standalone services within the meaning of "commercial items."[97] Accordingly, while the Section 800 Panel and the Senate would have included only "services that are procured for support of a commercial item,"[98] the House of Representatives prevailed in including within the meaning of "commercial items" any service that is "offered and sold competitively, in substantial quantities, in the commercial marketplace based on established catalog prices for specific tasks performed and under standard commercial terms and conditions."[99] The definition, which remains in the current statute, ties the definition of commercial services to the sale of services by competitive sales in the commercial marketplace. Thus, it links together the definition of commercial item for services with an explicit requirement for validation through competitive sales in the commercial market.

After defining "commercial items," Congress expressed a strong preference for their acquisition[100] and provided streamlined mechanisms to eliminate barriers to their procurement.[101] Likewise, by expanding the definition of "commercial items," Congress seemingly expanded the applicability of the exemption from TINA's cost or pricing data requirements.[102] Two years later, Congress eliminated the requirement for certified cost or pricing data for commercial item contracts.[103] However, FASA did provide that when certified cost or pricing data were not required to be submitted, the head of the procuring activity could require submission of "data

---

[94] *See* Federal Acquisition Streamlining Act of 1993, S. 1587, 103rd Cong. (1993) (as introduced); Federal Acquisition Improvement Act of 1993, H.R. 2238, 103rd Cong. (1993); Federal Acquisition Reform Act of 1994, H.R. 4328, 103rd Cong. (1994); Federal Acquisition Streamlining Act of 1994, S. 2206, 103rd Cong. (1994); Federal Acquisition Streamlining Reform Act of 1994, S. 2207, 103rd Cong. (1994); Federal Acquisition Streamlining Act of 1993, S. 1587, 103rd Cong. (1993) (enacted). *Cf.* Nondevelopmental Items Acquisition Act of 1991, S. 260, 102nd Cong. (1991); Federal Property and Administrative Services Authorization Act of 1991, H.R. 3161, 102nd Cong. (1991).
[95] Pub. L. No. 103-355.
[96] *Id.* § 8001(a), 108 Stat. at 3384.
[97] H.R. Conf. Rep. No. 103-712, at 228-29 (1994), *reprinted in* 1994 U.S.C.C.A.N. 2607, 2658-59.
[98] *Id.* at 228, 1994 U.S.C.C.A.N. at 2658. *Cf.* Acquisition Law Advisory Panel Report at 19 (1993).
[99] Pub. L. No. 103-355, tit. VIII, § 8001(a), 108 Stat. 3243, 3384 (adding 41 U.S.C. § 403(12)).
[100] *Id.* tit. VIII, § 8104, 108 Stat. at 3390 (adding 10 U.S.C. § 2377).
[101] *Id.* tit. VIII, § 8105, 108 Stat. at 3392 (eliminating various legal requirements imposed by Title 10 of the U.S. Code).
[102] *See supra* text accompanying note 40.
[103] *See* Pub. L. No. 104-106, div. D, tit. XLII, § 4201, 110 Stat. 642, 649-52 (1996).

other than certified cost of pricing data" to the extent necessary to determine price reasonableness.[104]

### 11. The Regulatory and Practical Implementation of FASA

Following the passage of FASA, the Executive Branch began the difficult task of implementing its statutory requirements.[105] On September 18, 1995, DoD, GSA, and NASA issued a final rule, which included a regulatory definition for "commercial items."[106] For the most part, this definition tracked the definition in FASA—though it did little to clarify some of its more archaic terms.[107] The definition did seek to clarify what would qualify as permissible "minor modifications" by providing specific factors that could be used to adjudge the nature of those modifications.[108] The regulatory definition also adjusted the scope of the definition of standalone services, permitting qualification based on established "market prices" in addition to catalog prices. (The statutory definition did not include the terms "market prices," rather it only referred to "[s]ervices offered and sold competitively, in substantial quantities, in the commercial marketplace based on established catalog prices for specific tasks performed. . . ."[109] )

The final regulation slightly revised the definition of commercial services by adding the term "of a type." The regulatory drafters were concerned that without this change, the Government would be limited to acquiring services based only on "established catalog prices." They cited lawn-cutting and janitorial services as examples of commercial services that were priced based on the size of the task rather than existing catalog prices. The drafters also expressed concern that the intent of the law – providing for the acquisition of commercial services that are sold in substantial quantities in the commercial marketplace – could easily be circumvented by the creation of a catalog.[110] Based on the record and testimony examined by the Panel, the drafters never intended for the "of a type" language to extend the definition of commercial services beyond those sold in substantial quantities in the commercial marketplace.[111]

---

[104] Pub. L. No. 103-355, tit. I, § 1203, 108 Stat.3275 (1994).
[105] For an overview of FASA's implementation, see U.S. GAO, *Acquisition Reform: Regulatory Implementation of the Federal Acquisition Streamlining Act of 1994*, GAO/NSIAD 96-139 (June 1996).
[106] 60 Fed. Reg. 48,231, 48,235 (Sept. 18, 1995).
[107] *Compare* Pub. L. No. 103-355, tit. VIII, § 8001(a), 108 Stat. 3243, 3384 (1994) (defining "commercial items"), *with* 60 Fed. Reg. at 48,235 (also defining "commercial items"). Among the terms that the implementing agencies failed to clarify were "established catalog and market prices." *See* 60 Fed. Reg. at 48,235.
[108] 60 Fed. Reg. at 48,235.
[109] Pub. L. No. 103-355, tit. VIII, § 8001, 108 Stat. 3385.
[110] Memorandum from the Commercial Items Drafting Team to the FAR Council and the Project Manager, FASA Implementation Project, (Nov. 16, 1994) (on file with Commercial Items Drafting Team).
[111] Some of the comments received by the Panel from service industry associations have assumed that the "of a type" language expands the definition of commercial services far beyond what Congress of the FAR drafters ever intended.

### 12. The Federal Acquisition Reform ("Clinger-Cohen") Act of 1996

In 1996, Congress passed the Federal Acquisition Reform Act[112]—later renamed the Clinger-Cohen Act[113]—as part of the National Defense Authorization Act for Fiscal Year 1996. The Clinger-Cohen Act expanded upon FASA's preference for commercial items by eliminating, for commercial items, TINA's requirement for certified cost or pricing data [114] and by relieving contractors supplying commercial items from complying with certain cost accounting standards ("CAS").[115] With respect to information "other than cost or pricing data," FARA provided additional guidance and limitations on what types of information could be required.[116] The act also provided simplified procedures for the acquisition of commercial items with a purchase value of $5.5 million or less[117] and set up an even more streamlined process for the acquisition of commercially available, off-the-shelf items ("COTS").[118] Finally, the act amended the definition of "commercial items" to include established "market prices" within the provision governing standalone services.[119] This amendment adopted the language previously adopted in the FAR definition that implemented FASA.[120]

### 13. Recent Congressional and Executive Changes

Even after the Clinger-Cohen Act, Congress and the Executive Branch have made subtle changes to the definition of "commercial items" and the process for their acquisition. First, in 1998, Congress directed the Executive Branch to modify the FAR's definition of "commercial items" to clarify such terms as "established catalog prices" and "established market prices."[121] Then, in 1999, Congress amended the statutory definition of "commercial items" to define what constitutes services in support of commercial items.[122] These legislative efforts helped to produce a revised regulatory definition for "commercial items," which was codified in the FAR.[123] Finally, in 2003, Congress amended the definition of "commercial items" in order to accommodate explicit authorization for time-and-material commercial services contracts "to be

---

[112] Pub. L. No. 104-106, div. D, 110 Stat. 642 (1996).
[113] Omnibus Consolidated Appropriations Act for Fiscal Year 1997, Pub. L. No. 104-208, tit. VIII, § 808, 110 Stat. 3009, 3009-393 (1996).
[114] Pub. L. No. 104-106, div. D, tit. XLII, § 4201, 110 Stat. 642, 649-52 (1996).
[115] *Id.* § 4205, 110 Stat. at 656.
[116] *Id.* § 4201, 110 Stat. at 650-51.
[117] *Id.* § 4202, 110 Stat. at 652-53.
[118] *Id.* § 4203, 110 Stat. at 654-55.
[119] *Id.* § 4204, 110 Stat. at 655-56.
[120] 60 Fed. Reg. 48,231, 48,235 (Sept. 18, 1995).
[121] Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, § 803(a), 112 Stat. 1920, 2082 (1998).
[122] National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, § 805, 113 Stat. 512, 705 (1999).
[123] 66 Fed. Reg. 53,477 (Oct. 22, 2001).

used for the acquisition of a commercial service commonly sold to the general public through such contracts."[124]

Section 814 of the National Defense Authorization Act for FY 2000 authorized the Secretary of Defense to initiate a 5-year pilot program treating procurement of some services "as" commercial items "if the source of the services provides similar services contemporaneously to the general public."[125] Section 821 of the FY 2001 National Defense Authorization Act expands the authority to procure services as commercial items. It establishes a preference for performance-based contracting for services and allows DoD to award any applicable performance-based contract as a commercial item under Federal Acquisition Regulation (FAR) part 12, "Acquisition of Commercial Items," if: the contract or task order is valued at $5 million or less; the contract or task order sets forth specifically each task to be performed and (1) defines each task in measurable, mission-related terms, (2) identifies specific end products or output, and (3) has a firm fixed price; and the source of the services provides similar services contemporaneously to the general public under similar terms and conditions.[126] Lesser revisions also have been made in various Defense Authorization laws.[127]

### 14. The Services Acquisition Reform Act of 2003

Congress has continued to revise the laws related to acquisition and commercial practices, including most notably the Services Acquisition Reform Act ("SARA") of 2003.[128] Through SARA, Congress sought to improve the acquisition workforce[129] and make various reforms, including incentives for performance-based contracting[130] and special emergency procurement authority, that permit agencies to utilize emergency acquisition authority under the "commercial items" exemptions.[131]

With specific reference to services acquisition, SARA made three changes. First, it authorized performance-based contract or task orders for the procurement of services to be "deemed" a "commercial item" under specified circumstances: (1) if the value of the contract or

---

[124] Service Acquisition Reform Act of 2003 ("SARA"), Pub. L. No. 108-136, tit. XIV, § 1432, 117 Stat. 1663, 1672-73 (2003). *See also* 149 Cong. Rec. H. 10563 (2003). The Senate initially requested additional safeguards and limitations on the use of time-and-materials contracts for commercial services, but later withdrew this request because Section 824 of the National Defense Authorization Act for FY 2001 only permits the use of time-and-material contracts when "no other contract type is suitable."

[125] National Defense Authorization Act for Fiscal Year 2000, Pub. L No. 106-65 (2000).

[126] National Defense Authorization Act for Fiscal Year 2001, Pub. L. No.106-398 (2001).

[127] *See, e.g.*, Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 816, 118 Stat. 1811, 2015 (2004); National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, tit. XIV, § 1431, 117 Stat. 1663, 1671-72 (2003) (containing SARA); Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, § 812, 116 Stat. 2458, 2609 (2002); National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, § 823, 115 Stat. 1012, 1183 (2001).

[128] Pub. L. No. 108-136, tit. XIV, 117 Stat. 1663 (2003).

[129] *Id.* sub-tit. A, §§ 1411-14, 117 Stat at 1663-66.

[130] *Id.* sub-tit. C, § 1431, 117 Stat. at 1671-72.

[131] *Id.* sub-tit. D, § 1443, 117 Stat. at 1675-76.

order is not expected to exceed $ 25 million; and (2) if the contract or order specifically sets forth (i) each task to be performed, (ii) defines each task in measurable, mission-related terms, and (iii) identifies the specific result to be achieved. In addition, such performance-based commercial services contracts must contain firm fixed-prices, and further, the source of the services provides similar services to the general public under terms and conditions similar to those offered to the Government. [132]

Second, Section 1432 of the Act authorizes the limited use of a time-and-materials ("T&M") or labor-hour contracts in the procurement of commercial services subject to certain restrictions, including that the services: (i) are commonly sold to the general public through such contracts; (ii) are purchased by the procuring agency on a competitive basis; (iii) the contracting officer executes a determination and finding that no other contract type is suitable; (iv) the contracting officer includes a ceiling price that the contractor exceeds at its own risk; and (v) the contracting officer authorizes any subsequent change in the ceiling price only upon a documented determination that it is in the best interest of the procuring agency to change the ceiling price.

Third, Congress looked at the definition of stand-alone services in FASA and maintained that definition with a revision to permit use of commercial items when the services are sold competitively in the commercial marketplace based on catalog or market prices for "specific outcomes" to be achieved as well as for specific tasks performed. Congress again remained focused on whether the services were sold competitively in the commercial marketplace.

In the SARA provisions, Congress also adopted a narrow exception to the prescribed market based approach to defining commercial items by allowing certain products or services to qualify for "commercial item" status, regardless of whether they actually were offered commercially. Section 1443(d)[133] provides authority to the head of an agency to treat certain procurements for defense against or recovery from terrorism or nuclear, biological, chemical, or radiological attack as commercial items, subject to the restriction that, if a contract greater than $15 million in value is awarded on sole source basis, the provisions of TINA and CAS shall apply.

### 15. Restrictions on Use of Commercial Items

In the Defense Authorization Act of 2005, Congress restricted the relief from the requirement for cost or pricing data for commercial items. This change provides that cost or pricing data is required for noncommercial modifications to commercial items that are expected to cost, in the aggregate, more than $500,000 or 5% of the total price of the contract, whichever is greater.[134] The provision took effect on June 1, 2005, and applies to offers submitted, and

---

[132] Pub. L. No. 108-136, tit. XIV, § 1431,117 Stat. 1663; codified at 41 U.S.C. § 403.
[133] *Id* at § 1443.
[134] Pub. L. No. 108-375, § 818.

modifications to contracts or subcontracts made, on or after that date. Interim Regulations implementing the provision became effective on June 8, 2005. [135]

### D. Time and Materials and Labor Hour Contracts

[The Panel notes that on December 12, 2006 the FAR Council issued its final rule implementing Section 1432 of the National Defense Authorization Act of 2004, which will be effective February 12, 2007. This section of the Panel's Report will be updated, as appropriate, to address the new rule.]

#### 1. Definition and Description – The Current Rule

A time-and-materials contract provides for the acquisition of supplies or services on the basis of direct labor hours at specified fixed hourly rates and/or the cost of any materials used for the project. This contrasts with fixed-price contracts where the contractor is paid a firm fixed-price for completion of the contract, irrespective of the amount of time or materials expended on the project.

The use of T&M contracts is governed by FAR Part 16. FAR 16.601 provides a description of a T&M contract, lays out its appropriate application, and limits its use. T&M contracts are permitted when the contracting officer determines that "it is not possible at the time of placing the contract to estimate accurately the extent or duration of the work or to anticipate costs with any reasonable degree of confidence."[136] In other words, when the buyer cannot determine its requirements sufficiently to use another contracting method. However, since T&M contracts provide "no positive profit incentive to the contractor for cost control or labor efficiency,"[137] the FAR makes T&M contracts the least preferred of all contract types. The most important limitation on the use of time and materials contracts is found in FAR 16.601(c)(1), which provides that T&M contracts may be used "only after the contracting officer executes a determination and findings that no other contract type is suitable…"[138]

Under the current FAR rules, T&M contracts make a labor hour a unit of sale, but they do not make efficient or successful performance a condition of payment. Under FAR 52.232-7(a)(1), the contractor bills the Government by multiplying the appropriate hourly rates prescribed in the contract schedule[139] by the number of direct labor hours performed.[140] The rates are to include wages, indirect costs, general and administrative expense, and profit. Also, FAR 16.601(c)(2) requires that a T&M contract shall not be used unless the contract includes a "ceiling price that the contractor exceeds at its own risk." The total cost of the contract is not to exceed the ceiling price set forth in the schedule, and the contractor must agree to make its best

---

[135] 70 Fed. Reg. 33659 (June 8, 2005); *See* FAR 15.403-1(c)(3)(ii)(B), and (C).
[136] FAR 16.601 (b).
[137] FAR 16.601(b)(1).
[138] FAR 16.601(c)(1).
[139] FAR 15.204-1(b) identifies the uniform contract format including Part I, the Schedule.
[140] FAR 52.232-7(a)(1) (Payments under Time-and-Material and Labor-Hour Contracts).

efforts to perform the work within the ceiling price.[141] However, the contractor is not obligated to continue performance if to do so would exceed the ceiling price, unless the contracting officer notifies the contractor that the ceiling price has been increased.[142] In addition, the Government may be required to pay the contractor at the hourly rate, less profit, for correcting or replacing defective services.[143] Generally, if the contractor is terminated for default or defective performance, the Government, nonetheless, is obligated to pay the contractor at the hourly rate, less profit, for all hours of defective performance.[144]

Under the current FAR provisions, therefore, the contractor does not have to complete the work successfully in order to obtain payment; rather the contractor is paid for the hours devoted to the task regardless of outcome. Therefore, substantial oversight is necessary for T&M contracts. Agencies are advised in FAR 16.601(b)(1) that "appropriate Government surveillance of contractor performance is required to give reasonable assurance that efficient methods and effective cost controls are being used."

### 2. Recent Legislative Developments

As noted above, section 1432 of the Services Acquisition Reform Act[145] amended section 8002(d) of the Federal Acquisition Streamlining Act to authorize the use of T&M contracts for the procurement of commercial services commonly sold to the general public through such contracts. As amended, section 8002(d) places certain conditions on the use of T&M contracts for purchases of commercial services under Federal Acquisition Regulation (FAR) Part 12: (1) the purchase must be made on a competitive basis; (2) the service must fall within certain categories as prescribed in FASA section 8002(d); (3) the contracting officer must execute a determination and findings (D&F) that no other contracting type is suitable; and (4) the contracting officer must include a ceiling price that the contractor exceeds at its own risk and that may be changed only upon a determination documented in the contract file that the change is in the best interest of the procuring agency.[146]

The House Conference Report for section 1432 noted that section 821 of the Floyd D. Spence National Defense Authorization Act for FY 2001[147] established a statutory preference for performance-based contracts and performance-based task orders that contain firm, fixed-prices for the specific tasks to be performed.[148] The Report stated that section 1432 should not be read to change that preference.[149] "A performance-based contract or task order that contains firm

---

[141] FAR 52.232-7(c).
[142] FAR 52.232-7(d).
[143] FAR 52.246-6.
[144] FAR 52.249-6, Alt. IV. This default condition can by incorporating special contract provisions. However, such special provisions are seldom negotiated for routine T&M contracts.
[145] Pub. L. No. 108-136.
[146] SARA § 8002(d); FAR § 16.601.
[147] Pub. L. No. 106-398.
[148] H.R. Conf. Rep. No. 108-354 (2003).
[149] *Id.*

fixed prices for the specific tasks to be performed remains the preferred option for the acquisition of either commercial or non-commercial items."[150]

Despite the preference for any other contract type, the use of T&M contracts by the Government is widespread. The GSA Office of the Inspector General reported to the Panel in May 2005, that of recent studies of 523 Federal Technology Service contract awards, valued at over $5.4 billion, the IG found (i) 58% of all awards were inadequately competed; (ii) of those solicitations open to competition, 1/3 of the orders representing 53% of the aggregate sales dollars received only one bid, and (iii) over 60% of all orders were awarded on a time and materials basis.[151]

#### 3. OFPP's Proposed Rule

It should be noted that the amendment section 1432 made to FASA section 8002(d) is not self-executing. Rather, implementation of section 8002(d) requires the Office of Federal Procurement Policy (OFPP) to revise FAR's current commercial items policies and associated clauses. The OFPP, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council issued a notice in the Federal Register soliciting comments regarding amendment to the FAR to account for T&M contracts.[152] Subsequently, OFPP and the Councils issued a proposed rule,[153] which is yet to be finalized.

The proposed rule allows an agency to purchase any commercial service on a T&M basis if it uses competitive procedures and prepares a D&F containing sufficient facts and rationale to justify that a firm fixed-pricing arrangement is not suitable. With respect to the contents of the D&F, the rule provides that the rationale supporting use of a T&M contract for commercial services should establish that it is not possible at the time of placing the contract or order to estimate accurately the extent or duration of the work or to anticipate costs with any reasonable degree of certainty. If the need is of a recurring nature and is being acquired through a contract extension or renewal, the rule requires that the D&F reflect why knowledge gained from the previous acquisitions could not be used to further refine requirements and acquisition strategies in a manner that would enable purchase on a fixed-price basis. The stated goal of the proposed rule is to ensure that T&M contracts are used only when in the best interests of the Government.

### E. Competition

#### 1. A History of Difficulty in Achieving Competition

The long history of public contracting problems and the various legislative attempts at solutions was discussed and reported in the Report of the Commission on Government

---

[150] *Id.*
[151] Test. of Eugene Waszily, GSA IG, AAP Pub. Meeting (May 17, 2005) Tr. at 198-99.
[152] 69 Fed. Reg. 56316 (Sept. 20, 2004).
[153] 70 Fed. Reg. 56318 (Sept. 26, 2005).

Procurement ("1972 Commission Report).[154] Issues such as how to encourage competition and assure reasonable prices have been recurrent themes. The Government Procurement Commission Report discusses the various studies of these issues over the years, including the Dockery Commission (1893), the Keep Commission (1905), the two Hoover Commissions, and that of the Commission on Government Procurement itself. The Report traces the development of the "formal advertising" competition requirement in the two basic procurement statutes enacted after Word War II; namely, the Armed Services Procurement Act of 1947 and the Federal Property and Administrative Services Act of 1949. Although these laws expressed a preference for competition, exceptions to competition requirements permitting "negotiated" contracts raised considerable concern whether or not the competition requirements were being met, particularly as the dollar value of government contracts increased. The Armed Services Procurement Act was amended in 1962 to enhance competition in negotiated procurements.[155]

The legislative history of the Competition in Contracting Act demonstrates significant concerns about the lack of competition, particularly for large negotiated procurements. The Report of the Senate Committee on Government Affairs notes that a large volume of procurement dollars was being expended through non-competitive negotiated procurements due to the lack of an adequate competition standard for negotiated procurements and due to familiar sounding problems such as lack of appropriate market research, overuse of sole-source justifications, restrictive specifications, and the rush to expend appropriated funds in the final quarter of the fiscal year.[156]

### 2. The Current Situation

As discussed below, currently, there are several different competition regimes in use today. The Competition in Contracting Act generally requires "full and open" competition (subject to certain exceptions for urgency, single source, *etc.*, that must be supported by a justification). However, today a large volume of federal procurement dollars are spent through processes that involve different types of procedures from the processes set forth in FAR Parts 15 (Contracting By Negotiation) and 14 (Sealed Bids).[157] Currently, the requirements of FAR Parts 15 and 14 do not apply to two parallel ordering regimes under which a huge volume of purchases is made.

First, the CICA statute provides that in addition to contracts entered into pursuant to full and open competition, the term "competitive procedures" also includes procedures established

---

[154] *Comm'n on Gov't Procurement Report* at 163-84.
[155] S. Rep. No. 98-50, at 5 (1984).
[156] *See, e.g., id.*
[157] The Panel is aware that sealed bid procurement is relatively unused in today's environment, accounting for less than 1% of total actions and dollars in FY 2004 according to the Federal Procurement Report for FY 2004, and 1.3% of actions and 3.5% of dollars in FY 2005 according to the Federal Procurement Data Center. However, as noted below, the statute continues to define "full and open competition" with reference to sealed bids and competitive proposals.

for the GSA schedules.[158] CICA provided a statutory basis for the schedule program as a means to meeting agency needs for a broad range of commercial products that would be provided to various using agencies in small quantities and at diverse locations.[159] As discussed below, the use of the GSA schedules for the acquisition of services has exploded since the late 90's. As this growth has occurred, GSA has developed approaches for obtaining competition among schedule contract holders that are different from the typical processes used under FAR Part 15 (and 14). Although prices on the schedules are deemed fair and reasonable, and orders can be placed directly in accordance with the applicable regulations, GSA also has developed additional tools, discussed further below, that allow buyers to enhance competition and seek further price reductions from schedule contract holders.

Second, also as discussed below, orders placed under multiple award contracts (such contracts usually awarded initially through Part 15 procedures) are subject to the requirement for a "fair opportunity to compete" among the contract holders if a waiver is not exercised. There is no requirement that these "mini-competitions" be synopsized[160] or that unsuccessful offerors for an order receive a debriefing. Data requested by the Panel indicates that significant numbers of large orders, in excess of $5 million, have been placed under these vehicles.

### 3. The Competition in Contracting Act[161]

#### a. Background

In 1982, contracting officers of various agencies testified before Congress to the effect that, while competition in government contracting was the requirement, it was not the practice. Congress attempted to reform the procurement process in 1984 by passing the Competition in Contracting Act (CICA). CICA provided that competition, rather than the common practice of "formal advertising" (sealed bidding) should be the norm. At the time, negotiated procurement was not required to be competitive, so Congress was concerned about the increasing use of non-competitive negotiations.

Although drafts of CICA used the term "effective competition," the conferees ultimately adopted "full and open competition" as the standard for federal procurement. The Report of the House Government Operations Committee on CICA explained the benefits of competition:

> The Committee has long held the belief that any effort to reform Government procurement practices must start with a firm commitment to increase the use of competition in the Federal marketplace. Competition not only provides substantially reduced

[158] 41 U.S.C. § 259(b)(3). The term "full and open competition" is defined in 42 U.S.C. § 403 (6) to mean that "all responsible sources are permitted to submit sealed bids or competitive proposals on the procurement."
[159] H. Conf. Rep. No. 98-861 (1984), as *reprinted in* 1984 U.S.C.C.A.A.N. ____ page .
[160] FAR 16.505(a)(1).
[161] Pub. L. No. 98-369, 98 Stat. 1175 (1984) (codified as amended in scattered sections of the U.S.C.)

> costs, but also ensures that new and innovative products are made available to the Government on a timely basis and that all interested offerors have an opportunity to compete.[162]

The premise that underlies this strong preference for "full and open competition" is the economic premise that has long been recognized by the courts as the basis for a free market economic system—that competition brings consumers the widest variety of choices and the lowest possible prices.[163]

The Senate Committee specifically provided a definition of competition for federal procurement in its report. "In government contracting, competition is a marketplace condition which results when several contractors, acting independently of each other and of the government, submit bids or proposals in an attempt to secure the government's business."[164]

CICA defined "full and open competition" to mean "all responsible sources are permitted to submit sealed bids or competitive proposals on the procurement."[165] In addition, to ensure that agencies did not lightly sidestep the competition requirement, Congress established requirements to justify departures from full and open competition. For example, CICA provided that full and open competition could be avoided only through one of seven limited exceptions,[166] and it required a written justification & approval ("J&A") document to be filed if one of the exceptions was invoked.[167] In addition, Congress mandated that the head of each agency designate a Competition Advocate and required that all J&A's for procurements of $500,000 or more be approved by the Competition Advocate for each agency.[168]

CICA expressly recognized and permitted the use of competitive negotiations, rather than sealed bids, required that the Government's requirements and evaluation factors be clearly expressed so that offerors could understand the ground rules, and mandated that the Government follow its stated requirements and evaluation factors in the source selection process. CICA expressly recognized and permitted best value selections based on technical, cost, and other factors, rather than just cost. In a best value source selection, the Government can choose the overall best value for the particular requirement; however, cost must be a consideration under CICA – it cannot be ignored. To support a best value selection, the source selection official must justify the trade off between the cost and technical merit of the offers in the competitive range. Thus, for each best value procurement, the government buyer has a record of the basis for the selection.

---

[162] H.R. Rep. No. 98-1157, at 11 (1984).
[163] *ATA Def. Indus., Inc. v. United States*, 38 Fed. Cl. 489, 500 (1997) (citing Adam Smith, *Wealth of Nations* 112 (1776)).
[164] S. Rep. No. 97-665, at 2.
[165] 41 U.S.C. § 403(6).
[166] 10 U.S.C. § 2304(c); 41 U.S.C. § 253(c).
[167] 10 U.S.C. § 2304(f)(1)(A); 41 U.S.C. § 253(f)(1)(A).
[168] FAR 6.501.

### b. Competition Under CICA Procedures

Acquisition Planning. The statute and the FAR require agencies to use advance procurement planning and develop specifications using appropriate market research that meets the agency's needs. Specifications may be stated in functional, performance or design terms as the agency requires. However, unless an exception applies, requirements must be stated in a manner designed to achieve full and open competition.[169]

Synopsis. Current procedures require contracting officers to synopsize contract actions expected to exceed $25,000 via the Internet to the single government point-of-entry (GPE) known as Federal Business Opportunities (FedBizOpps).[170] Publication is to insure that all responsible sources are permitted to submit offers consistent with the definition of "full and open competition" at 41 U.S.C. § 403(6) which provides:

> (6) The term "full and open competition," when used with respect to a procurement, means that all responsible sources are permitted to submit sealed bids or competitive proposals on the procurement."

Typically, for a procurement expected to exceed the simplified acquisition threshold, the FAR requires a synopsis to be published at least 15 days prior to the issuance of the solicitation. Once the solicitation is issued, agencies must allow at least 30 days response time for receipt of offers, making the minimum period between the publication of synopsis and the receipt of offers 45 days.[171]

For commercial items, agencies may establish a shorter period for issuance of the solicitation or use the combined synopsis/solicitation procedures set out in FAR 12.603. In such case the solicitation response time may be determined so as to "afford potential offerors a reasonable opportunity to respond" considering "the circumstances of the individual acquisition, such as the complexity, commerciality, availability, and urgency."[172] The time required for synopsis may be affected, even in the case of commercial items, by the requirements of certain trade agreements. Under the WTO Government Procurement Agreement or a Free Trade Agreement,[173] the time between publication of the notice and receipt of offers must be no less than 40 days.

Solicitation. Once a solicitation is issued in the form of a Request for Proposals (RFP) or Invitation for Bids (IFB), interested vendors submit their offers and the selection process begins.

---

[169] 41 U.S.C. § 253a; FAR 11.002, 15.2.
[170] The synopsis is required by the OFPP Act (41 U.S.C. § 416), and the Small Business Act (15 U.S.C. § 637(e). FAR 5.003 and 5.102(a)(1) requires the Government to use the GPE known as FedBizOpps at http//www.fedbizopps.gov.
[171] FAR 5.203.
[172] FAR 5.203 (b).
[173] FAR subpart 25.4.

While sealed bids are evaluated without discussion (FAR 14.101(d)) and award is made on the basis of price,[174] evaluation of competitive proposals typically involves a negotiation with the offerors. The objective of competitive negotiations under the statute and FAR Part 15 is to give the government the ability to negotiate for the proposal that represents the best value, considering the factors specified in the solicitation and price.[175] For competitive negotiated procurements, CICA requires that the solicitation state all significant factors and subfactors, both non-price (*e.g.*, technical capability, management capability, prior experience, and past performance) and price, that the agency expects to consider in evaluating proposals and the relative importance assigned to each of those factors and subfactors.[176] The statute explicitly requires that the agency evaluate proposals "based solely on the factors specified in the solicitation."[177]

Negotiations. The process of competitive negotiations allows the buying agency to negotiate with the offerors to obtain the best value. Where discussions are held,[178] the contracting officer must establish a competitive range comprised of "all of the most highly rated proposals." [179] The CO may, pursuant to specific statutory authority, further "limit the number of proposals in the competitive range to the greatest number that will permit an efficient competition among the most highly rated proposals.[180] This provision allows narrowing of the competitive range to the proposals most likely to be successful. Note, however, that the standard RFP instructions to offerors for commercial items in FAR 52.212-1 for some reason does not include such language while its FAR 15 counterpart does include the language. (See FAR 52.215-1(f)(4).)

Negotiations with offerors in the competitive range, if determined to be in the government's interest, may occur. If the CO holds discussions, the CO must "indicate to, or discuss with" each offeror, deficiencies, significant weaknesses, and adverse past performance information to which the offeror has not yet had an opportunity to respond. While the CO is not required to discuss every area where the proposal could be improved, the FAR encourages the CO to discuss aspects of the offeror's proposal that could, in the opinion of the CO, be altered or explained to enhance materially the proposal's potential for award (FAR 15.306(d)(3)). Following close of discussions, the CO is required to permit final proposal revisions at a common cut-off date.[181] Government personnel participating in discussions must observe certain requirements for fairness such as: (1) not favoring one offeror over another; (2) not revealing an

---

[174] FAR 14.101(e).
[175] 41 U.S.C. § 253 (b); FAR 15.302
[176] 41 U.S.C. § 253a(b), (c); FAR 15.305.
[177] 41 U.S.C. § 253b(a).
[178] Award may be made without discussions pursuant to FAR 52.212-1 and 52.215-1. In this case, no competitive range is established and the most competitive proposal as evaluated in accordance with the evaluation criteria will be awarded a contract. Here, only limited exchanges in the form of clarifications are allowed to ensure fair treatment of all offerors (FAR 15.306).
[179] 41 U.S.C. § 253b(d); FAR 15.306.
[180] 10 U.S.C. § 2305(b)(4); 41 U.S.C. § 253b(d); FAR 15.306.
[181] FAR 15.307.

offeror's unique technical solution or intellectual property; 93) not revealing an offeror's specific price; (4) not disclosing past performance references, and (5) not violating the Procurement Integrity Act by revealing source selection information.

Award. Awards are made on the basis of the solicitation factors and subfactors by a Source Selection Official who, using his or her discretion and independent judgment, makes a comparative assessment of the competing proposals, trading off relative benefits and costs. The Source Selection decision must be reflected in a written statement that explains the rationale for award.[182]

Post-Award. Unsuccessful offerors are entitled to a debriefing, if timely requested, regarding the conduct of the procurement and the evaluation of their proposals. The debriefing must disclose at least: (1) the government's evaluation of the significant weaknesses or deficiencies in the offeror's proposal; (2) the overall evaluated cost or price and technical rating of the awardee and the debriefed offeror, and past performance information on the debriefed offeror; (3) the overall ranking of all offerors, if one exists; (4) a summary of the rationale for award; (5) for commercial items, the make and model of the item to be delivered by the awardee; (6) reasonable responses to questions about whether the solicitation procedures were followed.[183]

An offeror who believes that the solicitation or the source selection process was unfair may protest and obtain an independent outside review of the award decision under an Administrative Procedure Act standard of review which provides that the decision may be overturned only upon a showing that the decision was arbitrary and capricious (which includes within its definition that the decision violated law or regulation). [184]

### 4. The Use of Interagency Vehicles

In 1993, the Section 800 Panel Report[185] again discussed the fundamental role of competition in public procurement. Agencies complained about the time and delays involved in considering multiple proposals and their perceived inability to eliminate proposals that did not have an opportunity for success from consideration.[186] The Section 800 Panel gave serious consideration to amending the competition statute to provide for "adequate and effective

---

[182] FAR 15.308.
[183] FAR 15.506.
[184] 31 U.S.C. §§ 3351-3666; 28 U.S.C. §1491(b)
[185] Acquisition Law Advisory Panel Report, Ch. 1,.
[186] The complaint of difficulty in winnowing down the offers to those with the best chance of success was not a new one. Congress had addressed this very issue in considering the potential definition of "effective competition" in enactment of CICA. The CICA conferees expressed their view that the procurement process "should be open to all capable contractors who want to do business with the Government. The conferees do not intend, however, to change the long-standing practice in which contractor responsibility is determined by the agency after offers are received." H.R. Rep. No. 861, 98-1422 (1984).

competition" but, after extensive consideration,[187] decided to retain the definition of full and open competition. Among other things, the Section 800 Panel was concerned both with the strongly expressed views of Congress and the difficulties involved in defining "adequate and effective competition."[188]

Following submission of the Section 800 Panel report, Congress considered substituting the term "efficient competition" for "full and open competition." However, Congress retained the term "full and open competition." In 1996, during consideration of the Federal Acquisition Reform Act, Congress provided guidance in use of the "full and open" standard by the following addition to 10 U.S.C. § 2304(j) and 41 U.S.C. § 253(h): "[t]he Federal Acquisition Regulation shall ensure that the requirement to obtain full and open competition is implemented in a manner that is consistent with the need to efficiently fulfill the Government's requirements." Although the basic standard was not changed, in response to agencies expressed concerns, Congress tried to convey to agencies that they had flexibility in establishing the competitive range and in using competition to obtain the best result for the Government.

Two other issues entered into the practical application of competition at the time of FASA and FARA. First, was the increased use of indefinite delivery indefinite quantity (IDIQ) contracts. Second, was the use of the GSA schedules to include the acquisition of services. These developments are discussed below.

### 5. Indefinite Delivery Indefinite Quantity (IDIQ) Contracts

#### a. Background

At the time of its deliberations, the Section 800 Panel reviewed the use of indefinite delivery indefinite quantity (IDIQ) contracts, also known as delivery order contracts or task order contracts.[189] The Section 800 Panel noted concerns regarding the abuse of sole source IDIQ contracts for supplies and services, and the existing of Inspector General and audit reports criticizing the award and administration of such contracts.[190] The 800 Panel was concerned about the growing practice of awarding IDIQ contracts on a sole source basis. Recognizing these concerns and the inadequacy of the then existing statutory provision for master agreements for

---

[187] The 800 Panel understood there could be situations in which the circumstances did not warrant the expense of proceeding with a full and open competition. Streamlining Defense Acquisition Laws: Report of the Acquisition Law Advisory Panel, Ch. 1 at 1-24.
[188] *Id.* at 1-25.
[189] Under FAR 16.501-2(a), indefinite delivery indefinite quantity (IDIQ) contracts are a subset of indefinite delivery contracts. IDIQ contracts may be delivery order contracts or task order contracts. Under FAR 16.501-1, a "delivery order contract" is defined as a contract for supplies that does not procure or specify a firm quantity of supplies (other than a minimum or maximum quantity) and that provides for the issuance of orders for the delivery of supplies during the period of the contract. A "task order contract" is defined as a contract for services that does not procure or specify a firm quantity of services (other than a minimum or maximum quantity) and that provides for the issuance of orders for the performance of tasks during the period of the contract.
[190] Streamlining Defense Acquisition Laws: Report of the Acquisition Law Advisory Panel, Ch. 1 at 1-32.

advisory and assistance services, the Section 800 Panel recommended a revision of the authority for IDIQ vehicles. While noting the issue of agencies expanding the scope of such vehicles as a problem, the Section 800 Panel believed that flexibility was necessary to permit award of contracts for supplies or services in which the detailed requirements, timing of work, and definite dollar value could not be determined at the time the basic contract was awarded.[191] Without this ability, the Section 800 Panel expressed concern that legitimate requirements and tasks would be unnecessarily delayed or result in improper sole source justifications or inappropriate undefinitized contract actions.

The Section 800 Panel then recommended a new statute that would provide some structure around the use of IDIQ contracts. First, the basic contract had to be awarded pursuant to full and open competition (or a permissible properly approved exception). The competition for the basic contract was required to have provided: (i) "a reasonable description of the general scope, nature, complexity, and purposes of the supplies or services;" (ii) meaningful evaluation criteria, properly applied; and (iii) if multiple awards were made, a clear method of competing or allocating delivery or task orders among contracts.[192] If properly awarded, then with respect to delivery orders or task orders issued under that contract, no notice (synopsis) or separate competition (or justification) was required.[193] At the time, the Section 800 Panel believed that the potential for abuse of these vehicles was the expansion of the contract scope or period by a delivery or task order. Thus, the Panel recommendation prohibited any such expansion without use of full and open competition.[194]

In enactment of FASA,[195] Congress largely accepted the Section 800 Panel approach. FASA required that award of IDIQ contracts be subject to full and open competition and include specific requirements for solicitations for such contracts, including specification of the contract period and the maximum quantity or dollar value to be procured. In addition, Congress stated that the solicitation should contain:

> 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.[196]

---

[191] *Id.* at 1-32, 33.
[192] *Id.* at 1-52-53.
[193] *Id.* at 1-53.
[194] *Id.* "The Panel believes that this statutory rule structure will meet the legitimate needs for having contracts in place to responsively provide supplies or perform services when the quantities, timing and exact nature are not known in advance. As important, it will prevent the improper use of such contracts to avoid competing new or expanded requirements when competition is appropriate, or ensure proper approval of the justification when it is not." *Id.*
[195] 41 U.S.C.A. § 253j; 10 U.S.C.A. § 2304a-d
[196] 41 U.S.C.A. § 253h; 10 U.S.C.A. § 2304a.

Congress also included a preference for multiple awards to improve competition, stating it was establishing a "requirement that solicitations for such contracts shall ordinarily provide for multiple awards and for fair consideration of each awardee for task orders issues under the contracts...."[197] The Report of the Senate Government Affairs Committee, which originated the provisions regarding IDIQ and task order contracts, stated its reasons for their enactment as follows:

> The Committee believes that indiscriminate use of task order contracts for broad categories of ill-defined services unnecessarily diminishes competition and results in the waste of taxpayer dollars. In many cases, this problem can effectively be addressed without significantly burdening the procurement system, by awarding multiple task order contracts for the same or similar services and providing reasonable consideration to all such contractors in the award of such task orders under such contracts. The Committee intends that all federal agencies should move to the use of multiple task order contracts, in lieu of single task order contracts, whenever it is practical to do so.[198]

**b. "Fair Opportunity"**

FASA mandated that agencies award orders through a limited competitive process. Specifically, the statute required that all contractors to multiple award contracts be provided a "fair opportunity to be considered" for each task or delivery order in excess of $2,500,[199] subject to four exceptions: (1) circumstances of unusual urgency that will not permit fair opportunity; (2) only one contractor has the capability to provide the highly unique or specialized services necessary; (3) a sole source order is necessary as a logical follow-on to an existing order already issued on a competitive basis; or (4) the non-competitive order is necessary to satisfy a minimum guarantee.[200]

The fair opportunity process for IDIQ contracts was implemented in FAR Subpart 16.5.[201] Although FASA called for a "fair opportunity to be considered," studies conducted by GAO and agencies' Inspectors General after the Act was implemented indicated that agencies did not consistently promote competition or justify exceptions to competition.[202] To address

---

[197] S. Rep. No. 103-258, at 15 (1994); *See also* 41 U.S.C.A. § 253h(d)(3); 10 U.S.C.A. § 2304a(d)(3).
[198] S. Rep. No. 103-258, at 15.
[199] 41 U.S.C.A. § 253j; 10 U.S.C.A. 2304c(b).
[200] 41 U.S.C.A. § 253j; 10 U.S.C.A. 2304c(b).
[201] FAR 16.5(c) provides that with respect to GSA, nothing in 16.5 restricts GSA's authority to enter into schedule, multiple award or task or delivery order contracts under any other provision of law. GSA's regulations at FAR 8.4 take precedence for GSA's contracts.
[202] *See* U.S. DOD IG, *DOD Use of Multiple Award Task Order Contracts,* (1999) at 4-7; U.S. General Accounting Office, *Contract Management: Few Competing Proposals for Large DOD Information Technology Orders,* Audit Rep. No. 99-116, GAO /NSIAD-0056, 12-13 (2000).

these concerns, Congress enacted section 804 of the National Defense Authorization Act for Fiscal Year 2000.[203] This provision directed that the FAR be revised to provide guidance regarding the appropriate use of multiple award IDIQ contracts. The guidance, at a minimum, was to identify specific steps that agencies should take to ensure that: (1) all contractors are afforded a fair opportunity to be considered for the award of task and delivery orders and (2) the statement of work for each order clearly specifies all tasks to be performed or property to be delivered. In April 2000, the FAR was revised to address these topics.

Under the FAR revisions, fair opportunity requires, with limited exceptions, that all awardees are afforded a fair opportunity to be considered for each order exceeding $2,500. The current FAR gives contracting officers significant discretion in applying the fair opportunity standard. For example, FAR 16.505(b)(1)(ii) provides that contracting officers "need not contact each of the multiple awardees ... if the contracting officer has information available to ensure that each awardee is provided a fair opportunity to be considered for each order."

Protests of task order awards are not authorized, except for cases where the order increases the scope, period, or maximum value of the contract under which the order is issued.[204] FASA did require that each agency issuing task or delivery order contracts appoint an ombudsman to review complaints regarding the fair opportunity process.[205]

#### c. Section 803 Revisions to "Fair Opportunity"

Notwithstanding the measures to further define the fair opportunity standard and the discretion afforded by the FAR, Congress continued to have concern regarding the adequacy of competition under multiple award contracts, particularly for services. For example, Section 803 of the National Defense Authorization Act for Fiscal Year 2002 required DoD to promulgate regulations requiring competition in the purchase of services by DoD under multiple award contracts. It required that DoD's regulations must provide for DoD the award of orders "on a competitive basis," absent a waiver.[206] The statute provided that the purchase of services would be made on a "competitive basis" only if it was made pursuant to procedures that required "fair notice" of the intent to make a purchase to be given to "all contractors offering such services under the multiple award contract" and afforded all contractors that respond "a fair opportunity to make an offer and have that offer fairly considered" by the official making the purchase.[207] Thus, Section 803 went beyond the FAR in that, when implemented, it would require agencies to solicit offers from all contract holders to meet the "fair opportunity" test.

---

[203] Pub. L. No. 106-65 (Oct. 5, 1999).
[204] 10 U.S.C. § 2304c(d).
[205] 10 U.S.C. § 2304c(e).
[206] *See* Pub. L. No. 107-107, § 803(b)(1).
[207] *Id.* § 803(b)(2).

DoD's implementing regulations, which became effective in October 2002, require that each order of services exceeding $100,000 shall be placed on a "competitive basis." The regulations provide that an order is made on such a basis only if the contracting officer:

> (1) Provides a fair notice of the intent to make the purchase, including a description of the work the contractor shall perform and the basis upon which the contracting officer will make the selection, to all contractors offering the service under the multiple award contract; and
>
> (2) Affords all contractors responding to the notice a fair opportunity to submit an offer and have that offer fairly considered.[208]

The regulations also permit the contracting officer to waive the competition requirement under certain circumstances.[209] As discussed below, the DoD regulations also cover ordering procedures for services under schedule contracts.

GAO continued to express concern in 2003 regarding the level of competition under fair opportunity.[210] In July 2004, GAO issued another report regarding DoD's implementation of Section 803.[211] GAO found that competition requirements were waived for nearly half of the task orders surveyed. GAO noted that, as a "result of the frequent use of waivers, there were fewer opportunities to obtain the potential benefits of competition—improved levels of service, market-tested prices, and the best overall value for the taxpayer."[212] GAO found that, in the majority of cases where waivers were invoked, it was done at the request of the government program office "to retain the services of contractors currently performing the work."[213] The report further found that roughly two-thirds of the cases in which waivers were invoked were in federal supply schedule orders.[214] For orders that were available for competition, buying organizations awarded more than one-third after receiving only one offer.[215]

In its July 2004 report regarding Section 803, GAO recommended that DoD:

- develop additional guidance on the circumstances under which the logical follow-on and unique services waivers may be used;

---

[208] *See* DFARS 216.505(c).
[209] See DFARS 216.505(b).
[210] U.S. GAO, *Contract Management: Civilian Agency Compliance with Revised Task and Delivery Order Regulations*, GAO-03-393, 7 (2003).
[211] U.S. GAO, *Contract Management: Guidance Needed to Promote Competition for Defense Task Orders*, GAO-04-874 (2004).
[212] *Id.* at 6.
[213] *Id.* at 3.
[214] *Id.* at 6.
[215] *Id.* at 3.

- require that all waiver determinations be supported by documentation describing in detail the circumstances that warrant the use of a waiver; and

- establish approval levels for waivers under multiple award contracts that are comparable to the approval levels for sole-source federal supply schedule orders under subpart 8.4 of the FAR.[216]

In testimony before the Panel, representatives of the DoD Inspector General discussed an additional investigative report that would show (report released in October 2006) a significant number of orders still are not being subjected to fair opportunity requirements.[217] The report states that on 6 of 14 soul-source purchases reviewed, adequate justification was not provided for sole-source procurements.[218] In the FY 2007 DOD Authorization Act, Congress tasked with IG with a further review of fair opportunity.[219] The agency implementation of the "fair opportunity" required by FASA thus has been uneven and subject to Congressional prodding to encourage competition.

The Defense FAR Supplement was amended further in March 2006 to add increased specificity to the requirements for competition in placement of orders under multiple award contracts.[220] The March 2006 amendments made clear that DoD's requirements pursuant to Section 803 apply to orders for both supplies and services, including orders placed by non-DoD agencies on behalf of DoD. In addition, DoD clarified that any justification for a waiver of fair opportunity was required to be consistent with the requirements of FAR 8.405-6,[221] including senior level approvals for waivers involving large orders.

#### d. Competition under Multiple Award IDIQ Contracts

As described above, the award of work under multiple award IDIQ contracts is a two-step process. The award of the basic multiple award IDIQ contract is made using FAR Part 15 procedures. Agency requirements are broadly stated in these contracts, since the actual requirements to be filled have not yet been determined.

---

[216] *Id.* at 17.
[217] Test. of Henry Kleinknecht & Terry McKinney, DoD, AAP Pub. Meeting (June 29, 2006) Tr. at 54-56, 111-12;
[218] U.S. DoD IG, *Acquisition – FY 2005 DoD Purchases Made Through the General Services Administration*, D-2007-007, 5 (2006).
[219] John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, § 817, 120 Stat. 2083 (2006).
[220] 71 Fed. Reg. 14106 (Mar. 21, 2006).
[221] FAR 8.405-6, as amended by GSA in June 2004, sets forth detailed requirements for a waiver justification including, among other things, (i) demonstration of the proposed contractor's unique qualifications; (ii) the ordering activity CO's determination that the order represents the best value to the Government, (iii) the market research performed; (iv) steps the ordering agency may take in the future to overcome the need for a non-competitive order; and (v) evidence that supporting data have been certified as accurate and complete by technical or requirements personnel.

In the case of supplies, an agency may know what it needs, but not the quantity or timing. For services, the government's ability to state its requirements in a manner that allows an evaluation against those requirements may be difficult. For routine services such as grounds keeping or equipment maintenance, the work is identifiable and the unknowns are quantity and timing. However, for complex IT and management services, the statement of requirements may be extremely general since the agency does not include the mix of labor or the expected nature and duration of the individual projects in the solicitation. For complex services, the evaluation thus typically is based on sample tasks rather than the agency's actual requirements. Because of the multiple award preference stated in FAR 16.504(c), awards usually are made to multiple offerors, including one or more mandatory awards to small businesses – if a partial reservation has been made. Large programs such as the authorized GWACs typically have a set number of awardees and involve more offerors. Some multiple award vehicles, such as SeaPort-e may not involve any initial competition, *i.e.*, according to testimony, SeaPort-e initially awarded 654 contracts.[222]

Once the base contract awards are made under a multiple award IDIQ solicitation, the government's specific requirements are identified in task orders. The DFARS order procedures at 216.505 contain relatively little guidance for the conduct of order competitions over $100,000. The CO is required to consider cost or price and is encouraged to use streamlined procedures, as well as take into account past performance on earlier orders under the contract.[223] However, for the more complex and higher value task orders involving services, agencies often will conduct competitive negotiations that apply some of the competitive source selection procedures from FAR Part 15. For example, agencies will issue a solicitation type document that contains a statement of work, proposal instructions, evaluation criteria, and a statement of intent to make a best value selection. Agencies often hold discussions, request final proposals, and make an award based on trade offs involving price and non-price factors. [Note that GSA's regulations for FSS order provide more detailed guidance for large orders involving statements of work, as discussed further below.] However, agencies making awards under multiple award IDIQ contracts are not required to debrief offerors, and, regardless of the size of the award, no protest involving the procurement process is permitted. Protests are permitted only under limited circumstances involving orders out of scope.

### 6. GSA Federal Supply Schedule

#### a. Background

With enactment of the provisions for commercial items, the acquisition of services on the GSA Federal Supply Schedule increased dramatically. Sales under the Federal Supply Schedules grew from $4.5 billion in 1993 to $10.5 billion in 1999[224] and reached $35.1 billion in fiscal year ("FY") 2006 (in addition, sales under the Veterans Administration Federal Supply

[222] Test. of Jerome Punderson, NAVSEA, AAP Pub. Meeting (Aug. 18, 2005) Tr. at 285-86.
[223] DFARS 216.505-70(c).
[224] *See* U.S. GAO, *Federal Acquisition: Trends, Reforms, and Challenges*, GAO/T-OCG-00-7, 6-7 (2000).

Schedule in FY 2005 was $7.9 billion).[225] The effect on the acquisition of services was particularly profound. FASA led to a "significant increase" in the type of services available on GSA's schedules,[226] and by 2001, the Federal Government spent $109 billion on services, constituting 51 percent of all acquisition spending for that year.[227] In FY 2005, total GSA schedule sales had increased to $33.9 billion with services constituting 61.9% of schedule sales or $20.9 billion. In FY 2006, GSA schedule sales increased again to a total of $35.1 billion with services constituting 64.4% or $22.6 billion. During the past nine years, GSA-managed schedule sales have grown on average 22.7% annually. (Note that for FY 2006 GSA-managed Schedule sales grew by only 3.5 percent from FY 2005 – a decrease from the 21.5 percent growth in FY 2004 and 9.0 percent growth in FY 2005.)[228] Today, services account for about two-thirds of all schedule sales.

GSA offers professional services through the schedule in a variety of areas, including: general purpose commercial Information Technology Equipment, software and services (known as the "IT 70" Schedule); Financial and Business Solutions ("FABS"); Mission Oriented Business Integrated Services ("MOBIS'); Professional Engineering Services ("PES"), and Environmental Services. Companies offering these services agree to perform the identified services for hourly rates identified on the Schedule.

Within the schedules program, the Services Acquisition Center offering the PES, FABS, and Advertising and Integrated Marketing (AIMS) Schedules has grown remarkably. The Services Acquisition Centers FY 2005 sales were $3.5 billion. During the previous three years, its sales have grown by 164 percent, showing a substantial demand for professional services. Although services under the IT 70 schedule grew less dramatically (less than one percent in FY 2005), IT 70 schedule sales totaled $16.9 billion in FY 2005, accounting for approximately 50.8 percent of total Schedule sales. This number grew only slightly in FY 2006, to $17 billion, of which services accounted for approximately 64 percent or $10.8 billion.

Federal Supply Schedule ("FSS") contracts are awarded pursuant to GSA's separate authorizing statute. CICA defined "competitive procedures" to include the GSA schedules so long as: (1) participation in the program is open to all responsible sources, and (2) orders and contracts under such procedures result in the lowest overall cost alternative to meet the Government's needs.[229] Thus, orders placed under the schedules are deemed to be the product of full and open competition, because they are items and services that are routinely sold in substantial quantities in the commercial marketplace. GSA's regulations implementing the FSS program are set forth in FAR Subpart 8.4. For the FSS program, GSA maintains an open solicitation under which any contractor may submit an offer of a commercial item or service for

---

[225] GSA Data, *Contractors Report of Sales - Schedule Sales FY 2006 Final,* (Oct. 24, 2006).
[226] *See* Commercial Activities Panel, *Final Report: Improving the Sourcing Decision of the Federal Government* 29 (Apr. 2002), http://www.gao.gov/a76panel/dcap0201.pdf.
[227] *Id.* at 27.
[228] GSA Data at _.
[229] 41 U.S.C.A. § 259.

award of an FSS contract.[230] Offerors under an FSS solicitation do not compete against other offerors; rather, prices are assessed against the standard of a "fair and reasonable price." For services, the FAR states:

> GSA has already determined that the prices of fixed-price services and rates for services offered at hourly rates under schedule contracts to be fair and reasonable. [B]y placing an order against a schedule contract..., the ordering activity has concluded that the order represents the best value...and results in the lowest overall cost alternative (considering price, special features, administrative costs, *etc.*) to meet the Government's needs.[231]

To be awarded a base schedule contract, a vendor has to provide GSA with information about its commercial sales practices and identify categories of customers who then become the basis of negotiation. Utilizing a most favored customer approach, GSA negotiates with its vendors to obtain the best prices afforded their preferred customers for like requirements of similar scale. The essence of GSA Schedule contract price analysis is a comparison of the prices offered to the Government with the prices paid by others in the commercial marketplace for the same or similar items, including services, under similar conditions. This pricing approach, combined with GSA's Price Reductions clause (GSAM 552.238-75), is designed to maintain a specific, commercially-competitive pricing relationship throughout the duration of the contract. The focus of this threshold negotiation is to leverage the government's volume buying to achieve a position similar to that of the most competitive commercial customer from the particular vendor.[232] The resulting price is, thus, deemed "fair and reasonable." [233]

#### b. Market Prices

As discussed above, orders placed under the schedules are deemed to be the product of a competitive procedure because the items and services are routinely sold in substantial quantities in the commercial marketplace. GSA attempts to ensure that the prices and labor rates of an FSS contract are reasonable through analysis of commercial pricing policies and practices and use of pre-award audits by the GSA IG of those commercial prices. In recent years GSA has increased the surveillance of commercial prices. The number of pre-award audits is increasing. During fiscal year 2003 to 2005, the number of pre-award audits performed increased from 18 to 40 to 70.[234] According to GSA, the goal is set at 100 in fiscal year 2006.[235] In FY 1995, GSA

---

[230] As of the date of this report, more than 17,000 companies have Schedule contracts.
[231] FAR 8.404(d).
[232] FSS Procurement Information Bulletin 04-2.
[233] FAR 8.404(d).
[234] GAO-05-229 at 14-15.
[235] *Id* at 17.

conducted 154 pre-award audits. GSA MAS contracts contain over 10 million products from more than 17,000 commercial vendors.[236]

### c. Streamlined Ordering Process

The use of GSA schedules provides for a simplified ordering process. For instance, as long as ordering activities (*i.e.*, buyers) comply with the regulatory ordering policies and procedures established by GSA and set forth in FAR 8.405, the order is not subject to the requirements of FAR Part 13 (Blanket Purchase Agreements), FAR Part 14 (Sealed Bidding), FAR Part 15 (Contracting By Negotiation), or FAR Part 19 (Small Business Programs)(except for the requirement at FAR 19.202-1(e)(1)(iii) dealing with bundling in small business procurements). Buyers still must comply with all FAR requirements regarding bundled contracts, if the order meets the definition for a bundled contract at FAR 2.101(b). The GSA schedules also may be used to meet agency small business goals.

Once a contractor's products or services are placed on the GSA schedules, any agency may order pursuant to the ordering procedures set forth in FAR 8.4.

> Although GAO generally lacks jurisdiction to hear protests involving the issuance of delivery and task orders,[237] GAO has determined that its bid protest jurisdiction under the Competition in Contracting Act[238] does extend to competitions conducted under FSS contracts.[239]

Orders under the schedules may be protested, regardless of the size of the order.

Policies and Procedures for Ordering Services. While there are no dollar limits for orders placed under GSA Schedule contracts, the ordering procedures specified in the FAR differ depending on a number of factors, including dollar thresholds. More specifically, the ordering procedures vary depending on (1) whether the acquisition is for supplies or services, (2) if services, whether they are of a type requiring a statement of work, *i.e.*, statement of the buyer's requirements, (3) the dollar value of the purchase (*i.e.*, below the micro-purchase threshold, currently set at $3,000, or above the micro purchase threshold established by category of supply or service), and (4) whether a Blanket Purchase Agreement ("BPA") is being established under the schedule contract for the fulfillment of repetitive needs for supplies or services. For any

---

[236] GSA Data at __.
[237] 41 U.S.C.A. § 253j(d); 10 U.S.C.A. § 2304c(d).
[238] *See* 31 U.S.C.A. § 3551 *et seq.*
[239] E.g., *Savantage Fin. Servs., Inc.*, B-292046, B-292046.2, June 11, 2003, 2003 CPD ¶ 113; *See Sys. Plus, Inc. v. United States, 68 Fed. Cl. 206 (2005),* where the extent of the authority for review of FSS competitions has been called into question. In recently rejecting a challenge to an agency decision not to implement a stay of performance in regard to the award of an order under a schedule contract, the U.S. Court of Federal Claims distinguished FAR Part 15 procurements from the competitions conducted under FAR subpart 8.4 for purposes of the statutory stay outlined in the statute that sets forth GAO's bid protest jurisdiction.

orders of services at or below the micro purchase threshold, the buyer may place orders directly with any FSS contractor that can meet the agency's needs, without regard to whether an SOW was used.[240]

For orders of services under the maximum order threshold, if a SOW is not used (*e.g.*, for commoditized services such as installation, maintenance or repair services), the ordering activity must review at least three schedule contractors pricelists.[241] Such a survey of prospective suppliers on the schedules may be accomplished through a review of the "GSA Advantage![242] On-line" shopping service or by review of catalogs or pricelists from three contractors. [243] The FAR does not define survey requirements or how the three schedule contractors are to be chosen. The FAR does include a list of factors that may be considered in determining best value for purposes of selecting a contractor for an order.[244] For orders in excess of the maximum order threshold, the policy is that buyers should seek a price reduction.[245] However, an order may be placed even though no reduction is offered.[246]

In cases where services priced at hourly rates are being acquired from schedule contractors, GSA policy calls for an SOW stating the buyer's requirements (*e.g.*, the work to be performed, location, period of performance, schedule, performance standards, etc.) to be provided along with evaluation criteria in an RFQ.[247] In circumstances involving orders over the micro-purchase threshold, but less than the maximum order threshold where a SOW is called for, the policy is that the buyer provide such an RFQ "to at least three schedule contractors that offer services that will meet the agency's needs."[248] RFQs may be posted on e-Buy. Buyers are encouraged to request firm fixed-prices for the work scope.[249] The policy makes it clear that although the hourly rates are already on the schedule and deemed fair and reasonable (through deemed competition) the responsibility for obtaining a fair and reasonable price for the buyer's specific requirement considering the level of effort and mix of labor proposed, is the responsibility of the buyer.[250] Buyers are encouraged to seek price reductions regardless of the size of individual orders.[251]

In purchases where the dollar value of the buy exceeds the maximum order threshold or if establishing a BPA under a schedule, the FAR instructs ordering activities whose order *does not*

---

[240] FAR 8.405-1(b) and 8.405-2(c)(1)
[241] FAR 8.405-1(c)
[242] As of January 2006, GSA Advantage! provides more than 11.2 million different commercial services and products through its 17,495 contracts in 43 different Schedules. It features advanced search capability and has traffic of approximately 45,000 hits a day.
[243] See *id.*
[244] FAR 8.405-1(c)(3).
[245] FAR 8.405-1(d).
[246] FAR 8.405-1(d)(3).
[247] FAR 8.405-2(c).
[248] FAR 8.405-2(c).
[249] FAR 8.405-2(c)(2)(iii).
[250] FAR 8.405-2(d).
[251] FAR 8.405-4.

require a SOW to review the pricelists of additional schedule contractors, seek price reductions, and place the order or BPA with the schedule contractor that provides the best value.[252] However, as noted above, the order may be placed even if no price reductions are forthcoming.[253]

For those orders exceeding the maximum order threshold or for establishing a BPA for services that require a SOW, the policy is that buyers provide the RFQ to additional schedule contractors, or to any schedule contractor who requests the RFQ. The SOW is required to identify the work performed, location period of performance deliverable schedule, and performance standards.[254] In order to determine the appropriate number of additional contractors, buyers should consider, among other factors, the complexity, scope, estimated value of the requirement and market research. GSA places the responsibility on the buyer whose requirement is being filled, to evaluate the responses and make an award to the schedule contractor determined to offer best value based on a consideration of the level of effort and the proposed labor mix for the task defined in the SOW.[255] In such circumstances and depending on the complexity and size of the order, the buying agency CO may use his or her discretion to use the minimum required evaluation procedures in FAR 8.405-2 to conduct an evaluation that is similar to a best value selection under FAR part 15 and produces a result deemed to be the best value.

The Internet-based tool e-Buy often is used for order competitions under the GSA schedules. This tool is designed to facilitate the request for and submission of quotes or proposals for products and services offered through FSS contracts and GSA GWACs.[256] Agencies can use e-Buy to prepare and post a request for quotations for specific products and services for a specified period of time, and contractors may review the request and post a response. Under the e-Buy tool, the buying agency, not GSA, defines the requirements and writes the statement of work – GSA does not review them. The buying agency selects the contractors who will be solicited for a quotation. However, the system is set up so that all vendors within the selected product/service categories or SINs can view the RFQ under the bulletin board and submit quotations. It is up to the vendor whether to make the effort to submit a quotation if that vendor did not receive a solicitation. Using e-Buy satisfies the additional requirements of DFARS 208.405-70. DoD's implementation was addressed in the GAO report discussed above.[257]

For example, an ordering agency with a requirement for an IT business improvement task may choose SIN 132-51, IT Services, under the Schedule 70-Information Technology and SIN

---

[252] FAR 8.405-1(d)(1)-(3).
[253] FAR 8.405-1(d)(3).
[254] FAR 8.405-2 (b) and (c)(3).
[255] FAR 8.405-2(c)(3)-(4) and 8.405-2(d).
[256] http://www.gsaadvantage.gov.
[257] See U.S. GAO, *Contract Management: Guidance Needed to Promote Competition for Defense Task Orders*, GAO-04-874 (2004).

874-1, Consulting Services, under the Schedule 874- Mission Oriented Business Integrated Services (MOBIS). The e-Buy system will show the list of 3,995 vendors available under SIN 132-51 and 1,741 vendors under SIN 874-1 (as of 6/8/2006). The agency will then select the vendors to whom to send e-mail notifications about the RFQ ("select all vendors" is also available). However, the rest of the vendors within the two SINs may still view the RFQ in the bulletin board and submit quotes. Under, FAR 8.405-2(c)(4) and (d), the ordering agencies must provide the RFQ including the statement of work and the evaluation criteria to any Schedule contractor who requests it and they must also evaluate all responses received. The agency can decide reasonable response time.

Postings on e-Buy have been continually increasing since its inception in August 2002. In fiscal year ("FY") 2003, 13,282 solicitations were posted. Postings increased to 25,582 in FY 2004 and 41,179 in FY 2005. Finally, in FY 2006, there have been 48,423 postings representing an approximately 18 percent increase over the last year. On average, three quotes have been received per closed RFQ during FY 2005 and FY 2006.

Regardless of whether ordering activities use e-Buy, the ordering activity, not GSA, is responsible for establishing the dollar thresholds for BPAs and orders, developing a quality SOW when required, conducting the competition including selecting appropriate vendors to receive an RFQ when e-Buy is not used, and evaluating and selecting the schedule contractor to fulfill their requirements.

As with task orders under multiple award contracts, Section 803 also applies to orders under FSS contracts. DoD regulations impose the requirements of Section 803 for services orders over $100,000 under GSA schedule contracts.[258] As implemented in DFARS 208.405-70, DoD's regulations require that a DoD order for supplies or services exceeding $100,000 must provide fair notice either to all applicable Schedule holders or to as many Schedule contractors as practicable to reasonably ensure receipt of at least three offers. The Procedures, Guidance and Information (PGI) for DFARS 208.405-70 specifically mentions "e-Buy" as one medium that provides fair notice to all the GSA schedule contractors. At the time of this report, GSA has under consideration, a proposed rule that will make Section 803 applicable government-wide.

Schedule BPAs. Blanket Purchase Agreements under GSA schedules also are used as a tool to streamline the ordering process. BPAs originally were designed to provide a simplified method for government agencies to meet their repetitive needs for unpredictable quantities of commodities.[259] With the addition of services priced at hourly rates to the Federal Supply Schedules, schedule BPAs for these services in some ways more closely resemble indefinite-delivery, indefinite-quantity (IDIQ) services contracts in their application and use than traditional FAR Part 13 BPAs with their individual purchase limitations.[260] BPAs under GSA schedules may be single BPAs or multiple BPAs. Schedule BPAs also may be established for the use of a

[258] *See* DFARS 208.405-70.
[259] FAR 8.405-3(a)(1).
[260] FAR Subsection 13.303-5(b).

single agency, or may be established for multi-agency use if the BPA identifies the participating agencies and their estimated requirements at the time the BPA is established.

While fair opportunity requirements that apply to umbrella IDIQ contracts do not apply to multiple BPAs, the establishing agency must specify the ordering procedures to be used by the ordering activities and the ordering activities must forward their requirement, including any statement of work and evaluation criteria, if required, to an appropriate number of BPA holders, as established by the BPA's ordering procedures.

Unlike traditional FAR Part 13 BPAs, with their dollar threshold limitations, BPAs under GSA schedules have been used for streamlining large buying programs for various types of services and supplies. While dollar thresholds invoke varying ordering procedures under GSA schedules (as discussed above), there are no dollar limits for an order or a BPA. After complying with the ordering policies discussed above under FAR Subsection 8.405-1 or -2 as applicable for establishing the BPA, and estimating the quantities or work to be performed,[261] the ordering activity may place orders as the need arises for the duration of the BPA (usually 5 years),[262] without notice requirements or competition beyond that required under the BPA's ordering procedures. As discussed above, FAR Subsection 8.405-3(b)(3) requires that those placing orders under a BPA for hourly rate services develop a SOW for the order and ensure that the order specifies a price for the performance of the tasks identified in the SOW. So, while the hourly rates are themselves already deemed fair and reasonable, FAR Subsection 8.405-2(d) places the responsibility for considering the level of effort and the mix of labor proposed to perform a specific task on the ordering activity in determining the total price reasonable.

While an established BPA can remain in effect for up to five years (may exceed 5 years to meet program requirements),[263] the contracting officer must review the BPA annually.[264] The review process must determine: whether the vendor is still under the GSA schedule contract; whether the BPA is still the best value for the Government; and whether additional price reductions could be obtained due to an increase in the amounts of services purchased.[265] In addition, the contracting officer must document the results of the annual review.[266]

Brand Name Specifications. On April 11, 2005, OMB issued a memorandum addressing the use of brand name specifications to reinforce the need to maintain vendor and technology neutral contract specifications. OMB's twin goals in issuing the memorandum were to increase competition and transparency regarding the use of brand name requirements. OMB encouraged agencies to limit the use of brand name specifications and requested that agencies publicize any justification for use of a brand name with the contract solicitation. The Civilian Agency

---

[261] FAR 8.405-3(a)(2).
[262] FAR 8-405.3(c).
[263] *Id.* at 8.405-3(c).
[264] *Id.* at 8.405-3(d).
[265] *Id.* at 8.405-3(d)(1).
[266] *Id*, at 8.405-3(d)(2).

Acquisition Council and the Defense Acquisition Regulations Council ("Councils") followed suit and, on September 28, 2006, the Councils issued an interim rule amending the FAR to require agencies to publish on the Government-wide Point of Entry ("GPE") or e-Buy, the justification to support the use of brand name specifications.

The interim rule stated that, as a general rule, contract specifications should emphasize the necessary physical, functional, and performance characteristics of a product – not brand names. In addition, the interim rule requires that brand name orders exceeding $25,000 to be placed against the FSS program must be posted on e-Buy. As part of the posting, the ordering agency is required to include the documentation or justification supporting the brand name requirement. For non-FSS acquisitions, including simplified acquisitions, the interim rule requires posting of the justification or documentation supporting the brand name requirement to the FedBizOpps website.

## F. Pricing – The Current Regulatory and Oversight Scheme

### 1. Overview

Under current law, contracts that are priced or performed on the basis of cost are subject to the requirement for submission of certified cost or pricing data if they are above the $650,000 threshold.[267] There are exceptions to this requirement, as discussed further below, for competitively awarded contracts (although non-competitive modifications to such contracts may be covered) and for contracts for commercial items (the exception also covers modifications to commercial item contracts).

For commercial item contracts under FAR Part 12, the Government still must determine whether the price is fair and reasonable. Where commercial item contracts are competitively awarded, price reasonableness is easily established. Where commercial item contracts are acquired non-competitively, an issue arises as to what data should reasonably be required to support the contractor's proposed pricing. For price-based acquisitions of commercial items, FAR 15.403-3(c) describes the process the contracting officer must utilize. The contracting officer is directed, "at a minimum" to use price analysis to determine fair and reasonable prices whenever a commercial item is acquired. If price analysis is not sufficient, the contracting officer is directed to use other sources (*e.g.*, market information), and if that is insufficient, authority exists to obtain information other than cost or pricing data.

In the grey area, where there is little or no competition, where exceptions to fair opportunity are used, or where there is an inadequate response to the competition, questions arise as to what types of data the contracting officer can and should obtain in connection with commercial items, whether pressures to get to award discourage asking for information other than cost or pricing data, and what the government audit community does with such data; *i.e.*, is the mindset to treat it no differently than cost or pricing data?

---

[267] FAR 16.403-4(a).

For defense articles, considerable controversy has arisen since this Panel was appointed regarding whether such articles should be considered "commercial items" and whether price-based acquisition of such items should be permitted.

### 2. The Current Truth in Negotiations Act

The Truth in Negotiations Act ("TINA")[268] requires a contractor to submit certain factual information to the Government for purposes of contract negotiations. The contractor must submit this "cost or pricing data" to the Government and certify that the data are "accurate, complete, and current."[269]

Specifically, unless an exception applies, TINA requires submission of cost or pricing data before the award of any negotiated prime contract, subcontract, or modification to any contract that is expected to exceed $650,000. Unless an exception applies, cost or pricing data also may be required for contract actions over the simplified acquisition threshold if the data are necessary to determine whether the offered contract or modification price is fair and reasonable.[270] The FAR encourages[271] contracting officers to "use every means available to ascertain whether a fair and reasonable price can be determined before requesting cost or pricing data."

There are several exceptions to the requirement that a contractor submit cost or pricing data.[272] A contractor does not have to provide cost or pricing data if the agreed upon price was based on "adequate price competition"[273] or "prices set by law or regulation."[274] Finally, submission of cost or pricing data is not required for contracts for "commercial items" or modifications to such contracts (provided that such modifications would not change the contract from one for a commercial item to one other than for a commercial item).[275] Notwithstanding, the contracting officer may require information other than cost or pricing data to support a determination of price reasonableness or cost realism.[276] The Government may not require submission of cost or pricing data if an exception applies.[277]

Cost or Pricing Data. Cost or pricing data is broadly defined as:

> all facts that, as of the date of agreement on the price of a contract (or the price of a contract modification), or, if applicable consistent

---

[268] 10 U.S.C. § 2306a; 41 U.S.C. § 254b.
[269] *See* 10 U.S.C. § 2306a(a)(2), 41 U.S.C. § 254b(a)(2).
[270] *See* FAR 15.403-4(a)(2).
[271] FAR 15.402(a)(3).
[272] *See* 10 U.S.C. § 2306a(b); 41 U.S.C. § 254b(b); FAR 15.403-1.
[273] *See* FAR 15.403-1(b)(1).
[274] FAR 15.403-1(b)(2).
[275] *See* FAR 15.403-1(b)(3).
[276] *See* FAR 15.403-1(b).
[277] *See* 10 U.S.C. § 2306a(b); 41 U.S.C. § 254b(b).

> with [TINA], another date agreed upon between the parties, a prudent buyer or seller would reasonably expect to affect price negotiations significantly. Such term does not include information that is judgmental, but does include the factual information from which a judgment was derived.[278]

The FAR further states:

> Cost or pricing data are factual, not judgmental; and are verifiable. While they do not indicate the accuracy of the prospective contractor's judgment about estimated future costs or projections, they do include the data forming the basis for that judgment. Cost or pricing data are more than historical accounting data; they are all the facts that can be reasonably expected to contribute to the soundness of estimates of future costs and to the validity of determinations of costs already incurred.[279]

Thus, cost or pricing data includes a variety of information including, but not limited to, cost information on which the contractor based its price.

The FAR provides some specific guidance in identifying broad categories of information that qualify as cost or pricing data. It states that cost or pricing data includes "such factors as –

> (1) Vendor quotations;
> (2) Nonrecurring costs;
> (3) Information on changes in production methods and in production or purchasing volume;
> (4) Data supporting projections of business prospects and objectives and related operations costs;
> (5) Unit-cost trends such as those associated with labor efficiency;
> (6) Make-or-buy decisions;
> (7) Estimated resources to attain business goals; and
> (8) Information on management decisions that could have a significant bearing on costs.[280]

Information Other Than Cost or Pricing Data. When one of the exceptions discussed above applies, the contracting officer "shall not require submission of cost or pricing data to support any action (contracts, subcontracts, or modifications)."[281] Therefore, the prohibition on obtaining such data is explicit. The FAR also states, however, that the contracting officer "may

---

[278] 10 U.S.C. § 2306a(h)(1); 41 U.S.C. § 254b(h)(1). *See also* FAR 2.101.
[279] FAR 2.101.
[280] *Id.*
[281] *See* FAR 15.403-1(b).

require information other than cost or pricing data to support a determination of price reasonableness or cost realism."[282]

The text of TINA provides:

> When certified cost or pricing data are not required to be submitted under this section for a contract, subcontract, or modification of a contract or subcontract, the contracting officer shall require submission of data other than certified cost or pricing data to the extent necessary to determine the reasonableness of the price of the contract, subcontract, or modification of the contract or subcontract. Except in the case of a contract or subcontract covered by the exceptions in subsection (b)(1)(A), the contracting officer shall require that the data submitted include, at a minimum, appropriate information on the prices at which the same item or similar items have previously been sold that is adequate for evaluating the reasonableness of the price for the procurement.[283]

The FAR mandates that, in establishing the reasonableness of prices, a contracting officer must not obtain more information than is "necessary."[284] If "the contracting officer cannot obtain adequate information from sources other than the offeror, the contracting officer must require submission of information other than cost or pricing data. . . ."[285]

In light of the use of the phrase "other than" in conjunction with "cost or pricing data," it is not entirely clear from the TINA statute or the implementing regulation in the FAR what qualifies as "information other than cost or pricing data." Neither statute nor the FAR specify the difference between "cost or pricing data" and "information other than cost or pricing data." For example, it is not clear from the regulation whether the category "information other than cost or pricing data" necessarily encompasses the same types of cost or price-related information as "cost or pricing data," and if it then differs from "cost or pricing data" only in regard to certification and defective pricing implications.

Although the FAR does not describe the differences between "cost or pricing data" and "information other than cost or pricing data," it sets forth the following order of precedence for seeking "information other than cost or pricing data" when cost or pricing data are not required and there is no "adequate competition":

> Information related to prices (*e.g.*, established catalog or market prices or previous contract prices), relying first on information

---

[282] *Id.*
[283] 10 U.S.C. § 2306a(d)(1); *See also* 41 U.S.C. § 254b(d)(1).
[284] *See* FAR 15.402(a).
[285] FAR 15.403-3(a)(1).

> available within the Government; second, on information obtained from sources other than the offeror; and, if necessary, on information obtained from the offeror. When obtaining information from the offeror is necessary, unless an exception under 15.403-1(b)(1) or (2) applies, such information submitted by the offeror shall include, at a minimum, appropriate information on the prices at which the same or similar items have been sold previously, adequate for evaluating the reasonableness of the price.
>
> Cost information, that does not meet the definition of cost or pricing data at [FAR] 2.101.[286]

Thus, the order of precedence for "information other than cost or pricing data" looks first to price information and, secondarily, to cost information. The FAR does not further identify or describe "information other than cost or pricing data."

Under the FAR, "information other than cost or pricing data" may be requested for commercial items where there is no adequate price competition.[287] The FAR provides:

> (i) The contracting officer must limit requests for sales data relating to commercial items to data for the same or similar items during a relevant time period.
>
> (ii) The contracting officer must, to the maximum extent practicable, limit the scope of the request for information relating to commercial items to include only information that is in the form regularly maintained by the offeror as part of its commercial operations.[288]

The FAR includes instructions (located in Table 15-2) for submission of proposals when a contractor is required to submit cost or pricing data. The table is entitled "Instructions for Submitting Cost/Price Proposals When Cost or Pricing Data Are Required." The instructions address various "cost elements," including materials and services, direct labor, indirect costs, and other costs. The FAR provides detailed guidance regarding submission of the information.[289] Although "information other than cost or pricing data" is addressed in FAR Subpart 15.4, the FAR does not include instructions for how to submit "information other than cost or pricing data." Instead, the FAR specifies[290] that the "contractor's format for submitting the information

---

[286] FAR 15.402(a)(2)(i), (ii).
[287] *See* FAR 15.403-3(c)(1).
[288] FAR 15.403-3(c)(2)(i), (ii).
[289] *See* FAR 15.408 (tbl. 15-2).
[290] FAR 15.403-3(a)(2).

should be used," although FAR 52.215-20 Alternate IV also enables the Government to provide "a description of the information and the format that are required."

### 3. GSA Schedule Pricing Policies

Because the services and products on GSA schedule contracts are commercial items and such contracts are awarded on commercial terms and conditions, GSA uses a price-based approach to negotiate contract pricing. This approach relies on the prices of the supplies/services that are the same or similar to those in the commercial marketplace. Under this approach, submission of cost or pricing data is not required.

GSA's negotiation objective is to receive prices that are equal to, or better than, a company's "Most Favored Customer" pricing for a comparable requirement. To arrive at a price that the Government considers fair and reasonable, offerors are required to submit significant amounts of data pertaining to their commercial sales and discounting practices using the standard Commercial Sales Practices Format.

GSA schedule contracts contain an Economic Price Adjustment clause under which schedule contractors may increase or decrease prices according to their commercial practice. Price decreases may be submitted at any time during the contract period. Price increases, resulting from a reissue or modification of the contractor's commercial catalog that formed the basis for award, can only be made effective on or after the initial 12 months of the contract period and, then, periodically thereafter for the remainder of the contract term. Under a standard GSA clause, MAS contractors are required to maintain and provide current Federal Supply Schedule Price Lists with detailed data on all price, price-related information, and pertinent ordering instructions (I-FSS-600).

A contractor's pricing and discount information is subject to audit by the GSA Inspector General. GSA schedule contracts also contain a "most-favored customer" clause that requires contractors provide and maintain auditable data establishing that, for the class of item offered, the Government has received the most favorable price and discount arrangement. If it is discovered that the contractor offered more favorable pricing arrangements to its commercial customers, the Government will be entitled to a rebate. GSA's Office of Inspector General uses its investigatory powers (including subpoenas) and the Civil False Claims Act to pursue such rebates. The MAS program thus is unique in that it relies on commercial pricing but uses the audit, investigatory, and fraud prosecution powers of the Government to enforce its price terms.

## G. Unequal Treatment of the Parties

A fundamental difference between government and commercial contracting is unequal treatment of the parties in the contracting process. The Government enjoys certain contractual "advantages" by virtue of its status as the "sovereign" resulting in benefits from the centuries-old, judicially-created doctrine of sovereign or governmental immunity. The prime example of

this doctrine is that the Government cannot be sued unless (and only to the extent that) it *consents* to be sued.[291] Application of this doctrine to the contracting process means that contractors can sue the Government only as permitted by the Tucker Act,[292] which does not authorize suits in United States District Courts, jury trials, and certain types of relief such as specific performance, injunctions (except in bid protest cases), interest on damages, etc. Related doctrines are "official" immunity, precluding lawsuits against government employees for their contractual activities,[293] and the "sovereign acts" doctrine, which shields the Government from contractual liability for actions taken in its sovereign capacity.[294]

The Government also enjoys special protection under the U.S. Constitution by virtue of the Appropriation Clause precluding payments from the Treasury unless authorized by a Congressional appropriation statute.[295] Additional favored treatment for the Government in contracts is provided in numerous statutory provisions, such as the Anti-Deficiency Act,[296] Contract Disputes Act of 1978,[297] Defense Production Act, False Claims Act,[298] Forfeiture of Claims Statute,[299] Procurement Integrity Act,[300] and the Truth in Negotiations Act.[301]

The United States Supreme Court, however, has held for some 130 years that the same rules of contract interpretation and performance apply both to the Government and contractors. The Supreme Court stated in 1875 that the Government is subject to the same rules as contractors. In *Cooke v. United States*,[302] the Court said that, when the United States became parties to commercial papers, they incur all the responsibilities of private persons under the same circumstances. The Court then said:

> If [a government] comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there.[303]

Two years later, in a case involving the Government's obligations under a lease, the Court said:

> The United States, when they contract with their citizens, are controlled by the same laws that govern the citizen in that behalf.

---

[291] *United States v. Sherwood*, 312 U.S. 584, 586 (1941).
[292] 28 U.S.C. § 1491(a)(1).
[293] *See Westfall v. Erwin*, 484 U.S. 292, 295-96 (1988).
[294] *Horowitz v. United States*, 267 U.S. 458 (1925).
[295] *See OPM v. Richmond*, 496 U.S. 414 (1990).
[296] 31 U.S.C. § 1341(a)(1).
[297] 41 U.S.C. § 601 *et. seq.*
[298] 31 U.S.C. §§ 3729-3731.
[299] 28 U.S.C. § 2514.
[300] Office of Fed. Procurement Policy Act, 41 U.S.C. § 423.
[301] 10 U.S.C. § 2306(f).
[302] 91 U.S. 389 (1875).
[303] *Id.* at 398.

> All obligations which would be implied against citizens under the same circumstances will be implied against them.[304]

In the *Lynch* case involving government insurance, the Court said:

> When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals.[305]

More recently, the Court said in *Franconia Associates v. United States:*[306] "When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals," quoting *Mobile Oil Exploration & Producing Southeast, Inc. v. United States.*[307]

The Panel considered areas in which the courts and boards of contract appeals have not followed the guidance in the Supreme Court's decisions and have provided the Government more favorable treatment than contractors even when the disparate treatment is not based on the Constitution, statutory provisions, or contract clauses. These areas included the presumption of regularity (that actions of the Government were conducted properly and correctly),[308] estoppel against the Government,[309] the presumption of good faith,[310] and interest as damages.[311]

The Panel gave considerable attention to the legal presumptions, primarily because of a scholarly opinion by Judge Wolski in the United States Court of Federal Claims decision in *Tecom, Inc. v. United States*[312] decided during the Panel's deliberations and a recommendation by the American Bar Association's Section of Public Contract Law.

The *Tecom* case discussed the history and application of the presumptions of regularity and good faith. The presumptions have their root in the English law of evidence, and the presumptions initially applied to both government officials and private persons (the law presumed every man, in his private and official character, did his duty, and all things were rightly done, until the contrary is proved).[313] The Supreme Court of the United States initially did not limit the presumptions to government officials but applied them also to private persons.[314] The *Tecom* decision discussed the judicial precedent involving the burden of proof needed to

---

[304] *United States v. Bostwick,* 94 U.S. 65, 66 (1877).
[305] *Lynch v. United States*, 292 U.S. 571, 579 (1934).
[306] 536 U.S. 129, 141 (2002).
[307] 530 U.S. 604, 607 (2000).
[308] *See, e.g., Astro Sci. Corp. v. United States*, 471 F.2d 624, 627 (Ct. Cl. 1973) (government tests were conducted properly).
[309] *See, e.g., Rumsfeld v. United Tech. Corp.*, 315 F.3d 1361, 1377 (Fed. Cir. 2003).
[310] *Torncello v. United States*, 681 F.2d 756, 770 (Ct. Cl. 1982).
[311] *See England v. Contel Advanced Sys., Inc.*, 384 F.3d 1372 (Fed. Cir. 2004).
[312] 66 Fed. Cl. 736 (2005).
[313] *Id.* at 758.
[314] *Id.* at 760.

rebut the presumptions and contrasted actions by government officials accused of fraud or quasi-criminal wrongdoing with their actions of the type that may be taken by a private party to a contract.[315] In fact, many of the cases discussed by Judge Wolski can be distinguished on the basis of actions taken by a government official in the Government's sovereign or contractual capacities.

The comments of the American Bar Association's Section of Public Contract Law (consisting of lawyers in private practice, industry, and government service) were contained in a letter to the Panel from the Section dated June 22, 2006. The Section noted that courts and boards of contract appeals, over time, have applied some presumptions to conduct of government employees acting in the contractual area, not merely the sovereign area. Much of the confusion, the Section said, comes from the mingling of (a) the duty of good faith and fair dealing (as recognized by Section 205 of the Restatement 2d of Contracts) that is implied into every contract with (b) the presumption of good faith that attaches to government employees acting in a sovereign capacity. The Section also noted that the unequal treatment of the Government and contractors by the misapplication of the doctrine has been compounded by some judges who have imposed a higher standard of proof on contractors in order to overcome the presumption. The Section concluded by recommending the following language:

> The contractor and the Government shall enjoy the same legal presumptions, if any, in discharging their duties and in exercising their rights in connection with the performance of any Government contract, and either party's attempt to rebut any legal presumption that applies to the other party's conduct shall be subject to a uniform evidentiary standard that applies equally to both parties.

Representatives of the ABA Section discussed the recommendation at a meeting of the Panel and responded to numerous questions and comments by Panel members, including acceptance of several revisions to the quoted recommendation made during the meeting.

## Part II – Findings

### 1. Commercial "Best Practices" Generally

**<u>Finding</u>: "Best practices" by commercial buyers of services include a clear definition of requirements, reliance on competition for pricing and innovative solutions, and use of fixed-price contracts.**

<u>Discussion</u>:

The Panel found a number of common "best practices" among commercial buyers in the commercial market place. Commercial buyers invest the time and resources necessary up front

[315] *Id.* at 769.

to clearly define their requirement. They use multidisciplinary teams to plan their procurements, conduct competitions, and monitor contract performance throughout the terms of the contract. They rely on well-defined requirements and competitive awards to reduce prices and to obtain innovative and high quality goods and services. Commercial buyers establish objective measures of performance and continuously monitor contract performance. They rely on carefully crafted standardized terms and conditions, developed with vendor input, to manage risk and ensure quality performance.

Commercial buyers also told the Panel that, when feasible, they preferred fixed-priced contracts. Well-defined performance-based requirements facilitated the use of fixed-price contracts. These same buyers avoided the use of cost-based contracts whenever possible. They indicated that cost-based contracts were too expensive and too burdensome on the company to manage. These commercial buyers typically use relatively short-term contracts; usually 3-5 years with some contracts lasting 7 years. Commercial buyers usually reserve the right to recompete before the contract has run full term.

### 2. Defining Requirements

**Finding: Commercial organizations invest the time and resources necessary to understand and define their requirements. They use multidisciplinary teams to plan their procurements, conduct competitions for award, and monitor contract performance. They rely on well-defined requirements and competitive awards to reduce prices and to obtain innovative, high quality goods and services. Procurements with clear requirements are far more likely to meet customer needs and be successful in execution.**

Discussion:

Effective services competition in the private sector rests upon a robust requirements-building process.[316] Gathering of requirements is a fundamental first step in commercial organizations' services acquisition strategy.[317] Companies with deep experience in services acquisition value acquisition process governance as highly as selecting the awardee providing the best functional expertise.[318] For buyers, detailed statements of work communicating specific contract requirements and expected levels of service quality are essential to a successful relationship with vendors.[319]

Private sector companies spend significant amounts of time and resources developing business cases for services acquisition.[320] They get the stake holders involved and use highly qualified personnel to develop the business cases. Business case development helps to prevent

[316] Test. of Janice Menker, Concurrent Tech. Corp., AAP Pub. Meeting (May 17, 2005) Tr. at 32 (culture change to focus on requirements definition is difficult, but the best written contract cannot fix poor requirements definition).
[317] Test. of Mark Stelzner, EquaTerra, AAP Pub. Meeting (Aug. 18, 2005) Tr. at 360.
[318] *Id.*
[319] Test. of Robert Miller, Procter & Gamble, AAP Pub. Meeting (Mar. 30, 2005) Tr. at 80.
[320] Test. of Todd Furniss, Everest Group, AAP Pub. Meeting (Mar. 30, 2005) Tr. at 122.

false trade-offs. Cost reduction is just one component of the business cases. They have found that too much focus on cost reduction can lead to missed opportunities and, in some cases, reduce service quality in other areas of the organization.[321] Stated differently, total cost of service acquisition does not equal total value captured through sourcing.[322] Companies that conducted successful sourcing transactions focused on total value when planning requirements. They also used specifications with well-defined scopes of desired services.[323]

### 3. Competition in the Commercial Marketplace

**Finding: Commercial buyers rely extensively on competition when acquiring goods and services. Commercial buyers further facilitate competition by defining their requirements in a manner that allow services to be acquired on a fixed-price basis in most instances.**

Discussion:

Commercial buyers strongly prefer head-to-head competition among vendors. Successful commercial organizations rely on competition to deliver the best quality and the greatest value. As a result, they minimize use of sole-source, or other contract forms that restrict competition. One company testified that its standard practice is to send RFPs to four leading vendors and hold discussions with at least two of the four.[324] Consultants recommend maintaining competition throughout the procurement process.[325]

Competition in the commercial marketplace is achieved by starting with an in-depth analysis of company needs, internal strengths and weaknesses and strategic goals.[326] The process often begins with wide-ranging requests for information ("RFIs") to gather information about services and vendors available in the commercial marketplace.[327] Competition does not end when the sourcing transaction contract is signed. Rather, Six Sigma-style, continuous evaluation is the predominant model for continuously measuring vendor/supplier performance.[328] Vendors expect ongoing monitoring, and continually face the prospect of losing business if technology or strategic direction changes, or if service metrics fall below target levels.[329] Commercial companies with robust sourcing activities are aligned around common objectives, with buy-in at all levels of the organization, so that vendors and company employees managing

---

[321] *Id.* at 121; Test. of Tony Scott, Walt Disney Co., AAP Pub. Meeting (Apr. 21, 2006) Tr. at 11.
[322] Furniss Test., AAP Pub. Meeting (Mar. 30, 2005) at 116.
[323] Testimony of Ronald Casbon, Bayer, AAP Pub. Meeting (Aug. 18, 2005) Tr.at 218.
[324] Miller Test., AAP Pub. Meeting (Mar. 30, 2005) at 79.
[325] *See* Furniss Test., AAP Pub. Meeting (Mar. 30, 2005) at 142.
[326] *See* notes 1 – 32, *infra*, and accompanying text.
[327] *See* notes 14-16, *infra*, and accompanying text.
[328] *See* notes 13, 33 – 34, 44 – 48, *infra*, and accompanying text.
[329] *See* notes 47 – 48, *infra*, and accompanying text.

vendors understand their objectives and have profit-and-loss responsibility for their transactions.[330]

### 4. Contract Terms and Conditions Used in Commercial Contracts

**Finding: Large commercial buyers generally require sellers to use the buyers' contracts which include the buyers' standard terms and conditions. This allows all offerors to compete on a common basis. The use of standard terms and conditions streamlines the acquisition process, making it easier to compare competing offers, eliminating the need to negotiate individual contract terms with each offeror, and facilitating contract management.**

Discussion:

The commercial buyers who addressed the Panel said that they use tight deal terms in their solicitation, *e.g.*, detailed pricing structure, work breakdown matrices, description of work, *etc.* The commercial buyers also have developed and use their own standard contracts in large procurements. These standard contracts have several important advantages to the seller. They provide consistency and predictability. Sellers know what to expect. Also standard contract terms create a common baseline for evaluating offers in a competitive acquisition. Standard contract terms also benefit the buyer. They streamline the acquisition process by simplifying the comparison of competing offers and by eliminating the need for negotiation of terms and conditions with individual vendors. Commercial buyers seldom grant deviations to their standard contract terms. Rather than tailoring terms for individual offerors, the buyers instruct the sellers to adjust their price to account for any risks associated with the buyer's standard contract terms.

Unlike commercial practices, government contracts using the streamlined procedures of FAR Part 12 normally incorporate the sellers' terms and conditions verbatim along with several mandatory FAR clauses. Analyzing the seller's terms and conditions, and negotiating changes to them can be very time consuming. The risk allocations under commercial terms frequently differ from those under the FAR provisions for traditional procurements. For example, a seller's commercial terms might limit its risk by defining when acceptance occurs or by limiting remedies for nonperformance. Also under FAR Part 12, the government cannot unilaterally direct changes. The seller must first agree to both the change and the price.

### 5. Pricing of Commercial Contracts by Commercial Buyers

**Finding: Commercial buyers rely on competition for the pricing of commercial goods and services. They achieve competition by carefully defining their requirements in a manner that facilitates competitive offers and fixed-price bids. In the absence of competition,**

---

[330] *See* notes 29 – 30, *infra*, and accompanying text.

**commercial buyers rely on market research, benchmarking, and in some cases, cost-related data provided by the seller, to determine a price range.**

Discussion:

Commercial buyers rely upon well-defined requirements and head-to-head competition for pricing. They define requirements in a manner that facilitates fixed-price bids. Commercial buyers conduct extensive market research and use that information to support competition for their solicitations. In the absence of competition, (which is relatively rare), commercial buyers rely on their own market research and sometimes seek data from other vendors. Commercial buyers occasionally use vendor cost data from sellers to establish price reasonableness. However, commercial buyers generally do not request detailed cost data from commercial sellers.

There is an unequivocal mandate for competition that runs through the statutes and regulations that govern federal procurement. Despite this clear mandate, reports by the GAO and DOD IG show that the federal government continues to award a significant proportion of task orders noncompetitively. These noncompetitive actions are not limited to traditional procurements; they include commercial items and services. In contrast, commercial buyers repeatedly told the Panel that competition results in better quality good and services and lower prices. As a result, commercial buyers avoid sole source arrangements.

### 6. "Commercial Practices" Adopted by the Government

**(a) Finding: The government has implemented a number of different approaches to acquiring commercial items and services. Each approach has distinct strengths and weaknesses. The extent to which each of these approaches achieves competition, openness, and transparency varies. Competition for government contracts differs in significant respects from commercial practice, even where the government has attempted to adopt commercial approaches.**

Discussion:

Competition for government contracts for commercial items differs in significant respects from actual commercial practice, even where government has attempted to adopt commercial approaches. Reasons for this include the budget and appropriations process which largely limits availability of funds to a single fiscal year period, the government's need to accomplish mission objectives, policies and statutory requirements requiring transparency and fairness in expenditure of taxpayer funds, use of the procurement system to accomplish various government social and economic objectives, and the audit and oversight process designed to protect from fraud, waste and abuse. The Panel found that government practices vary from providing very structured acquisitions processes with carefully defined requirements and a competitive selection process on the one hand, to ill defined requirements and minimal, if any head-to-head competition on the other.

**(b) Finding: The Panel received evidence from witnesses and through reports by inspectors general and the GAO concerning improper use of task and delivery order contracts, multiple award IDIQ contracts, and other government-wide contracts, including federal supply schedule contracts, including improper use of these vehicles by some assisting entities. Nonetheless, the Panel strongly believes that when properly used these contract vehicles serve an important function and that the government derives considerable benefits from using them. Accordingly, the Panel has made specific recommendations in an effort to balance corrections to the identified problems while preserving important benefits of such contract vehicles.**

Discussion:

Evidence received by Panel through witnesses and reports identified recurring problems with multiple award IDIQ contracts, and other government-wide contracts, including federal supply schedule contracts. These problems include poorly defined requirements, lack of effective competition, the use of sole source awards without adequate justification, fiscal law violations, and the failure to manage the work once awarded. While these problems are serious and need to be addressed, they do not reflect underlying deficiencies in the contract vehicles. Rather they indicate management and contract administration failures that can be corrected. The Panel also heard testimony of corrective action taken by agencies to address these problems.

**(c) Finding: The evidence received by the Panel regarding federal supply schedule and multiple award contracts included the following:**

**(1) Solicitations for task and delivery order contracts often include an extremely broad scope of work that fails to produce meaningful competition.**

Discussion:

The Panel noted the testimony expressing concern and criticism regarding the extremely broad scope of work in the solicitations for task and delivery order contracts.[331] The Panel noted that many agencies have put in place, for example, broadly defined contracts for IT services.

The Panel noted the testimony expressing concern and criticism regarding the extremely broad scope of work in the solicitations for task and delivery order contracts.[332] For example, many agencies opt for broadly defined contracts for IT services in an effort to encourage multiple bidders and, ultimately, multiple awardees. These efforts seek to encourage flexibility and spur competition on future task orders.

---

[331] U.S. DoD IG, *DoD Use of Multiple Award Task Order Contracts,* Audit Rep. No. 99-116, 4-7 (1999); U.S. GAO, *Contract Management: Few Competing Proposals for Large DOD Information Technology Orders,* GAO/NSIAD 00-56, 12-13 (2000); Test. of Henry Kleinknecht, DOD IG, AAP Pub. Meeting (June 29, 2006) Tr. at 54-56.

[332] U.S. DoD IG, *DoD Use of Multiple Award Task Order Contracts,* Audit Rep. No. 99-116, 4-7 (1999); GAO/NSIAD 00-56; Kleinknecht Test. at 54-56.

Testimony from large private sector buyers stated that those buyers were capable of defining their requirements for information technology services and competing them head-to-head – without resort to a secondary ordering process. The Panel questions whether the large IDIQ contracts being used by the government involve sufficient rigor in the requirements process for the base contract and whether there is meaningful competition for these contracts and for task orders issued under these contracts.

**(2) Orders placed under task and delivery order contracts frequently indicate insufficient attention to requirements development.**

Discussion:

The Panel heard criticism that orders often are placed under task and delivery order contracts with insufficient attention to requirements development. Testimony before the Panel by senior agency procurement officials[333] and oversight organizations strongly indicates that these orders frequently involve insufficient requirements development.

**(3) The ordering process under task and delivery order contracts, in some instances, occurs without rigorous acquisition planning, adequate source selection, and meaningful competition.**

Discussion:

Reviews by GAO and the DoD IG over several years have repeatedly called into question the competitiveness of the ordering process under task and delivery order contracts. These reviews have found overuse of the waiver authority to direct the work to a particular contractor. A review currently underway by the DoD IG indicates that the proportion of sole-source orders is significant.[334] In addition to the concerns about the waivers, GAO found in 2004 that for orders that were available for competition, buying organizations awarded more than one-third of the orders after receiving only one offer.

Although anecdotal, the Panel is familiar with situations where a statement of work was issued with proposals due in two or three days. The Panel observes that the contract holders confronted with such solicitations readily determine that it is not worth the time and cost to submit a proposal.

Testimony before the Panel indicated concern that the Schedules may be used, in some instances, for large services procurements without adequate planning and source selection procedures.[335] Agencies placing large orders typically use a form of negotiated, best value-like

---

[333] Test. of Glenn Perry, DoE, AAP Pub. Meeting (Feb. 23, 2006), Tr. at 136,140-44, 146-51. Test. of Shay Assad, DPAP, AAP Public Meeting (June 14, 2006) Tr. at 25-28, 55-58, 96-97.
[334] U.S. DoD IG, *Acquisition – FY 2005 DoD Purchases Made Through the General Services Administration*, D-2007-007, (2006).
[335] Perry Test. at 177-78.

process, but are not required to adhere to any particular procedures for defining of requirements, evaluating proposals, or making a source selection decision.

**(4) Finding: Agencies frequently make significant purchases of complex services using task and delivery orders.**

Discussion:

Large orders under these contracts are being used for acquisition of complex services. The Panel analyzed FPDS-NG data for 2004 and determined that of the $142 billion in interagency transactions, $66.7 billion was expended in single transactions over $5 million, with services accounting for 64% or $42.6 billion. For 2005, there was $132 billion in interagency transactions with $63.7 billion expended in single transactions over $5 million, with services accounting for 66% or $42 billion. The Panel believes these numbers to be understated because the numbers reflect single transactions, not the total order value (*i.e.*, base year plus options).

**(5) Use of task and delivery order contracts by agencies for the acquisition of complex services on a best value basis has been increasing. Guidance on how to conduct best value procurements using these contract vehicles is not adequate.**

Discussion:

The Panel notes that agencies use best value type source selection procedures for larger orders, including use of evaluation factors, cost/technical trade-offs and best value decisions. As the orders grow in size and the agencies use FAR Part 15-like procedures, the Panel has reservations about whether the standards for competition are adequate.

**(6) Agency management control of orders placed using multi-agency contracts have varied in adequacy and effectiveness.**

Discussion:

Evidence received by the Panel indicates that agency management controls of orders placed using multi-agency contracts have varied widely in adequacy and effectiveness. For example, DoD IG reports in 2005 and 2006 addressing multi-agency contracts have cited poor acquisition planning, inadequate interagency agreements, lack of adequate quality assurance surveillance, and failure to clearly establish roles and responsibilities for contract administration between the contracting agency and the requiring agency.[336] The Panel also heard testimony from officials from various agencies, including GSA, of efforts to strengthen contract administration and better delineate roles and responsibilities for administration.

[336] *See* U.S. DoD IG, Acquisition – FY 2005 DoD Purchases Made Through the General Services Administration, D-2007-007, (2006) and DoD Purchases Made Through the General Services Administration, D-2005-096 (2005).

**(7) The unit price structure commonly used on Federal Supply Schedule Contracts and many Multiple Award Contracts is not a particularly useful indicator of the true price when acquiring complex professional services.**

Discussion:

The current structure of the GSA Schedules was established for acquiring commercial commodities based on unit prices. Unit prices are not a particularly useful indicator of the true price for acquisition of complex professional services such as design, development and implementation of IT systems. Obtaining best value for these acquisitions depends on the capabilities and expertise of a vendor, the mix of skills, and well-defined requirements -- not merely hourly rates.

For such transactions, the Panel found that commercial practice for acquisition of such services involves careful requirements definition, head-to-head competitive negotiations, and best value source selection procedures.

**(8) Finding: Competition based on well-defined requirements is the most effective method of establishing fair and reasonable prices for services using the Federal Supply Schedule.**

Discussion:

The Panel noted the comments from GAO and others regarding the use of pre and post-award audits of vendor commercial pricing to aid in negotiation and establishment of the prices most favorable to the government. With particular reference to services, the Panel finds that competition for services awards that is based on good quality requirements definition likely will be more effective than reliance on certifications and audits in establishing fair and reasonable prices for services on the Schedule.

### 7. Time & Materials Contracts

**Finding: Commercial buyers have a strong preference for the use of fixed-price contracts and avoid using Time and Materials contracts whenever practicable. Although difficult to quantify precisely due to limited data, the government makes extensive use of time and materials contracts.**

Discussion:

Commercial buyers who spoke with the Panel provided many sound reasons not to use time and materials ("T&M") contracts.[337] They noted that commercial clients in-source, or bring

[337] *See* Bajaj Test. at 203-06.

the work in-house, rather than use T&M contracts.[338] T&M contract structure encourages contractors to provide people to perform services while under the purchaser's direction. The purchaser becomes the project manager rather than shifting project management risks and rewards to the vendor. The T&M vendor has no incentive to be efficient, "because if they do so, they won't be able to provide more T&M bodies…."[339] This view was not unanimous with ## others suggesting that checks and balances inherent in the existing process do provide incentive for vendors to work efficiently. Such incentives include the threat of poor past performance citations and failure to receive contract options or follow-on work.[340]

Despite concerns about efficiency, commercial organizations do use T&M contracts for some specific types of work. One large company, for example, uses T&M contracts for design engineering/development work, construction, and repair work.[341] Another uses T&M contracts for unique work, such as building capital equipment that was designed internally.[342] These companies are aware of the risks associated with T&M contracting and endeavor to maintain tight controls over the contracting process, costs, and levels of effort.[343]

### 8. Statutory and Regulatory Definitions of Commercial Services

**Finding: The current regulatory treatment of commercial items and services allows goods and services not sold in substantial quantities in the commercial market place to be classified nonetheless as "commercial" and acquired using the streamlined procedures of FAR Part 12.**

Discussion:

The FAR definition of stand-alone commercial services in FAR 2.101 added the phrase "of a type" between the words "Services" and "offered" in the first line of the statutory definition of commercial services quoted below. There was no discussion of the addition of this phrase in the two proposed rules to implement the FASA definitions published in 60 Fed. Reg. 11198 (March 1, 1995) and 60 Fed. Reg. 15220 (March 22, 1995). Notwithstanding having received 559 written comments to these proposed rules, the final rule implementing the statutory provisions for the acquisition of commercial items did not mention this variance between the statutory definition and the FAR definition.

---

[338] *Id.* at 203.
[339] Bajaj Test. at 205; Test. of John P. McMonagle, GE Corporate Initiatives Group, AAP Pub. Meeting (May 18, 2006) Tr. at 171.
[340] Test. of Bruce Leinster, ITAA, AAP Pub. Meeting (Aug., 18, 2005) Tr. at 121-22.
[341] Panel communications with Casbon, Bayer, Spring 2006.
[342] Panel communications with Miller, Procter & Gamble, Spring 2006.
[343] Panel communications with Casbon and Miller, Spring 2006.

The definition of stand-alone "commercial services" in 41 U.S.C. § 403(12)(F) is:

> Services offered and sold competitively, in substantial quantities, in the commercial marketplace based on established catalog [or market] prices[344] for specific tasks performed or specific outcomes to be achieved and under standard commercial terms and conditions.

The definition of a "commercial item" in subsection (12)(A) of the same statutory section, however, refers to any item that is "of a type" customarily used by the general public (with additional requirements). The omission of the phrase "of a type" from the statutory definition of stand-alone "commercial services" is significant.

This definition for commercial services is adopted in FAR 2.101 as follows:[345]

> (6) Services ***of a type*** offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed under standard commercial terms and conditions. This does not include services that are sold based on hourly rates without an established catalog or market price for a specific service performed. For purposes of these services –
>
> (i) Catalog price means a price included in a catalog, price list, schedule, or other form that is regularly maintained by the manufacturer or vendor, is either published or otherwise available for inspection by customers, and states prices at which sales are currently, or were last, made to a significant number of buyers constituting the general public; and
>
> (ii) Market prices means current prices that are established in the course of ordinary trade between buyers and sellers free to bargain and that can be substantiated through competition or from sources independent of the offerors. (emphasis added).

---

[344] The words "or market" were added by Pub. L. No. 104-106 § 4204 (Feb. 10, 1996).

[345] FAR 2.101 also provides the following definition for commercial services directly related to a commercial item:

> (5) Installation services, maintenance services, repair services, training services, and other services if –
> (i) Such services are procured for support of an item referred to in paragraph (1), (2), (3), or (4) of this definition, regardless of whether such services are provided by the same source or at the same time as the item; and
> (ii) The source of such services provides similar services contemporaneously to the general public under terms and conditions similar to those offered to the Federal Government.

The most critical element of this definition is that a service must be "offered and sold competitively, in substantial quantities, in the commercial marketplace." When commercial services are sold in substantial quantities, commercial market forces determine both price and the nature of the services offered.

The current regulatory definitions of commercial items and services allow goods and services not sold in substantial quantities in the commercial market place to be classified nonetheless as "commercial" and acquired using the streamlined procedures of FAR Part 12. This can put the government at a significant disadvantage with respect to pricing when there is limited or no competition.

It is clear that Congress has always intended that pricing for commercial items and service be based on either competition or market prices. The conference report accompanying the National Defense Authorization Act for Fiscal Year 1996, which added "market prices" to the FASA definition of commercial item applicable to services, 41 U.S.C. 403(12)(F) (1994), states that market prices are current prices that are established in the course of ordinary trade between buyers and sellers free to bargain and that can be substantiated from sources independent of the offeror.[346]

The Panel believes that there is an appropriate balance between the use of commercial procedures under FAR Part 12 and more traditional methods of procurement. Commercial items and commercial services that meet the various statutory and regulatory definitions can and should be acquired under the streamlined procedures of FAR Part 12 whenever appropriate. It is the operation of commercial market forces that makes FAR Part 12 work. Extending the streamlined commercial procedures of FAR Part 12 to items and services that are not commercial under the statutory and regulatory definitions (with the changes recommended by the Panel), and therefore not subject to commercial market forces, disadvantages the government in pricing, limits competition, reduces transparency, and creates the opportunity for abuse. When commercial market forces do not exist, the Panel believes that the more traditional methods of procurement should be used.

### 9. Time Required for Commercial Services Contracts

**<u>Finding</u>: Commercial buyers can award a contract for complex services acquisitions in about 6 months, depending on the size of the acquisition and how much work is necessary for requirements definition. For larger contracts, if the process begins with requirements definition, the total cycle time to award may be six to twelve months. If some market research and requirements definition has been done in advance, commercial buyers stated they could get under contract in three to six months, even for larger contracts.**[347]

---

[346] H.R. Conf. Rep. No. 104-450, at 967.

[347] Bajaj Test. at 192; Test. of Neil Hassett, United Tech. Corp., AAP Pub. Meeting (Apr. 19, 2005) Tr. at 123; Test. of Michael Bridges, GM, AAP Pub. Meeting (Aug. 18, 2005) Tr. at 191.

Discussion:

The commercial buyers and consultants who testified before the Panel said that they generally required about six months to award a complex services contract. Large acquisitions, such as corporate-wide information technology contracts, could take up to a year. Factors that facilitate a prompt award included market research, well defined requirements, and direct involvement by key corporate stakeholders.

### 10. Impact of the Annual Budget and Appropriations Processes

**Finding: A fundamental difference between commercial and government acquisition is the fiscal environment in which decisions on acquisition processes are made. Commercial acquisition planning decisions can take place in a fiscal environment relatively unconstrained with respect to the availability of funds over time. In contrast, Government acquisition decisions are driven to a significant extent by the budget and appropriations process which often limits availability of funds to a single fiscal year period.**

Discussion:

Unlike commercial firms, federal agencies must plan and execute acquisition decisions within strict fiscal rules established by Congress. Most agencies' operations and programs are funded on an annual basis. Fiscal rules limit when funds can be obligated. For example, operations and maintenance funds are only available for obligation within a single fiscal year. If not obligated, these funds cannot be rolled over into the next fiscal year. Fiscal rules also limit agencies' flexibility in using funds for any purpose other than that for which the funds were specifically provided. Reprogramming of funds normally requires Congressional approval. The inherent limitations created by an annual funding process are compounded when Congress fails to make these annual appropriations on time.[348] Late appropriations disrupt acquisition planning and compress the amount of time that agencies have to award new contracts or exercise options under existing contracts.

In this environment, the ability to obligate funds before they expire or are reprogrammed is treated as one measure of success by both Congress and agencies. In contrast to commercial companies, agencies have a fundamental incentive to follow acquisition processes that allow them to obligate funding as expeditiously as possible. At times, this occurs at the expense of obtaining the best business deal. The Panel recognizes that this significant difference between and the commercial sector and the Federal government has to be taken into account in considering the application of commercial acquisition practices to federal agencies.

[348] For example, Congress only enacted 2 of 10 major appropriations acts for fiscal year 2007 before the fiscal year began forcing many agencies to operate on short term continuing resolutions.

### 11. Unequal Treatment of the Contracting Parties

**Findings: The failure to provide equal treatment for both parties to a government contract is inconsistent with commercial practices. Equal treatment should be afforded to the Government and contractors in contractual provisions unless the Constitution of the United States or special considerations of the public interest require otherwise.**

Discussion:

Although the presumption of good faith applies equally to both parties to a commercial contract in the event of a performance dispute, in performance disputes with the government, contractors do not enjoy the same legal presumptions regarding good faith of the parties. Under current legal precedent the government enjoys an enhanced presumption of good faith and regularity in such a dispute.

## Part III – Recommendations

### 1. Definition of Commercial Services

**Recommendation: The definition of stand-alone commercial services in FAR 2.101 should be amended to delete the phrase "of a type" in the first sentence of the definition. Only those services that are actually sold in substantial quantities in the commercial marketplace should be deemed "commercial." The government should acquire all other services under traditional contracting methods, *e.g.*, FAR Part 15.**

Discussion:

The Panel observed that the regulatory definition of commercial services is broader than the statute and can include services not sold in substantial quantities in the marketplace. The statute defining commercial services does not include the phrase "of a type." Based on the Panel's research and basic statutory construction, it is clear that when Congress used the phrase of a type for items, but not for services, it did not intend "of a type" to apply to services. The Panel proposes that the FAR be revised to be consistent with the statutory definition.[349] However, the regulatory coverage can be improved in two specific areas as proposed in Recommendations 1 and 6.

The Panel considered whether the statutory definitions of commercial services should be changed. After reviewing the legislative and regulatory origins of commercial services, and hearing evidence as to how the private and government sectors acquire commercial services, the Panel concluded that the current statutory definition of commercial services was adequate and does not need to be changed. The statutory definition of commercial services correctly focuses on the key concept – whether the services are sold in substantial quantities in the marketplace.

[349] *Lindh v. Murphy*, 521 U.S. 320, 326-30 (1997).

The regulatory drafters added the phrase "of a type" to the statutory definition of commercial services. Their intention in adding this phrase was to allow the acquisition of commercial services when catalog prices did not exist. The drafters used grass cutting and janitorial contracts as some examples.[350] Today, the "of a type" language allows the government to acquire under FAR Part 12 services that are not sold in substantial quantities in the market place.

The Panel received some public comments critical of this proposed change. Some even accused the Panel of "rolling back the clock" on procurement reform. These critics, apparently confused, assumed that the Panel's recommendation extended to both commercial items and commercial services. In fact, the Panel's recommendation regarding the deletion of the phrase "of a type" is limited to commercial services.

The Panel also considered whether the statutory definition of commercial items should be changed. For the reasons described above, the Panel concluded that the current statutory definition of commercial items was adequate and does not need to be changed. The "of a type" language with respect to items enables the government to acquire the next generation of commercial items when they become available. Existing market forces generally are adequate to enable the government to price new commercial items that are "of a type." The Panel did hear anecdotal evidence of items being mischaracterized as commercial items by virtue of being "of a type."[351] However, correction of these mischaracterizations does not require a legislative change.

### 2. Improving the Requirements Process

**Recommendation: Current policies mandating acquisition planning should be better enforced. Agencies must place greater emphasis on defining requirements, structuring solicitations to facilitate competition and fixed-price offers, and monitoring contract performance. Agencies should support requirements development by establishing centers of expertise in requirements analysis and development. Agencies should then ensure that no acquisition of complex services (*e.g.*, information technology or management) occurs without express advance approval of requirements by the program manager or user and the contracting officer, regardless of which type of acquisition vehicle is used.**

Discussion:

Testimony before the Panel from commercial buyers overwhelmingly emphasized the importance of requirements definition to successful competition and performance of services contracts. DoD officials also testified that "it's all about requirements."[352] The Panel's findings

[350] *See* Appendix B.
[351] The characterization of the Air Force KC-767 tanker and C-130J tactical transport aircraft as commercial items are two recent examples. U.S. DoD IG, *Acquisition of the Boeing KC-767A Tanker Aircraft*, D-2004-064 (2004); *Contracting for and Performance of the C-130J Aircraft*, D-2004-102 (2004); *Contracting and Funding for the C-130J Aircraft Program*, D-2006-093 (2006).
[352] Assad Test. AAP Pub. Meeting (June 14, 2006) at 67.

demonstrate that the government's requirements process for services acquisition is deficient in several respects.

This recommendation is intended to put "teeth" into the process of requirements definition for services contracts. Without review and sign off from the senior program executive and the CO, no acquisition may be conducted. This approach is consistent with commercial practice that requires "buy-in" by those portions of the company with an interest in the transaction. The sign-off may occur at the time of the initial business clearance memorandum, or an equivalent point – but must be accomplished without regard to the type of procurement process or vehicle used.

### 3. Improving Competition

**(a) Recommendation: The requirements of Section 803 of the FY 2002 Defense Authorization Act regarding orders for services over $100,000 placed against multiple award contracts, including Federal Supply Service schedules, should apply uniformly government-wide to all orders valued over the Simplified Acquisition Threshold. Further, the requirements of Section 803 should apply to all orders, not just orders for services.**

Discussion:

Section 803 of the National Defense Authorization Act for 2002 (P.L. 107-107) changed the process for orders for services over $100,000 placed against multiple award contracts, including Federal Supply Schedules. Defense Federal Acquisition Regulation Supplement (DFARS) implements Section 803 and requires the contracting officer to contact as many as schedule holders that are capable of performing the work as practicable and ensure that at least three responses are received, or, alternatively, contact all the schedule holders. If the order is placed against multiple award contracts that are not part of the Federal supply schedules program, the contracting officer must contact all awardees that are capable of performing the work and provide them an opportunity to submit a proposal that must be fairly considered for award. Program managers and other requiring offices must assist in determining which contractors are capable of performing the desired work.[353]

Under the Federal Supply Schedule program, the requirements of Section 803 apply to orders placed directly by DoD and orders placed by non-DoD activities on behalf of DoD. In contrast, civilian agencies must place orders in accordance with Federal Acquisition Regulation (FAR) Subpart 8.4. Civilian agencies must comply with FAR 16.5 when placing orders against multiple award contracts authorized by FASA.

The Panel believes that there is no logical basis for having two sets of "fair opportunity" regimes – one subject to Section 803 and one not, especially given that DoD orders account for approximately 55 to 60 percent of all orders under the Schedules as well a majority of the orders

[353] DFARS 208.405-70 and 216.505-70.

under multiple award multi-agency contracts. Further the Panel believes there is no logical basis for limiting the requirements of Section 803 to services. It should apply to all orders.

The proposed change would generally provide that for schedule orders over the simplified acquisition threshold the ordering agency must either provide notice to all schedule holders capable of meeting the requirement (via e-Buy or other electronic medium) or as many as practicable to reasonably ensure receipt of at least three offers. In the case where agency provides notice under the second scenario, if less than three offers are received, the contracting officer would be required to document the file outlining the efforts to obtain competition before an award could be made. For multiple award contracts authorized by the Federal Acquisition Streamlining Act of 1994 (FASA), notice and a fair opportunity to submit an offer for all contract holders would be required for all orders over the simplified acquisition threshold.

**(b) Recommendation: Competitive procedures should be strengthened in policy, procedures, training, and application. For services orders over $5 million requiring a statement of work under any multiple award contract, in addition to "fair opportunity," the following competition requirements as a minimum should be used: (1) a clear statement of the agency's requirements; (2) a reasonable response period; (3) disclosure of the significant factors and subfactors that the agency expects to consider in evaluating proposals, including cost or price, and their relative importance; (4) where award is made on a best value basis, a written statement documenting the basis for award and the trade-off of quality versus cost or price. The requirements of FAR 15.3 shall not apply. There is no requirement to synopsize the requirement or solicit or accept proposals from vendors other than those holding contracts.**

Discussion:

Where acquisitions under multiple award contracts become significant procurement actions in their own right, essential attributes of source selection requirements should be applied at the order level. A substantial volume of orders exceeds $5 million and includes orders for services where the Agency uses best value type source selection. This approach facilitates head-to-head competition, but with a pre-qualified group of vendors. The Panel notes that it is not recommending use of all of the procedures in FAR 15.3, nor is it suggesting that a synopsis of the requirement be provided to all responsible sources. The exceptions to "fair opportunity" would be available consistent with the current DoD implementation of those exceptions which requires advance approval of a waiver. The Panel understands that the current regulations provide guidance on the structuring of best value acquisitions in the context of orders under multiple award contracts. However, the Panel believes that a clear unambiguous statement addressing the specific standards to be applied should be included in the revised regulations implementing Section 803 across the government.

The Panel believes that these recommendations are not inconsistent with the Small Business recommendations regarding award of contracts and task or delivery orders.

**(c) Recommendation: Regulatory guidance should be provided in FAR to assist in establishing the weights to be given to different types of evaluation factors, including a minimum weight to be given to cost/price, in the acquisition of varous types of products or services.**

### 4. New Competitive Services Schedule

**Recommendation: GSA be authorized to establish a new information technology Schedule for professional services under which prices for each order are established by competition and not based on posted rates.**

Discussion:

The Panel recommends that GSA be authorized to establish a new information technology (IT) Schedule for professional services under which negotiation of the Schedule contracts is limited to terms and conditions other than price.[354] Under this new Schedule, prices would be determined at the order level based on competition for the specific requirement to be performed. As discussed in the Findings above, the Panel believes that the pricing for services is requirement specific. The price for services depends, to a greater degree, on the level of effort and mix of skills necessary to meet the government's needs for an individual requirement (order). Rates play a role but are more often determined based on the specifics of the individual requirement and current market conditions.

The Panel envisions the proposed schedule working in the following manner. Negotiation of hourly rates based on Most Favored Customer pricing would be eliminated at the Schedule contract level. The Price Reductions Clause also would be eliminated. Offerors under the new IT Schedule would be required to meet the following terms: (1) offer a commercial service that meets the definition described above (sold in substantial quantities); (2) have a suitable record of past performance; (3) agree to specific GSA terms and conditions for purchase of commercial items. The IT Schedule contractors also would be contractually required to post labor rates on GSA Advantage!. The labor rates posted on GSA Advantage! would be established solely at each contractor's discretion and could be changed by the contractor at any time. However, proposed prices in response to a task order request would be binding on the contractor.

Contracting officers would use the posted labor rates, along with key terms and conditions, for market research and comparison purposes when reviewing potential competitors at the order level. The Panel believes that the posting of rates at each contractor's discretion will create a more dynamic market for services. The inherent competition created by the transparency of the "electronic marketplace" will benefit buyers who will be able better compare and contrast the associated labor rates and services offered under this new IT schedule.

---

[354] *See* Appendix C.

Contracting officers seeking to place a task order against this new schedule would be required to conduct a task order competition consistent with the Section 803 ordering procedures. See Panel Recommendation 3 above. Contracting officers could only use this schedule if a firm requirement exists that has been converted to a Statement of Work or Statement of Objectives. To the maximum extent practicable, the requirement should be firm fixed price. If a labor hour task order is contemplated, the agency must ensure it has the infrastructure in place to manage the effort. See Panel Recommendation 6 below. Contracting officers will be strongly encouraged to use "e-Buy," GSA's electronic request for quote (RFQ) tool linked to GSAAdvantage!. "e-Buy" currently provides notice and an opportunity to compete to all applicable Schedule contractors for RFQs posted at the site. Ordering activities will remain to be responsible for determining the reasonableness of the total price or prices proposed in response to an RFQ's Statement of Work. The Federal Acquisition Regulation currently provides that for "services requiring a statement of work," the ordering agency contracting officer determines the reasonableness of the price for the specific requirement by examining the level of effort and the labor mix. See FAR 8.405-2(d).

Audits under this schedule would more closely mirror commercial practice. Once the task order competition has taken place, audits may be performed on a contractor's performance. However, since task order awards under this schedule will be based on competition, an examination of the individual rates or their corresponding "cost build up" would not be authorized. Audits would be limited to examining whether a contractor performed a task consistent with the contract and/or task order terms and conditions. Audits based on cost data or pricing practices, including post-award audits of pre-award price information and Price Reductions Clause compliance would be eliminated. While prices established by competition will require less audit attention, GSA's current regulations, amended to adopt this recommendation, would provide sufficient basis for review of prices to ensure that the price proposed is consistent with the price paid.

Testimony before the Panel revealed that it is commercial practice to audit performance of a contract or task.[355] The private sector will audit whether a contract has been performed in accordance with applicable terms and conditions. In essence, a typical commercial audit includes whether the buyer get what he or she paid for under the contract. Generally, when competition exists, commercial audits do not examine cost data or cost build ups associated with performance of a requirement.[356] In contrast, it is current GSA schedule policy that, at the time of contract formation, GSA requires the submission and potential audit of sensitive information regarding a commercial firm's pricing practices and policies. See GSAR 52.215-20. GSA uses this data to identify the "Most Favored Customer" pricing negotiation objective. GSA also uses the data to identify a class of customer for Price Reductions Clause application during performance of the contract. Testimony before the Panel revealed that, in the case of professional services, it is commercial practice to price based on the specific task to be

[355] MacMonagle Test. (May 18, 2006) at 164-165; Bajaj Test. (Mar. 17, 2006) at 153.
[356] Bajaj Test. at 189-191.

performed.[357] The use of Most Favored Customer and Price Reductions Clause mechanisms are not conducive to commercial practices for pricing services. Accordingly, the use of the Price Reductions clause today for professional IT labor rates produces little benefit – the facts driving the cost of the project are the proficiency of the personnel and the mix of skills. This is particularly relevant if the requirement is large and complex such as in IT services procurement.

Currently, GSA and the contractors focus a great deal of time and energy on the negotiation of rates and audits of those rates. GSA has invested millions of dollars building an extensive infrastructure focused on the negotiation and audit of labor rates under the Schedules program. Schedule contracting officers spend a significant portion of their work life negotiating pricing for professional service contracts that more often than not is not relevant to the actual performance of a complex professional service order requiring a statement of work.[358] GSA has also built structures to monitor and audit contractor performance with an emphasis on compliance with the Price Reductions Clause. Similarly, contractors invest major resources in submitting, negotiating and creating compliance programs for schedule contracts including compliance with the Price Reductions Clause. By eliminating the MFC price negotiation model at the contract level as well as the Price Reductions Clause and focusing on competition at the order level, both industry and GSA can save money, improve efficiency and provide greater opportunity under the Schedules program. Under the proposed model, GSA would be able to focus more on negotiating key terms and conditions relating to services, establishing a more uniform description of the services being offered, as well as continuing to improve its e-tools for stronger task order competition. This approach could provide a more efficient and effective program for delivering services to the federal government.

From the contractor's perspective, providing pricing information at time of basic Schedule contract offer also has significant implications for continued compliance with the Price Reductions and audit clauses. Under GSAR 515.215-71, Examination of Records by GSA (Multiple Award Schedule), GSA maintains the right to examine contractor records up to three years after final payment relating to overbillings, price reductions, and compliance with the Industrial Funding Fee (IFF). Although GSA has modified its audit procedures in 1997 and redefined the limited circumstances to use of the Examination of Records clause for MAS contracts, the contractor community has continually expressed concerns related to what may essentially lead to defective pricing audit. Even a slight possibility for such post-award defective pricing audit is a real risk to the Schedule holders and may drive business practices that are counter productive to both industry and to the Government. Such non-standard business practices are not consistent with commercial practices and end up driving up the cost of doing business with the Government. Additionally, the Panel's review found that the commercial service industry does not necessarily have a pre-defined set of standard labor categories as required by the Schedules program, and that commercial firms sometimes modify or create

[357] Bridges Test. (Aug. 18, 2005) at 136; MacMonagle Test. at 141; Leinster Test. (Jan. 31, 2006) at 139; Bajaj Test. at 154.
[358] Watson Test. (Aug. 18, 2005) at 25-28.

separate government business divisions with corresponding price lists for services in order to meet that schedule requirements including MFC pricing.[359]

In adopting this recommendation the Panel was also concerned that the current schedule structure for professional IT services remains static at a time of increased dynamism in the commercial sector. Currently, the IT schedule program includes over 4,000 contractors offering professional IT services. [360] This number represents a dynamic market cutting across all types and sizes of commercial firms. In addition, each year the IT schedule receives over 1,200 offers.[361] Under the IT Schedule, approximately 64 percent or $10.8 billion out of $17.0 billion FY 2006 sales was for services.[362] However, the basic pricing strategy for negotiating and awarding schedule contracts is built on a framework established at a time when supplies accounted for the vast majority of purchases under the schedules program. Over time, the framework has evolved to accommodate the addition of professional IT services to the schedules program but the accommodation reflects trying to put a square peg in a round hole. Accordingly, the Panel's recommendation will foster a more dynamic model, improve efficiency and reduce costs for government and industry, and foster greater competition and transparency.

### 5. Improving Transparency and Openness

**(a) Recommendation: Adopt the following synopsis requirement.**

**Amend the FAR to establish a requirement to publish, for information purposes only, at FedBizOpps notice of all sole source orders (task or delivery) in excess of the simplified acquisition threshold placed against multiple award contracts.[363]**

**Amend the FAR to establish a requirement to publish, for information purposes only, at FedBizOpps notice of all sole source orders (task or delivery) in excess of the Simplified Acquisition Threshold placed against multiple award Blanket Purchase Agreements.**

**Such notices shall be made within ten business days after award.**

Discussion:

Transparency into government requirements by the public serves two important purposes. First, it promotes competition by familiarizing the public with what the government buys and the opportunity for vendors of similar products and services to sell to the government thus providing for new entrants into the government market place and greater competition. Second, transparency promotes public confidence in the awarding of government contracts.

---

[359] *Id.* at 26-27, 78; Leinster Test. at 102; Trowel Test. (Jan. 31, 2006) at 113.
[360] GSA Data at __.
[361] GSA Data, IT Acquisition Center (FCI).
[362] GSA Data, *Contractors Report of Sales - Sales by Service/Commodity Code for FY 2006*, (Oct. 16, 2006).
[363] Multiple award contracts has the same meaning here as in Section 803 of the National Defense Authorization Act for 2002, Pub. L. No. 107-107).

The degree of transparency provided in today's contracting system notwithstanding, the growth of indefinite delivery indefinite quantity (IDIQ) contracts since FASA and the growth of the Multiple Award Schedules (MAS) program over the last decade, have reduced the visibility that the public has into more than 10 percent of the non-defense system procurements made annually and that percentage continues to grow. FPDS-NG data for 2004 indicates that $142 billion, or 40% of all government-wide obligations were against multi-agency contracts including multiple award IDIQ and MAS contracts. Currently once an IDIQ or a MAS contract is awarded there is no provision for publishing information, pre-award, of the task or delivery orders placed against that contract. The first time the public learns about these awards is when the data on the award is published in the FPDS database, often many months after the award was made. This lack of transparency into the placement of orders has led some, according to the testimony received by the Panel, to question whether the government complied with its own procedures, whether competition was obtained in placing the order and whether the taxpayer received best value.

The Panel believes that sole source orders under these vehicles should not be subject to a lesser standard of transparency. The synopsis proposed here would be post-award only, providing the positive pressure that transparency offers and bolstering public confidence, while not delaying the award or imposing any further restrictions, on urgent requirements for instance, than the current fair opportunity regime.

**(b) Recommendation: For any order under a multiple award contract over $5 million where a statement of work and evaluation criteria were used in making the selection, the agency whose requirement is being filled should provide the opportunity for a post-award debriefing consistent with the requirements of FAR 15.506.**

Discussion:

Where agencies are making acquisitions of goods or services under a negotiated process involving a statement of work and evaluation criteria, the Panel sees no basis for not providing a debriefing to the unsuccessful offeror(s), regardless of the contract type involved. Companies expend significant bid and proposal costs in response to order solicitations, just as they do in response to other solicitations. The Panel believes that debriefings are a good business practice. It is important that the government share its rationale regarding a task order award with losing offerors in order to create a climate of continuous improvement. Offerors need to understand where they can improve their approaches to meeting the government's needs. While FAR Part 8 encourages debriefings for Schedule orders, it does not require them. There is no requirement for debriefings for orders under multiple award contracts. The Panel believes providing debriefings will increase confidence in the integrity of the procurement process.

### 6. Time-and-Materials Contracts

**Recommendations: The Panel makes the following recommendations with respect to time & materials contracts.**

**(a) Current policies limiting the use of time-and-materials contracts and providing for the competitive awards of such contracts should be enforced.**

**(b) Whenever practicable, procedures should be established to convert work currently being done on a time-and-materials basis to a performance-based effort.**

**(c) The government should not award a time-and-materials contract unless the overall scope of the effort, including the objectives, has been sufficiently described to allow efficient use of the time-and-materials resources and to provide for effective government oversight of the effort.**

Discussion:

The issues that give rise to concern by the Panel over the use of time & materials contracts in the government are price and contract management. The Panel has carefully considered how best to deal with these issues so as to protect the government's interests and allow the government to continue to perform its mission uninterrupted. Clearly, an arbitrary limitation on the use of T&M contracts is not appropriate nor is a solution that shifts all of the risk to the private sector.

However, it is not unreasonable to require the government when it chooses to use T&M contracts, to obtain price competition by defining its requirements and requiring the competitors for the work to define their labor categories so that adequate price comparisons can be performed. Similarly, it is not unreasonable for the government to ensure up-front in its acquisition planning process, that it has sufficient resources to manage T&M contracts and that those resources are identified as already required by FAR Part 7 or that T&M contracts not be used.

Finally, in order to get a firm grasp on how much T&M contracting is being done throughout the government and to ensure that it is being managed aggressively, the government should account for its use of T&M contracts through the budget execution process, reporting annually at the conclusion of the fiscal year the dollars and personnel purchased through the use of T&M contracts.

### 7. Protest of Task & Delivery Orders

**Recommendation: Permit protests of task and delivery orders over $5 million under multiple award contracts. The current statutory limitation on protests of task and delivery orders under multiple award contracts should be limited to acquisitions in which the total value of the anticipated award is less than or equal to $5 million.**

Discussion:

The Panel has serious concerns about the use of task order to conduct major acquisitions of complex services without review. The Panel has obtained and analyzed data from FPDS-NG

that show that nearly half of the dollars spent under interagency contracts are expended on single transactions valued over $5 million. Agencies are using competitive negotiation techniques to make best value type selections under these multi-agency, multiple award contracts. The panel believes that these procurements are of sufficient significance that they should be subject to greater transparency and review.

### 8. Pricing When No or Limited Competition Exists

**Recommendation: For commercial items, provide for a more commercial-like approach to determine price reasonableness when no or limited competition exists. Revise the current FAR provisions that permit the government to require "other than cost or pricing data" to conform to commercial practices by emphasizing that price reasonableness should be determined by competition, market research, and analysis of prices for similar commercial sales. Move the provisions for determining price reasonableness for commercial items to FAR Part 12 and de-link it from FAR Part 15.**

**Establish in FAR Part 12 a clear preference for market-based price analysis but, where the contracting officer cannot make a determination on that basis (e.g., when no offers are solicited, or the items or services are not sold in substantial quantities in the commercial marketplace), allow the contracting officer to request additional limited information in the following order: (i) prices paid for the same or similar commercial items by government and commercial customers during a relevant period; or, if necessary (ii) available information regarding price or limited cost related information to support the price offered such as wages, subcontracts or material costs. The contracting officer shall not require detailed cost breakdowns or profit, and shall rely on price analysis. The contracting officer may not require certification of this information, nor may it be the subject of a post-award audit.**

Discussion:

Competition, market research, and comparisons to prior prices that have been determined to be reasonable typically should enable the contracting officer to determine that an offered price for a commercial item is fair and reasonable without further information from the offeror. However, if the contracting officer is unable to make such a determination on that basis (*e.g.*, no offers are solicited, or the items or services are not sold in substantial quantities in the commercial marketplace), the contracting officer should be able to request the following information: (i) Prices paid for the same or similar commercial items or services by its commercial and government customers under comparable terms and conditions for a relevant time period, and (ii) available information regarding price or cost that may support the price offered, such as wages, subcontracts, or material costs.

In requesting this information, the contracting officer should limit the scope of the request to information that is in the form regularly maintained by the offeror as part of its commercial operations. The contracting officer should not require the offeror to provide information regarding all cost elements, detailed cost breakdowns, or profit, but instead shall rely

on price analysis. The contracting officer should not request that this information be certified as accurate, complete, or current, nor shall such information be the subject of any postaward audit or price redetermination with regard to price reasonableness. This information would be exempt from release under the Freedom of Information Act (5 U.S.C. 552(b)).

See proposed regulatory changes in Appendix D.

### 9. Improving Government Market Research

**Recommendation: GSA should establish a market research capability to monitor services acquisitions by government and commercial buyers, collect publicly available information, and maintain a database of information regarding transactions. This information should be available across the government to assist with acquisitions.**

Discussion:

This internal government group should collect data regarding significant services buys regardless of whether they are made in the private sector or by government and regardless of whether they are made through Part 15, the Schedules or task/delivery order contracts. The data should include size of transaction, whether it is competitive, the type of competition, the scope and elements of work, the type of contract (*e.g.*, fixed price, T&M or cost-based) the price or prices paid, the period of performance, the terms, and other data that affects the value of the transaction. This group will make its expertise and data available to other civilian and military agencies to assist in analysis and design of services acquisitions, and to provide current market data for comparison of price and terms.

### 10. Unequal Treatment of the Contracting Parties

**(a) Recommendation: Legislation should be enacted providing that contractors and the Government shall enjoy the same legal presumptions, regarding good faith and regularity, in discharging their duties and in exercising their rights in connection with the performance of any government procurement contract, and either party's attempt to rebut any such presumption that applies to the other party's conduct shall be subject to a uniform evidentiary standard that applies equally to both parties.**

Discussion:

When the government acts in a sovereign or regulatory capacity, either under its Constitutional authority or pursuant to an Act of Congress, the courts have held that those actions are entitled to a strong presumption of regularity when they are challenged in court.[364] Indeed, this approach is specified in the statutory provisions that Congress has enacted authorizing

[364] *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415, 416 (1971)

judicial review of government action in most contexts,[365] and it is meant as a safeguard against what we today might call inappropriate "judicial activism."[366] On the other hand, when the Government enters into contractual relations, it is frequently engaged in the kinds of actions that might be taken by any party to a contract. In the latter situation, we do not believe there is any sufficient policy or legal justification for extending to the Government an extraordinary presumption of good faith or of regularity that is well-high impossible to overcome. Yet some judicial decisions have done just that. Our recommendation would not mean that the rights of the Government and of the contractor under government contracts are identical in all respects, however. Congress and its authorized delegates have concluded that public policy requires the inclusion in most government contracts of provisions giving the Government certain special prerogatives deemed necessary for the protection of the public interest. Nonetheless, to the extent permitted by the terms of the government contract, we see no reason not to make any presumptions of regularity and good faith even-handed in their application to the government and the contractor.

This recommendation would not place the burden on government contract officials of showing that they have acted in good faith. Nor would it make the good faith of either party an issue to be litigated in every case. Rather, our recommendation simply requires that any presumption of good faith and regularity be applied equally to the Government and to contractors in disputes arising from the performance of a government contract. Thus, where good faith is relevant to any issue in a government contract dispute, the party claiming that the other failed to act in good faith would bear the ordinary civil litigation burden of proof by a preponderance of the evidence and would also bear the burden of going forward with evidence to prove the allegation of failure to act in good faith.

**(b) Recommendation: In enacting new statutory and regulatory provisions, the same rules for contract interpretation, performance, and liabilities should be applied equally to contractors and the Government unless otherwise required by the United States Constitution or the public interest.**

Discussion:

The parties to any contract should expect and receive fair dealing from others. It is sometimes said that, in order for there to be fair dealing, "the door must swing both ways." In order for this to occur, the same rules must apply to both the Government and contractors unless there is a compelling public interest requiring a different rule. This principle should be applied in enacting new statutory and regulatory provisions.

---

[365] Administrative Procedure Act, 5 U.S.C. §706(2)(A)(arbitrary and capricious standard of review).
[366] *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971) ("The court is not empowered to substitute its judgment for that of the agency.")

Appendix A

Statutory Evolution of "Commercial Item"

This appendix traces the statutory and regulatory evolution of the term "Commercial Item" beginning with the Federal Acquisition Streamlining Act of 1994. Successive changes to the FAR are marked and highlighted.

### 1. Federal Acquisition Streamlining Act of 1994[1]

*The term 'commercial item' means any of the following:*

*(A) Any item, other than real property, that is of a type customarily used by the general public or by nongovernmental entities for purposes other than governmental purposes, and that—*

*(i) has been sold, leased, or licensed to the general public; or*

*(ii) has been offered for sale, lease, or license to the general public.*

*(B) Any item that evolved from an item described in subparagraph (A) through advances in technology or performance and that is not yet available in the commercial marketplace, but will be available in the commercial marketplace in time to satisfy the delivery requirements under a Federal Government solicitation.*

*(C) Any item that, but for—*

*(i) modifications of a type customarily available in the commercial marketplace, or*

*(ii) minor modifications made to meet Federal Government requirements, would satisfy the criteria in subparagraph (A) or (B).*

*(D) Any combination of items meeting the requirements of subparagraph (A), (B), (C), or (E) that are of a type customarily combined and sold in combination to the general public.*

*(E) Installation services, maintenance services, repair services, training services, and other services if such services are procured for support of an item referred to in subparagraph (A), (B), (C), or (D) and if the source of such services—*

*(i) offers such services to the general public and the Federal Government contemporaneously and under similar terms and conditions; and*

*(ii) offers to use the same work force for providing the Federal Government with such services as the source uses for providing such services to the general public.*

*(F) Services offered and sold competitively, in substantial quantities, in the commercial marketplace based on established catalog prices for specific tasks performed and under standard commercial terms and conditions.*

*(G) Any item, combination of items, or service referred to in subparagraphs (A) through (F) notwithstanding the fact that the item, combination of items, or service is transferred between or among separate divisions, subsidiaries, or affiliates of a contractor.*

---

[1] Pub. L. No. 103-355, § 8001(a) (Oct. 13, 1994).

*(H) A nondevelopmental item, if the procuring agency determines, in accordance with conditions set forth in the Federal Acquisition Regulation, that the item was developed exclusively at private expense and has been sold in substantial quantities, on a competitive basis, to multiple State and local governments.*

**2. The Clinger-Cohen Act of 1996**[2]

*The term 'commercial item' means any of the following:*

*(A) Any item, other than real property, that is of a type customarily used by the general public or by nongovernmental entities for purposes other than governmental purposes, and that—*

*(i) has been sold, leased, or licensed to the general public; or*

*(ii) has been offered for sale, lease, or license to the general public.*

*(B) Any item that evolved from an item described in subparagraph (A) through advances in technology or performance and that is not yet available in the commercial marketplace, but will be available in the commercial marketplace in time to satisfy the delivery requirements under a Federal Government solicitation.*

*(C) Any item that, but for—*

*(i) modifications of a type customarily available in the commercial marketplace, or*

*(ii) minor modifications made to meet Federal Government requirements, would satisfy the criteria in subparagraph (A) or (B).*

*(D) Any combination of items meeting the requirements of subparagraph (A), (B), (C), or (E) that are of a type customarily combined and sold in combination to the general public.*

*(E) Installation services, maintenance services, repair services, training services, and other services if such services are procured for support of an item referred to in subparagraph (A), (B), (C), or (D) and if the source of such services—*

*(i) offers such services to the general public and the Federal Government contemporaneously and under similar terms and conditions; and*

*(ii) offers to use the same work force for providing the Federal Government with such services as the source uses for providing such services to the general public.*

*(F) Services offered and sold competitively, in substantial quantities, in the commercial marketplace based on established catalog or market prices for specific tasks performed and under standard commercial terms and conditions."*[3]

*(G) Any item, combination of items, or service referred to in subparagraphs (A) through (F) notwithstanding the fact that the item, combination of items, or service is transferred between or among separate divisions, subsidiaries, or affiliates of a contractor.*

---

[2] Pub. L. No. 103-355, § 8001(a) (Oct. 13, 1994), as modified by Pub. L. No. 104-106 § 4204 (Feb. 10, 1996).

[3] Pub. L. No. 104-106, § 4204 (Feb. 10, 1996). Note that this language was already present in the FAR definition of "commercial item." *See also* 60 Fed. Reg. 48231 (Sept. 18, 1995).

*(H) A nondevelopmental item, if the procuring agency determines, in accordance with conditions set forth in the Federal Acquisition Regulation, that the item was developed exclusively at private expense and has been sold in substantial quantities, on a competitive basis, to multiple State and local governments.*

**3. The National Defense Authorization Act for Fiscal Year 2000**[4]

*The term 'commercial item' means any of the following:*

*(A) Any item, other than real property, that is of a type customarily used by the general public or by nongovernmental entities for purposes other than governmental purposes, and that—*

*(i) has been sold, leased, or licensed to the general public; or*

*(ii) has been offered for sale, lease, or license to the general public.*

*(B) Any item that evolved from an item described in subparagraph (A) through advances in technology or performance and that is not yet available in the commercial marketplace, but will be available in the commercial marketplace in time to satisfy the delivery requirements under a Federal Government solicitation.*

*(C) Any item that, but for—*

*(i) modifications of a type customarily available in the commercial marketplace, or*

*(ii) minor modifications made to meet Federal Government requirements, would satisfy the criteria in subparagraph (A) or (B).*

*(D) Any combination of items meeting the requirements of subparagraph (A), (B), (C), or (E) that are of a type customarily combined and sold in combination to the general public.*

*(E) Installation services, maintenance services, repair services, training services, and other services if ~~such services are procured for support of an item referred to in subparagraph (A), (B), (C), or (D) and if the source of such services~~—*

*(i) ~~offers such services to the general public and the Federal Government contemporaneously and under similar terms and conditions~~ the services are procured for support of an item referred to in subparagraph (A), (B), (C), or (D), regardless of whether such services are provided by the same source or at the same time as the item; and*

*(ii) ~~offers to use the same work force for providing the Federal Government with such services as the source uses for providing such services to the general public~~ the source of the services provides similar services contemporaneously to the general public under terms and conditions similar to those offered to the Federal Government.*

*(F) Services offered and sold competitively, in substantial quantities, in the commercial marketplace based on established catalog or market prices for specific tasks performed and under standard commercial terms and conditions."*

---

[4] Pub. L. No. 103-355, § 8001(a) (Oct. 13, 1994), as modified by Pub. L. No. 104-106 § 4204 (Feb. 10, 1996) and Pub. L. No. 106-65 §805 (Oct. 5, 1999).

*(G) Any item, combination of items, or service referred to in subparagraphs (A) through (F) notwithstanding the fact that the item, combination of items, or service is transferred between or among separate divisions, subsidiaries, or affiliates of a contractor.*

*(H) A nondevelopmental item, if the procuring agency determines, in accordance with conditions set forth in the Federal Acquisition Regulation, that the item was developed exclusively at private expense and has been sold in substantial quantities, on a competitive basis, to multiple State and local governments.*

**4. The Services Acquisition Reform Act of 2003**[5]

*The term 'commercial item' means any of the following:*

*(A) Any item, other than real property, that is of a type customarily used by the general public or by nongovernmental entities for purposes other than governmental purposes, and that—*

*(i) has been sold, leased, or licensed to the general public; or*

*(ii) has been offered for sale, lease, or license to the general public.*

*(B) Any item that evolved from an item described in subparagraph (A) through advances in technology or performance and that is not yet available in the commercial marketplace, but will be available in the commercial marketplace in time to satisfy the delivery requirements under a Federal Government solicitation.*

*(C) Any item that, but for—*

*(i) modifications of a type customarily available in the commercial marketplace, or*

*(ii) minor modifications made to meet Federal Government requirements, would satisfy the criteria in subparagraph (A) or (B).*

*(D) Any combination of items meeting the requirements of subparagraph (A), (B), (C), or (E) that are of a type customarily combined and sold in combination to the general public.*

*(E) Installation services, maintenance services, repair services, training services, and other services if ~~such services are procured for support of an item referred to in subparagraph (A), (B), (C), or (D) and if the source of such services~~*

*(i) ~~offers such services to the general public and the Federal Government contemporaneously and under similar terms and conditions~~ the services are procured for support of an item referred to in subparagraph (A), (B), (C), or (D), regardless of whether such services are provided by the same source or at the same time as the item; and*

*(ii) ~~offers to use the same work force for providing the Federal Government with such services as the source uses for providing such services to the general public~~ the source of the services provides similar services contemporaneously to the general public under terms and conditions similar to those offered to the Federal Government.*

[5] Pub. L. No. 103-355, § 8001(a) (Oct. 13, 1994), as modified by Pub. L. No. 104-106 § 4204 (Feb. 10, 1996), Pub. L. No. 106-65 §805 (Oct. 5, 1999), and Pub. L. No. 108-136, §1433 (Nov. 24, 2003).

*(F) Services offered and sold competitively, in substantial quantities, in the commercial marketplace based on established catalog or market prices for specific tasks performed or specific outcomes to be achieved and under standard commercial terms and conditions.*

*(G) Any item, combination of items, or service referred to in subparagraphs (A) through (F) notwithstanding the fact that the item, combination of items, or service is transferred between or among separate divisions, subsidiaries, or affiliates of a contractor.*

*(H) A nondevelopmental item, if the procuring agency determines, in accordance with conditions set forth in the Federal Acquisition Regulation, that the item was developed exclusively at private expense and has been sold in substantial quantities, on a competitive basis, to multiple State and local governments.*

**5. Current FAR Definition of "Commercial Item" (as distinguished from the current statutory definition)**

*"Commercial item" means—*

*(1) Any 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, and—*

*(i) Has been sold, leased, or licensed to the general public; or,*

*(ii) Has been offered for sale, lease, or license to the general public;*

*(2) Any item that evolved from an item described in paragraph (1) of this definition through advances in technology or performance and that is not yet available in the commercial marketplace, but will be available in the commercial marketplace in time to satisfy the delivery requirements under a Government solicitation;*

*(3) Any item that would satisfy a criterion expressed in paragraphs (1) or (2) of this definition, but for --*

*(i) Modifications of a type customarily available in the commercial marketplace; or*

*(ii) Minor modifications of a type not customarily available in the commercial marketplace made to meet Federal Government requirements. Minor modifications means modifications that do not significantly alter the nongovernmental function or essential physical characteristics of an item or component, or change the purpose of a process. Factors to be considered in determining whether a modification is minor include the value and size of the modification and the comparative value and size of the final product. Dollar values and percentages may be used as guideposts, but are not conclusive evidence that a modification is minor;*

*(4) Any combination of items meeting the requirements of paragraphs (1), (2), (3), or (5) of this definition that are of a type customarily combined and sold in combination to the general public;*

*(5) Installation services, maintenance services, repair services, training services, and other services if--*

*(i) Such services are procured for support of an item referred to in paragraph (1), (2), (3), or (4) of this definition, regardless of whether such services are provided by the same source or at the same time as the item; and*

*(ii) The source of such services provides similar services contemporaneously to the general public under terms and conditions similar to those offered to the Federal Government;*

*(6) Services* ***of a type*** *offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed or specific outcomes to be achieved and under standard commercial terms and conditions. This does not include services that are sold based on hourly rates without an established catalog or market price for a specific service performed or a specific outcome to be achieved. For purposes of these services—*

*(i) "Catalog price" means a price included in a catalog, price list, schedule, or other form that is regularly maintained by the manufacturer or vendor, is either published or otherwise available for inspection by customers, and states prices at which sales are currently, or were last, made to a significant number of buyers constituting the general public; and*

*(ii) "Market prices" means current prices that are established in the course of ordinary trade between buyers and sellers free to bargain and that can be substantiated through competition or from sources independent of the offerors.*

*(7) Any item, combination of items, or service referred to in paragraphs (1) through (6) of this definition, notwithstanding the fact that the item, combination of items, or service is transferred between or among separate divisions, subsidiaries, or affiliates of a contractor; or*

*(8) A nondevelopmental item, if the procuring agency determines the item was developed exclusively at private expense and sold in substantial quantities, on a competitive basis, to multiple State and local governments.*[6]

[6] FAR 2.101

APPENDIX B

DEPARTMENT OF THE AIR FORCE
WASHINGTON DC

OFFICE OF THE ASSISTANT SECRETARY

16 November 1994

94-790

MEMORANDUM FOR PROJECT MANAGER, FEDERAL ACQUISITION STREAMLINING ACT IMPLEMENTATION PROJECT

FROM: Commercial Items Drafting Team

SUBJECT: Federal Acquisition Regulation (FAR) Case 94-790, Acquisition of Commercial Items

The Commercial Items Drafting Team was tasked to prepare proposed FAR language to implement Title VIII of the Federal Acquisition Streamlining Act (FASA) of 1994 (Pub. L. 103-355). This report responds to that tasking and is prepared in accordance with the format prescribed in DOD FAR Supplement 201.201-1.

## I. PROBLEM:

The Federal Acquisition Streamlining Act of 1994 included Title VIII, entitled Commercial Items (Tab D). This Title made numerous additions and revisions to both the civilian agency and Armed Service acquisition statutes to encourage the acquisition of commercial end items and components by Federal government agencies as well as contractors and subcontractors at all levels. The Commercial Item Drafting Team was organized and tasked with reviewing the Act and preparing implementing language for the FAR.

## II. RECOMMENDATION:

The Team recommends adopting the proposed revisions to FAR Parts 10, 11, 12 and 52 as well as various other conforming changes throughout the FAR. The proposed FAR revisions are at Tab A.

## III. DISCUSSION:

**Drafting Team Tasking.**

On 3 October 1994, the Commercial Items Drafting Team was officially tasked by the FAR Council and the FASA Implementation Project Manager to draft proposed FAR language to implement the following sections of Title VIII of the Act:

Subtitle A -- Definitions and Regulations
- Section 8001 Definitions
- Section 8002 Regulations on acquisition of commercial items
- Section 8003 List of inapplicable laws in Federal Acquisition Regulation

Subtitle C -- Civilian Agency Acquisitions
- Section 8201 Relationship to other provisions of law
- Section 8202 Definitions
- Section 8203 Preference for acquisition of commercial items
- Section 8204 Inapplicability of certain provisions of law

Subtitle D -- Acquisitions Generally
- Section 8301 Inapplicability of certain provisions of law
- Section 8302 Flexible deadlines for submission of offers of commercial items
- Section 8303 Additional responsibilities of advocates for competition
- Section 8304 Provisions not affected

Subtitle B of the Act addresses Armed Services acquisitions and is not specifically implemented by this case. However, most of the Act's provisions related to Armed Services acquisitions closely parallel the civilian agency provisions. The DOD-unique sections of Title VIII will be implemented in the DOD FAR Supplement (DFARS) at a later date under a separate tasking. These sections remaining to be implemented are:

Subtitle B Armed Services Acquisitions
- Section 8101 Establishment of a new chapter in Title 10
- Section 8102 Relationship to other provisions of law
- Section 8103 Definitions
- Section 8104 Preference for acquisition of commercial items
- Section 8105 Inapplicability of certain provisions of law
- Section 8106 Presumption that technical data under contracts for commercial items are developed exclusively at private expense

At the kickoff meeting at the Office of Federal Procurement Policy (OFPP), Dr. Steven Kelman, Administrator of OFPP, and Ms Colleen Preston, Deputy Under Secretary of Defense for Acquisition Reform, challenged the drafting teams to be innovative and aggressive in drafting implementing language for the regulation and to "think out of the box." Dr. Kelman stated that although the Act decreased the burden on the system and increased room for contracting officer judgment, the revised regulations were necessary to bring these important changes to reality. This challenge was reiterated during our Team meetings by our Legislative Team Liaisons who continually prodded us to "do something different." The Team took these challenges very much to heart and endeavored throughout our discussions to challenge every assumption, practice and policy by asking "How does the commercial market place address this issue?" As a result, the Team developed proposed FAR language that took a "different" approach to the government's acquisition of commercial items.

**Team Objectives.**

The Team established a series of objectives that guided our discussions and drafting of the proposed FAR language and would result in the development of revisions that were a clear break from past practices for the acquisition of commercial items. Our objectives were to:

- Revise the FAR to establish Federal government policies and practices specifically designed to the acquisition of commercial items and more closely aligned to those of the commercial market place;
- Attract new commercial businesses by making the Federal government a more attractive customer;
- Make it easier for businesses to sell their commercial supplies and services to the Federal government;
- Make it easier for government acquisition personnel to acquire commercial supplies and services from the commercial market; and
- Provide the necessary flexibility for contracting officers to adapt to the customary practices of specific markets.

**Team Approach.**

The Team began its review of the Act and discussion of a proposed implementation approach on 4 October 1994. Before beginning the drafting process, the Team discussed in detail the provisions of the Act as well as a number of related reports and documents including the Joint Explanatory Statement of the Committee of Conference to accompany S.1587 (Conference Report 103-712), the DFARS Part 211 implementation of Section 824 (b) of the National Defense Authorization Act for Fiscal Years 1990 and 1991 (Pub. L. 101-189; 10 U.S.C. 2325 note); the Report of the Acquisition Law Advisory Panel (Section 800 Panel) Chapter 8, Commercial Items; and numerous reports and correspondence relating to the use of commercial practices by the Federal government. A wider review of source documents on government use of commercial acquisition practices was limited by the time constraints imposed on the Team. While not directly adopting the recommendations of the sources reviewed, the Team found each a useful source of information and ideas and used concepts from each in arriving at its recommended FAR language.

**Team Findings.**

After discussing the Act at length and reviewing the available source documents, the Team agreed to findings that guided our development of the proposed FAR language. These findings were:

- The adoption of the Uniform Commercial Code (UCC) as the basis for Federal government contracting for commercial items is not appropriate. The concept of utilizing the UCC for the acquisition of commercial items has been studied and discussed many times over the years. While the Team made steps towards the establishment of UCC-like practices, the Team concluded that adoption of the UCC *in toto* would be inappropriate. A White Paper describing in more detail the conclusions of the Team on this matter is attached to this report (Tab B). The Team's recommendations regarding the use of certain UCC-like language in certain clauses and provisions is discussed elsewhere in this report.

- The proposed language developed by the Team reflects our belief that we were not striving to establish a method of "commercial contracting." Rather, we developed proposed revisions to the FAR to facilitate the Federal government's contracting for commercial items. While this seems like a subtle difference, it reflects our conclusion that adopting "commercial

contracting" practices is inappropriate. The proposed FAR revisions exist within the general framework of Federal government contracting, albeit for commercial items.

- Notwithstanding conventional thinking on this matter, the Team concluded after reviewing many commercial contracts, purchase orders and similar documents that there is no one "standard" commercial practices that could be adopted across the board for government contracts, but many customary commercial practices that vary by market sector. There are 10 -12 topic areas commonly discussed in commercial contracts, but the treatment of the topic in each contract often varies widely. (See attached White Paper on the UCC, Tab B.) Most of these same topics are also presently discussed in the FAR, albeit often with an approach different from those found in industry. It was also interesting to note that, in the opinion of the Team, the current FAR clauses tend to be more balanced in their approach to the rights and responsibilities of both the buyer and seller. The commercial contract language tended to vary widely depending upon the party's role in the acquisition (buyer vs. seller) and relative bargaining position (weak vs. strong) of the parties.

-- In adapting customary commercial practices to provisions and clauses appropriate for the government's acquisition of commercial items, the Team chose to not spell out in great detail the requirements of applicable statutes and executive orders. Where some discussion was necessary, abbreviated language was developed. Where a reference to statute was adequate to alert contractors to their responsibilities, the Team mirrored the approach seen in many commercial contracts of providing only a reference to the statute or executive order. This was done to simplify the solicitation and contract documents and adopt the often mentioned commercial practice of brevity.

--The Team's recommended provisions and clauses, and a discussion of their relationship to customary commercial practices is provided elsewhere in this report.

- Just as the Team concluded there is no one "standard" commercial practice that could be adopted, there is also no single "market place" in which the government will operate. The Federal government awards over 11 million contracts every year for the widest possible range of supplies and services. As a result, the government operates in virtually every market place, both in the U.S. and overseas. This fact makes it very difficult to create a single set of policies, procedures, provisions and clauses that would reflect the customary commercial practice across all these markets. The Team has opted for creating policies, procedures, provisions and clauses that reflect some generalized set of conditions across a variety of markets, but has left sufficient flexibility for contracting officers to use their understanding of the market they are working in and their business judgment to adapt to the particular conditions. The acquisition of commercial items as contemplated in the law and the proposed coverage would give unprecedented flexibility to our contracting officers and, at the same time, demand far more in terms of the exercise of good business judgment and in adapting to the ever changing business conditions in the markets in which they operate. This very flexibility itself is consistent with commercial practices where buyers and sellers have the ability to tailor each contract to a particular acquisition's circumstances.

- Revisions to the FAR alone will be inadequate to ensure the Federal government fully implements the Act's stated preference for the acquisition of commercial items and limits its use of solicitation provisions and contract clauses to those consistent with commercial practices. Full implementation will require a culture change within both the government requirements-generating and contracting communities as well as a parallel cultural change in industry. For both parties, the implementation of the Act must result in a significant change from past practices. To take the first step in facilitating this cultural change, the Team completely rewrote the current FAR Parts 10, 11 and 12 as follows:

-- We retitled Part 10 from "Specifications, Standards, and Other Purchase Descriptions" to "Market Research." In the process, we moved and rewrote much of the coverage formerly found in Part 11. This new Part is intended to emphasize the importance of market research as the first step in the acquisition process and an essential element in describing the agency's need, the overall acquisition strategy and to some degree, any terms and conditions unique to the item being acquired.

-- We retitled Part 11 from "Acquisition and Distribution of Commercial Products" to "Describing Agency Needs." The new Part 11 contains much of the coverage formerly found in Part 10 regarding documenting the government's need, but takes a much more streamlined approach (see footnotes in Part 11). In addition, the new Part 11 clearly states the government's order of preference for stating requirements (functions to be performed, performance required, or essential physical characteristics), and the order of preference for documenting requirements (performance-oriented over design-based, voluntary over federal specifications, commercial over military-unique). Part 11 also contains most of the language from the current Part 12 regarding deliveries and performance.

-- We retitled Part 12 from "Contract Deliveries or Performance" to "Acquisition of Commercial Items." We created this entirely new coverage to address, in one Part, both the policies and procedures for the acquisition of commercial items. This approach was taken to reinforce the expected sequence of events in approaching a given acquisition . . .market research (Part 10), description of agency need (Part 11), acquisition of commercial items, if they meet the agency's needs (Part 12); and acquisition of other than commercial items using current FAR procedures if commercial items are not available or adequate to meet the need (Parts 13, 14 and 15). More important than putting the acquisition events in some order of sequence, the Team believes that moving the policies and procedures for the acquisition of commercial items to Part 12 creates a clean break with past policies and procedures such as the Acquisition and Distribution of Commercial Products (ADCOP) program initiated in 1978 and currently described in Part 11, and the DFARS 211 implementation of Section 824 (b) of the 1990 - 1991 DOD Authorization Act. The Team strongly believes that a real cultural change will require a significant shift in thinking and proposes this approach to take the first step in creating this change.

- The Team concluded that the proposed procedures would be used for the acquisition of commercial items regardless of dollar value. The Act gave no threshold, and the Team felt none

was appropriate. The procedures described in the proposed language are appropriate for the acquisition of any commercial item unless a simpler procedure (e.g., micro-purchases) is available.

- Finally, the Team made the assumption that where the prime contract is for a non-commercial item, subcontracts could be for either commercial or non-commercial items. Where the prime contract is for a commercial item, subcontracts will likewise be for commercial components. This assumption is reflected in our drafting of clauses and provisions and any associated flow down.

**Highlights of proposed FAR revisions.**

The Team's proposed revisions to the FAR are at Tab A. At appropriate points in the proposed coverage, footnotes point out the section of the Act being implemented or significant changes or points of information. Some additional points regarding these proposed revisions are discussed below.

*Part 2. Definitions of Words and Terms.* The Team incorporated the definitions of "commercial item," "component," "commercial component" and "nondevelopmental item" from the Act with modifications in two areas:

- The Team expanded on the definition of "minor modification" to further explain the difference between "modifications" and "minor modifications. The added language is based, in part, on the Senate Report of the Committee on Governmental Affairs on S. 1587.

- The Team revised slightly the definition of commercial services at paragraph (f) by adding the terms "of a type" and "or market price."

-- The Streamlining Act defines services (other than installation, maintenance, repair, training and other services incidental to support of the item) as "Services offered and sold competitively, in substantial quantities, in the commercial marketplace based on established catalog prices for specific tasks performed and under commercial terms and conditions."

-- This definition restricts the Federal government to acquiring commercial services based only on "established catalog prices." There are many services sold in the commercial market that are offered on the basis of prices for specific tasks performed, but not based on a "catalog" price. For example, lawn-cutting services are often sold based on the size of the job, cleaning services are sold based on the physical layout and size of the building, storage services are sold based on the type and size of the facility needed, etc. The company has a standard price for the task based on the current market price, but the company does not maintain any sort of catalog. These services are clearly commercial in nature and should be eligible for streamlined acquisition procedures. For the government to require the existence of a catalog would impose unnecessary paperwork on industry with no real benefit. In addition, the law could easily be circumvented by firms creating catalogs solely to be eligible for use of streamlined commercial acquisition procedures; such a response to the language of the Act would not be beneficial to either government or industry.

-- Finally, FAR 15.804-3, as well as the new Truth in Negotiations Act legislative amendments, already discusses both catalog prices and market prices as going hand-in-hand. To separate the two concepts would be contrary to commercial practice and also cause confusion in the acquisition community that already deals with catalog and market prices together. The type of service provided, not the existence of a catalog, should be the only factor determining whether or not a service meets the definition of a commercial item. If the government is buying a service commonly sold by commercial firms to other businesses, then the government should emulate commercial practice as much as possible. This was clearly the thrust of the new legislation and the rationale for the Team's proposed revision to the definition.

*Part 12. Acquisition of Commercial Items.*

- Subpart 12.3 - Preparing solicitations and contracts for commercial items.

-- The Act and much of the related congressional report language, discusses the concept of uniform contract clauses for commercial items. The Act states that, to the maximum extent possible, "...only those contract clauses - (A) that are required to implement provisions of law or executive order applicable to acquisitions of commercial items or commercial components, as the case may be; or (B) that are determined to be consistent with standard commercial practice" may be included in contracts for commercial items. In order to implement this and other requirements of the Act, the Team concluded that a standardized solicitation and contract format would be the most straightforward method. In addition, such an approach, if streamlined and with sufficient flexibility, would serve as an incentive to contracting officer to use it by simplifying the process and reducing procurement lead-time.

-- The proposed standard solicitation contemplates use of negotiated procedures for selection of the successful offeror. While sealed bids could be used for commercial items, the Team expects that the government's best interest will be served by use of negotiated procedures as is typically done in the commercial market place. Moreover, the concept of the firm bid rule in government contracts is itself alien to commercial practices.

-- The Team proposes establishment of three solicitation provisions (Instructions to Offerors, Evaluation, and Representations and Certifications) and two contract clauses (Contract Terms and Conditions and Contract Terms and Conditions Required to Implement Statutes or Executive Orders). The specific language of these provisions and clauses is discussed below. The Team believes this approach is appropriate for a very large percentage of our commercial item acquisitions, would serve to simplify the process for contracting officers and contractors and aid in the implementation of the requirements of the Act.

-- The Team proposes the establishment of a new form, the Standard Form XXXX, Solicitation/Contract/Order for Commercial Items. The proposed SF XXXX combines features of the SF 33, Solicitation, Offer and Award; the SF 1447, Solicitation/Contract; and the DD 1155, Order for Supplies and Services. The most significant element is the addition of acceptance blocks at the bottom of the form (patterned after the DD Form 1155). This will allow suppliers of commercial items to utilize the SF XXXX to document receipt of the supplies or

services by the government avoiding the need for preparation of separate receipt/acceptance forms.

-- As a result of the creation of these provisions and clauses and the new standard form, the Team believes that a much more streamlined solicitation and contract is possible. Where the description of a particular need is relatively brief, and where the contracting officer can use the standardized provisions and clauses without addendum, the documents necessary for the acquisitions of commercial items would be:

--- A solicitation document consisting of (1) a SF XXXX; (2) the provision at 52.212-3, Offeror Representations and Certifications - Commercial Items, for the offeror to complete; and (3) the clause at 52.212-5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders - Commercial Items, with any required clauses checked in paragraph (b). The other solicitation provisions (52.212-1, Instructions to Offerors - Commercial Items, and 52.212-2, Evaluation - Commercial Items) and contract clause (52.212-4, Contract Terms and Conditions - Commercial Items) would be incorporated by reference.

--- A contract consisting of (1) the completed SF XXXX; and (2) the clause at 52.212-5 with paragraph (b) completed.

--- The Team believes that given the mandate to acquire items from the commercial market place, to minimize government-unique detailed specifications, and to use only selected provisions and clauses, such a streamlined solicitation and contract document is possible in a wide variety of acquisitions.

- Subpart 12.4 - Procedures for solicitation, evaluation and award of contracts for commercial items.

-- The Team took advantage of the Act's provision that allows flexibility in establishing response times for offers as pointed out in the associated footnote at 12.403.

-- In addition to providing a standardized format for the solicitation and contract award, the Team established in Subpart 12.4 an alternate method of soliciting for commercial items. We assumed that when acquiring commercial items, the government's needs can often be stated succinctly using commercial item descriptions, or other performance related documents. If the requirements documents are relatively brief and the contracting officer can use the standard solicitation terms and conditions with relatively few changes, it would be possible to alert contractors to all the essential information necessary to prepare an offer by combining the CBD synopsis and the solicitation into a single document. Soliciting offers through the CBD offers many advantages to both government and industry for the acquisition of commercial items. These advantages include making the CBD synopsis a more meaningful description of the government's need, elimination of the time and effort required for industry to request copies of the solicitations, eliminating the need to prepare and issue paper solicitations, and a reduction of lead time by eliminating the need to wait 15 days between the CBD synopsis and issuing the solicitation. A sample solicitation prepared using this technique is attached (Tab C).

-- The Team established a standard evaluation technique in the provision at 52.212-2, Evaluation - Commercial Items, based on the use of "best value" techniques. As pointed out in 12.209, the Team recognizes that this technique may not be appropriate for every acquisition, and will often require more detailed evaluation factors and related information. However, the Team believes that, in general, the use of best value techniques is appropriate for the acquisition of commercial items, and that the establishment of this technique in 52.212-2 as the baseline clearly conveys that message to both government and industry.

- Subpart 12.5 -- Using other procedures for acquiring commercial items.

-- The Team believes that some standardization is beneficial to implementing the Act and offers contracting officers and industry an easy to use, simplified method for acquiring commercial items. However, the Team also recognizes that it is essential that contracting officers be allowed to tailor solicitations and contracts to meet the needs of the particular acquisition and the market place for that item. Subpart 12.5 gives contracting officers broad authority to tailor most aspects of solicitations and contracts without need for a formal deviation. The Act requires that some constraints be placed on this authority to tailor, and that has also been accommodated in this subpart in regards to the clauses at 52.212-3, Offeror Representations and Certifications, and 52.212-5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders. Other provisions and clauses may be tailored consistent with commercial practices.

- Subpart 12.7 -- Laws inapplicable to commercial item acquisitions.

-- Section 8003 (a) of the Act requires that the FAR contain a list of laws determined to be inapplicable to prime contracts for commercial items. The language of the Act further states that the laws covered by this provision (and therefore inapplicable to the acquisition of commercial items) are those enacted after the date of enactment of FASA, unless (1) it provides for criminal or civil penalties; (2) specifically refers to Section 34 of the OFPP Act and provides that, notwithstanding Section 34, it is applicable to the acquisition of commercial items; or (3) the Federal Acquisition Regulation Council makes a written determination that it would not be in the best interest of the government to exempt contracts from the provision.

--- The list of laws that meet the criteria in Section 8003 (a) of the Act and are determined to be inapplicable to the acquisition of commercial items is currently being developed. Once complete, the list will be reflected in 12.702 (b).

--- The coverage at 12.702 (b) will include all of those statutes waived by Title VIII of this Act that apply to both DOD and civilian agencies, but will not include those laws that only apply to DOD. The statutes applying only to DOD will be addressed in a subsequent DFARS case.

--- The Team is also considering including two other statutes the Team believes are not applicable to commercial item acquisitions:

---- 41 U.S.C. 416(a)(3), Minimum Response Times under the Office of Federal Procurement Policy Act. Section 8302 of the Act modifies 41 U.S.C. 416(a) to provide flexible deadlines for the submission of bids or proposals for the procurement of commercial items; and

---- 41 U.S.C. 43, Walsh-Healey Act. The Walsh-Healey Act does not apply to items "offered for sale on the open market." The Team interprets this phrase as an exception for commercial items.

-- Section 8003 (b) of the Act requires that the FAR contain a list of provisions of law that are inapplicable to subcontracts under either a contract for the acquisition of commercial items or a subcontract for the acquisition of commercial items or components. The language of Section 8003 (b) of the Act regarding which laws are inapplicable to subcontracts is very similar to the prime contracts language discussed above except for the phrase "...that is enacted after the date of the enactment of the Federal Acquisition Streamlining Act of 1994..." which does not appear in Section 8003 (b). For this reason, the list of laws not applicable to subcontractors will not be limited to laws enacted after 13 October 1994 and will therefore be much broader than that applying to prime contractors. Once completed, the list will be reflected in 12.702 (c).

*Part 52. Solicitation Provisions.*

- 52.212-1 Instructions to Offerors - Commercial Items.

-- This provision contains information unique to government procurement that is provided to all offerors to ensure that they understand the solicitation requirements. The information has been simplified and tailored to meet the requirements of commercial items. For the most part, the simplified paragraphs in the new provision do not contain new concepts, nor were they intended to do so. The information is compiled from a number of FAR provisions prescribed in Parts 14 and 15. The paragraph entitled "Late Offers" contains a new concept that a late offer received prior to the evaluation of offers may be considered if it offers significant cost or technical advantages to the government. This concept was taken from a provision that is currently being used in solicitations by Public Health Service.

- 52.212-2 Evaluation - Commercial Items

-- The new solicitation provision included at 52.212-2, "Evaluation - Commercial Items" contains information unique to government procurement that has been simplified and tailored to meet the requirements of commercial items. Again, the new provision does not contain new concepts and is generally compiled from provisions prescribed in Parts 14 and 15. As mentioned earlier in this report, this provision utilizes "best value" techniques in the selection of successful offerors, and includes the use of past performance in the evaluation of offers as required by Section 8002 (e)(3) of the Act.

- 52.212-3 Offeror Representations and Certifications - Commercial Items.

-- There are numerous FAR certifications required to comply with laws or executive orders. Instead of using the certification language contained in the FAR, the Team

drafted one provision at FAR 52.212-3, Offeror Representations and Certifications - Commercial Items, which distills the required certifications into a single provision for the acquisition of commercial items. Again, this effort was substantially based on a previous DOD effort that resulted in a provision currently found at DFARS 252.211-7020. The DOD provision combined a number of representations associated with FAR Part 19 into one provision. Certifications Regarding Payments to Influence Federal Transactions (31 U.S.C. 1352), Procurement Integrity Certification (41 U.S.C. 423), and Taxpayer Identification Number (TIN) (26 U.S.C. 6050M) were added to the DOD provision.

-- FAR 52.212-3 satisfies the requirements contained in the following FAR certifications:

--- FAR 52.203-11, Certification and Disclosure Regarding Payments to Influence Certain Federal Transactions

--- FAR 52.204-3, Taxpayer Identification

--- FAR 52.219-1, Small Business Concern Representation

--- FAR 52.219-2, Small Disadvantaged Business Concern Representation

--- FAR 52.219-3, Women-Owned Small Business Representation

--- Paragraph (1) of FAR 52.203-8, Requirement for Certificate of Procurement Integrity

-- Certifications required by executive orders are still being reviewed and will be added as necessary.

*Part 52. Contract clauses.*

Section 8002 of the Act requires the FAR be amended to contain a list of clauses for the acquisition of commercial items which will include, to the maximum extent practicable, only those clauses -

(a) that are required to implement provisions of law or executive orders applicable to acquisitions of commercial items or commercial components; or

(b) that are determined to be consistent with standard commercial practice.

The Team implemented this requirement by creating two clauses for inclusion in contracts for commercial items. The first clause contains provisions that the Team believes are consistent with customary commercial practices. The second clause contains requirements that implement

provisions of law or executive orders that are applicable to government acquisitions of commercial items or commercial components.

- 52.202-1 Definitions.

-- This clause was revised to include the definitions of "commercial item," "component" and "commercial component." This was necessary to ensure that the contractors had access to the definitions when preparing solicitations and contracts for their subcontractors and suppliers.

- 52.212-4 Contract Terms and Conditions - Commercial Items.

-- This clause contains the terms and conditions the Team believes are consistent with customary commercial practice. The clause addresses general areas that previous studies have identified as the "core" areas covered by commercial contracts. These "core" areas were identified by DOD as part of the implementation of Section 824(b) of Pub. L. 101-189 (and the resulting DFARS Part 211), and in an earlier study prepared by Wendy Kirby formerly of the law firm Hogan & Hartson (See Tab B).

-- This clause represents the core terms and conditions of a government contract for commercial items and is intended to respond to the Act's requirement to limit clauses to those ". . .that are determined to be consistent with standard commercial practice."

-- Some of the concepts in this clause are required to implement statutes or executive orders and a few represent unique government procurement practices. However, the Team believes all the concepts in this clause are either consistent with customary commercial practice or, if not consistent, would represent an improvement over customary commercial practice from the perspective of a commercial industry. An example of the latter is the provision that failure of the parties to reach agreement on any request for relief, claim, appeal or action arising under or related to the contract shall be a dispute to be resolved in accordance with the clause at FAR 52.233-1, Disputes, which is incorporated by reference. While this is required to comply with the Contract Disputes Act of 1978, it also represents a significant benefit to both parties by providing a dispute resolution procedure under the contract in lieu of the more uncertain commercial practice of resorting to formal legal proceedings. Similarly, FAR 52.212-4 provides that the government will pay an interest penalty in accordance with the Prompt Payment Act for late payments. This language eliminates the need to include FAR 52.232-25, Prompt Payment; a clause the public complained was too confusing. FAR 52.212-4 also contains a simple statement allowing the assignment of claims. This statement replaces FAR 52.232-27, Assignment of Claims. Where an element within the clause at FAR 52.212-4 implements a statute or executive order, the paragraph contains the appropriate statutory cite.

-- Several concepts included in the clause at 52.212-4 are significant changes from standard government practices and represent what the Team believes are very close to commercial practices. These include language stating that all changes to the contract be made only by written agreement of the parties; that the government's right to inspect and test is limited to items

tendered for acceptance; that revocation of acceptance shall occur before there is any substantial change in the commercial items; and that the implied warranties of mechantability and fitness for use apply in addition to any express warranties. Moreover, the proposed coverage adopts a more flexible standard regarding revocation of acceptance and contractor notification of excusable delay. These changes to the "Acceptance" and "Termination for Cause" language are based on principles in the UCC.

-- Because the government's unilateral right to terminate a contract has frequently been cited as an extraordinary contractual right of the government unique to government contracts, the Team considered not including this language in the clause at 52.212-4. However, the provision must be included because the government's protest procedures requires the government have the right to order a contractor to stop work, and subsequently to terminate a contract in the event of a successful protest of an award. However, the Team also noted that, in spite of the common perception, the concept of termination for convenience is neither extraordinary nor unique to government contracts. The earlier DOD review of commercial contracts found that approximately 50% of the commercial contracts reviewed contained termination for convenience language. The Team believes that the FAR termination clause is objectionable to commercial contractors because of the manner in which amounts payable in a termination settlement are specified; the termination language contained in the proposed clause for commercial items will overcome these objections. The language of the termination-related provisions ("Termination," "Excusable Delays", and "Termination for Cause") was all taken, with only minor revisions, from commercial contracts.

-- The Team incorporated other statutory requirements into the clause at 52.212-4 by reference only; this is a customary commercial method to require compliance with laws, executive orders, and other regulatory requirements. These were divided into two elements: Other Compliances and Compliance with Laws Unique to Government Contracts.

--- The first provision, entitled "Other Compliances," was drafted to highlight the laws, executive orders and other regulatory requirements that apply to the public at large. These provisions, therefore, apply to commercial contractors whether or not they are contained in a contract clause. The language in this paragraph was taken directly from one of the commercial contracts the Team reviewed; similar language was found in many other commercial contracts. The requirements include all applicable Federal, State and local laws, executive orders, and regulations thereunder and amendments thereto, including, Executive Order 11246 of September 24, 1965, as amended by Executive Order 11375 of October 13, 1967, relating to Equal Employment Opportunity, the Federal Occupational Safety and Health Act of 1970, the Federal Hazardous Substances Act, the Transportation Safety Act of 1974, the Clean Air Act, the Toxic Substances Control Act, and the Federal Water Pollution Control Act.

--- The second provision, "Compliance with Laws Unique to Government Contracts," includes laws that only apply to government contracts. Generally, these are statutes related to business ethics. They include 31 U.S.C. 1352 relating to limitations on the use of appropriated funds to influence certain Federal contracting; 18 U.S.C. 431 relating to officials not to benefit; and 41 U.S.C. 251 related to whistle blower protections. The Team believes requiring

contractors to comply with these statutes by reference meets the requirements of the 31 U.S.C. 1352 (implementing FAR clause is at 52.203-12, Limitation on Payments to Influence Certain Federal Transactions) and 18 U.S.C. 431.

- 52.212-5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders - Commercial Items.

-- This clause implements provisions of law or executive orders applicable to government acquisitions of commercial items or commercial components. In preparing this clause, the Team used the list prepared for DFARS Part 211 as the basis for determining which provisions were required by statute or executive order. DFARS 211 had been thoroughly reviewed by both the DAR Council and OSD legal, and published as an interim rule. As a result of the publication of the interim rule in the Federal Register, DOD received and analyzed more than 500 public comments. A final rule was subsequently prepared, reviewed by the DAR Council and OSD counsel, and scheduled for publication when Pub. L. 103-355 was enacted. Therefore, this previous effort was considered an accurate baseline from which to proceed. In addition, the Team also reviewed other public comments and the Section 800 Panel report regarding commercial items.

-- After identifying an initial group of clauses and provisions required to implement statute or executive order, the Team analyzed each of the applicable statutes or executive orders to confirm the need for the clause, provision, representation or certification in solicitations and contracts. This research indicated that some statutes and executive orders did not require clauses be included in contracts. For example, the executive orders cited as authority for 52.225-11, Restrictions on Certain Foreign Purchases, do not specifically require a clause in contracts; the executive orders only prohibit anyone from doing business with certain countries. It is only the implementing Department of the Treasury regulations that require use of a clause similar to FAR 52.225-11 in government contracts. Because Section 8002 of the Act requires the FAR include a list of only those clauses required to implement provisions of law or executive orders applicable to acquisitions of commercial items, clauses implementing agency regulations, such as FAR 52.225-11, were not considered for incorporation in contracts for commercial items.

-- After reviewing the initial group of required clauses, the Team then examined FAR Part 52 to determine if there were any existing clauses that already contained an exemption for commercial items and to identify other clauses required by law or executive order. This research identified required clauses for the Service Contract Act provisions and the clauses implementing NAFTA and Trade Agreements Act. The Team did not include any construction-related clauses, since the Team does not believe construction projects meet the definition of "commercial items."

-- The Team believes the clause at 52.212-5 represents the minimum number of clauses required to implement statutes. In addition, the Team is presently reviewing numerous executive orders to determine their applicability to Federal contracts for commercial items and to contracts within the United States in general. Any executive orders determined to properly apply to prime contracts will be added to the clause.

-- The clause at 52.212-5 does not include FAR 52.219-9, Small Business and Small Disadvantaged Business Subcontracting Plan. The Team understands that OFPP intends to revise the requirement for subcontracting plans to allow them to be done on a company-wide basis for commercial items. In addition, the coverage does not include FAR 52.219-16, Liquidated Damages - Small Business Subcontracting Plan. The Team believes a clause requiring liquidated damages for failure to meet subcontracting goals should not be included in contracts that do not contain a requirement to have a subcontracting plan. Consequently, the Team recommends OFPP include the requirement for liquidated damages when it promulgates its coverage on subcontracting plans. If these changes are not made, the related clauses must be included in contracts for commercial items.

- 52.244-XX Subcontracts for Commercial Items and Commercial Components.

-- This clause implements the preference at 10 U.S.C. 2377(b)(2) and 41 U.S.C. 314(b) for the acquisition of commercial items or nondevelopmental items other than commercial items as components of items to be supplied under Federal contracts. In addition, paragraph (e) of the clause at 52.244-XX provides that the contractor is not required to include any FAR provision or clause, other than those listed in the clause and as may be required to comply with cost or pricing data requirements, in a subcontract for commercial items or commercial components. The clauses to be included on this list and flowed down to subcontractors for commercial items is currently under review.

**Other related comments.**

The Team recognizes the relationship between the requirements of: (1) Section 8002 (b) of the Act for a list of contract clauses required to implement provisions of law or executive orders applicable to acquisitions of commercial items; and (2) Section 8003 of the Act for a list of provisions of law that are inapplicable to contracts for the acquisition of commercial items.

- The Team has chosen to implement the requirements of Section 8002 (b) through the clause at 52.212-5, Contract Terms and Conditions Required to Implement Statutes and Executive Orders, and to implement the requirements of Section 8003 through the language in 12.702. Maintaining this language in the FAR could become quite difficult as future laws are enacted and executive orders are signed. As a result, the Team has included language at 12.103 which states that future laws or executive orders will only be applied to the acquisition of commercial items if the provisions and clauses in Subpart 12.3 are revised accordingly. This eases the burden on the contracting officer, but places a tremendous responsibility on the FAR System to keep these provisions and clauses up to date. To do otherwise would surely result in a quickly outdated Part 12 whose usefulness would become increasingly limited over time.

Section 8301 (d) makes certain revisions to Section 26(f)(2) of the OFPP Act regarding the applicability of cost accounting standards to commercial items. The Team notes that this Section of the OFPP Act is under the responsibility of the Cost Accounting Standards Board. The appropriate revisions must first be made to 48 CFR Chapter 99; these will subsequently be incorporated into Appendix B of the FAR.

## IV. COLLATERAL REQUIREMENTS:

**Public Comments.**

This proposed FAR revision will have a significant effect on contractors and offerors and requires publication in the Federal Register for public comment. In this regard, the Team recommends that in conjunction with requesting public comments, a public meeting should also be scheduled at an appropriate time to obtain further comments from the public.

**Paperwork Burden Analysis.**

The Paperwork Reduction Act (Pub. L. 96-511) applies. A separate analysis will be prepared and submitted to the Office of Information and Regulatory Affairs prior to publication of the proposed rule for public comment.

**Regulatory Flexibility Act Analysis.**

The proposed rule is expected to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et. seq., because the proposed FAR rule will significantly reduce the burden presently imposed on small businesses by (1) limiting provisions and clauses that can be made applicable to both large and small businesses at either the prime or subcontractor level; (2) by requiring that, except in unique circumstances, that the government utilize the contractor's quality assurance system; and (3) by clearly stating a preference for performance-based documents and commercial designs rather than government-specific designs. Therefore, an initial Regulatory Flexibility Analysis has not been completed. Comments from small entities concerning the affected FAR Parts will also be considered in accordance with Section 6120 of the Act.

## V. CONCURRENCE:

The Commercial Items Drafting Team was comprised of the following members from the agencies indicated:

Colonel Larry Trowel, SAF/AQCF
Lou Gaudio, OUSD(A&T)DDP/MPI
Rob Lloyd, Office of the Procurement Executive, Dept of State
Eve Lyon, Office of General Counsel, NASA
Ludlow Martin, Office of General Counsel, Army Materiel Commend
Anne Burleigh, HQ DLA
Pam Pilz. FISC Norfolk, Washington detachment, Washington Navy Yard
Les Davison, GSA(VP)

In addition, the following individuals were assigned to the Team as Legislative Team Liaisons. These individuals briefed the Team at the beginning of the drafting process on policy issues and legislative intent, participated in elements of Team discussions and reviewed drafts of the Team's proposed language and report:

Bill Mounts, Office of the Deputy Under Secretary of Defense for Acquisition Reform (DUSD(AR))
Alan Brown, Office of Federal Procurement Policy (OFPP)

All members of the Drafting Team concur in this report and the proposed FAR language.

Laurence M. Trowel

LAURENCE M. TROWEL, Colonel, USAF
Team Leader
Commercial Item Drafting Team

Tabs:
Tab A - Proposed FAR Language
Tab B - White Paper, Uniform Commercial Code
Tab C - Sample Combined CBD Synopsis/Solicitation
Tab D - Title VIII, Pub. L. 103-355

Appendix C

SARA-CPWG: Statutory Revision for R-4 New Competitive Services Schedule

SUGGESTED PLACEMENT: 41 U.S.C. § 253h(g); add the following as related guidance.

AUTHORITY TO ESTABLISH A NEW MULTIPLE AWARDS SCHEDULE FOR PROFESSIONAL SERVICES

(1) GSA Federal Supply Schedules program.-- Under the Multiple Awards Schedule program of the General Services Administration referred to in section 309(b)(3) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 259(b)(3)) that is administered as the Federal Supply Schedules program, the Administrator of General Services may establish a new information technology (IT) Multiple Awards Schedule for professional services under which prices for each order are established by competition and not based on posted rates. Under this new Schedule model, prices would be determined exclusively at the order level based on competition for the specific requirement to be performed in accordance with the ordering procedures established by the General Services Administration. The ordering procedures for the new Schedule shall strongly encourage the use of "e-Buy," GSA's electronic request for quote (RFQ) tool, as a means to assure competition. This new Schedule model shall be reviewed in two years after implementation to see whether the process is producing competition and better pricing. If so, the Administrator of General Services may expand the new Schedule model to the other professional services Schedules.

## APPENDIX D

### Proposed Changes to FAR Parts 12 and 15 to Implement Recommendation 8 Pricing When No or Limited Competition Exists

**12.209 Determination of price reasonableness.**

(a) ~~While t~~The contracting officer must establish price reasonableness ~~in accordance with 13.106-3, 14.408-2, or Subpart 15.4, as applicable~~ for any commercial item, which includes commercial services. ~~a~~As discussed below, the contracting officer should be aware of customary commercial business terms and conditions when pricing commercial items. Commercial item prices are affected by factors that include, but are not limited to, speed of delivery, length and extent of warranty, limitations of seller's liability, quantities ordered, length of the performance period, and specific performance requirements. The contracting officer must ensure that contract terms, conditions, and prices are commensurate with the Government's need.

(b) Competition, market research, and comparisons to prior prices that have been determined to be reasonable typically should enable the contracting officer to determine that an offered price for a commercial item is fair and reasonable without further information from the offeror. If the contracting officer is unable to make such a determination on that basis (e.g., no offers are solicited), the contracting officer may request the information in (i) or (ii) below from the offeror in the following order of preference, provided that the contracting officer should not request more information than is necessary to determine that an offered price is reasonable:

(i) Prices paid for the same or similar commercial items under comparable terms and conditions by both government and commercial customers. The contracting officer must limit requests for sales data relating to such items during a relevant time period. (10 U.S.C. 2306a(d)(2) and 41 U.S.C. 254b(d)).

(ii) Available information regarding price or cost that may support the price offered, such as wages, subcontracts, or material costs. The contracting officer must, to the maximum extent practicable, limit the scope of the request to information that is in the form regularly maintained by the offeror as part of its commercial operations. (10 U.S.C. 2306a(d)(2) and 41 U.S.C. 254b(d)). The contracting officer shall not require the offeror to provide information regarding all cost elements, detailed cost breakdowns, or profit, but instead shall rely on price analysis (see 15.404-1(b)).

(c) A determination of price reasonableness shall be based on the information referenced in paragraph (b) of this section. The contracting officer shall not request that any information provided by the offeror pursuant to paragraph (b) be certified as accurate, complete, or current, nor shall such information be the subject of any postaward audit with regard to price reasonableness.

(d) The Government must not disclose outside the Government information obtained relating to commercial items that is exempt from disclosure under 24.202(a) or the Freedom of Information Act (5 U.S.C. 552(b)). (10 U.S.C. 2306a(d)(2) and 41 U.S.C. 254b(d)).

---

**15.402 Pricing policy.**

Contracting officers must—

(a) Purchase supplies and services from responsible sources at fair and reasonable prices. In establishing the reasonableness of the offered prices, the contracting officer must not obtain more information than is necessary. To the extent that cost or pricing data are not required by 15.403-4, the contracting officer must generally use the following order of preference in determining the type of information required:

(1) No additional information from the offeror, if the price is based on adequate price competition, except as provided by 15.403-3(b).

(2) Information other than cost or pricing data:

(i) Information related to prices (*e.g.*, established catalog or market prices, sales, or previous contract prices), relying first on information available within the Government; second, on information obtained from sources other than the offeror; and, if necessary, on information obtained from the offeror. When obtaining information from the offeror is necessary, unless an exception under 15.403-1(b)(1) or (2) applies, such information submitted by the offeror shall include, at a minimum, appropriate information on the prices at which the same or similar items have been sold previously, adequate for evaluating the reasonableness of the price.

(ii) Cost information, ~~that does not meet the definition of~~ but in no event shall the offeror be requested to provide cost or pricing data as that term is defined in ~~at~~ 2.101 or to certify any such information.

(3) *Cost or pricing data.* The contracting officer should use every means available to ascertain whether a fair and reasonable price can be determined before requesting cost or pricing data. Contracting officers must not require unnecessarily the submission of cost or pricing data, because it leads to increased proposal preparation costs, generally extends acquisition lead time, and consumes additional contractor and Government resources.

(b) Price each contract separately and independently and not—

(1) Use proposed price reductions under other contracts as an evaluation factor; or

(2) Consider losses or profits realized or anticipated under other contracts.

(c) Not include in a contract price any amount for a specified contingency to the extent that the contract provides for a price adjustment based upon the occurrence of that contingency.

---

**15.403-3 Requiring information other than cost or pricing data.**

(a) General.

(1) The contracting officer is responsible for obtaining information that is adequate for evaluating the reasonableness of the price or determining cost realism, but the contracting officer should not obtain more information than is necessary (see 15.402(a)). If the contracting officer cannot obtain adequate information from sources other than the offeror, the contracting officer must require submission of information other than cost or pricing data from the offeror that is adequate to determine a fair and reasonable price (10 U.S.C. 2306a(d)(1) and 41 U.S.C. 254b(d)(1)). Unless an exception under 15.403-1(b)(1) or (2) applies, the contracting officer ~~must~~ may require that the information submitted by the offeror include~~, at a minimum,~~ appropriate information on the prices at which the same item or similar items have previously been sold, adequate for determining the reasonableness of the price. To determine the information an offeror should be required to submit, the contracting officer should consider the guidance in Section 3.3, Chapter 3, Volume I, of the Contract Pricing Reference Guide cited at 15.404-1(a)(7).

(2) The contractor's format for submitting the information should be used (see 15.403-5(b)(2)).

(3) The contracting officer must ensure that information used to support price negotiations is sufficient~~ly current~~ to permit negotiation of a fair and reasonable price. ~~Requests for updated offeror information should be limited to information that affects the adequacy of the proposal for negotiations, such as changes in price lists.~~

***(4) As specified in Section 808 of Public Law 105-261, an offeror who does not comply with a requirement to submit information for a contract or subcontract in accordance with paragraph (a)(1) of this subsection is ineligible for award unless the HCA determines that it is in the best interest of the Government to make the award to that offeror, based on consideration of the following:***

(i) The effort made to obtain the data.

(ii) The need for the item or service.

(iii) Increased cost or significant harm to the Government if award is not made.

(b) *Adequate price competition*. When adequate price competition exists (see 15.403-1(c)(1)), generally no additional information is necessary to determine the reasonableness of price. However, if there are unusual circumstances where it is concluded that additional information is necessary to determine the reasonableness of price, the contracting officer shall, to the maximum extent practicable, obtain the additional information from sources other than the offeror. In addition, the contracting officer may request information to determine the cost realism of competing offers or to evaluate competing approaches.

(c) Commercial items.

~~(1) At a minimum, t~~The contracting officer ~~must~~ should use price analysis to determine whether the price is fair and reasonable whenever the contracting officer acquires a commercial item (see ~~15.404-1(b)~~12.209). The fact that a price is included in a catalog does not, in and of itself, make it fair and reasonable. ~~If the contracting officer cannot determine whether an offered price is fair and reasonable, even after obtaining additional information from sources other than the offeror, then the contracting officer must require the offeror to submit information other than cost or pricing data to support further analysis (see 15.404-1).~~

~~(2) Limitations relating to commercial items (10 U.S.C. 2306a(d)(2) and 41 U.S.C. 254b(d)).~~

~~(i) The contracting officer must limit requests for sales data relating to commercial items to data for the same or similar items during a relevant time period.~~

~~(ii) The contracting officer must, to the maximum extent practicable, limit the scope of the request for information relating to commercial items to include only information that is in the form regularly maintained by the offeror as part of its commercial operations.~~

~~(iii) The Government must not disclose outside the Government information obtained relating to commercial items that is exempt from disclosure under 24.202(a) or the Freedom of Information Act (5 U.S.C. 552(b)).~~

**DRAFT**
Final Panel Working DRAFT
December 2006

# CHAPTER 1A

# COMMERCIAL PRACTICES

## REPORT OF THE ACQUISITION ADVISORY PANEL

December 2006

## OBSERVATION: IMPACT OF FUNDING DELAYS

Although the Panel's Report makes no recommendations in this area, we believed that we should note our concern about the impact of the appropriations process on the acquisition system. Many Panel witnesses, both government and contractor, noted problems caused for meaningful acquisition planning, requirements development, and competition by uncertain funding that is limited to annual appropriations. Virtually every commission that has looked at the acquisition process has noted this point. Given the Constitutional and statutory issues involved, the Panel did not believe that we had the resources to make recommendations. Nonetheless, because of the obvious impact of these issues on acquisition practices, the Panel offers the following observations with the hope that a future Panel may be given the capacity to study this matter with the aim of making meaningful changes.

### Federal Procurement Problems Resulting From Delays In Federal Procurement Officials Receiving Spending Authority

Each year, after the federal budget and appropriations processes are completed, federal procurement officials are allocated specific amounts of money to be expended on government programs for which they are responsible. Generally, the procurement officials must then reconcile spend plans against actual dollars appropriated to determine the best and most efficient course of action for that fiscal year. Once procurement officials decide how the allocated amounts of money will be most efficiently used, they then perform all necessary steps (such as perform competitions or justify sole-source procurements) in order to obligate those funds, *i.e.*, enter binding agreements that will result in the outlays of funds, either immediately or in the future, before the end of the end of the fiscal year.

Contracting inefficiencies resulting from the one-year nature of most government procurement have been noted in previous studies and reports regarding federal contracting, are the subject of substantial debate, and are discussed in other sections of this Report. Even taking the notion that most appropriations will continue to be annual as a given, however, the problems associated with yearly contracting have been exacerbated in recent years by the growing length of time required to complete the congressional budget and appropriations processes, as well as the uncertainties resulting from the DoD's increasing dependence on supplemental appropriations. Uncertainty regarding when final appropriations will occur and how much will be allocated for specific programs decreases the amount of time in which procurement officials can complete their yearly tasks. That delay and uncertainty also reduce the efficiency of that spending.

#### A. Legal Requirements That Must Be Completed Before Federal Money Can Be Obligated

Federal law requires that before the procurement officials may begin their annual task of determining the most efficient manner to spend government funds allocated to certain programs, numerous steps must be completed by the Nation's political leaders and the heads of the various Departments and Agencies. A general understanding of the steps that must occur before

procurement officials may obligate government funds will be helpful in understanding the problems described below.

At the conclusion of the annual congressional budget and appropriations processes, 13 appropriations bills are enacted to fund the government's discretionary spending for the next fiscal year.[1] Technically, federal funds are made available for obligation and expenditure by procurement officials by means of those appropriations acts (or by other legislation, such as supplemental appropriations) and the subsequent administrative actions that release appropriations to the spending agencies.[2] The Executive Branch process required to release those funds to the spending agencies (and to procurement officials) requires several separate steps.

Congressional appropriations must first be apportioned by the Office of Management and Budget (OMB). Apportionments are plans to spend resources provided by law. The apportionment system distributes budget authority by time periods (usually quarterly) or by activities, and is "intended to achieve an effective and orderly use of available budget authority and to reduce the need for supplemental or deficiency appropriations."[3] Thus, for instance, if Congress appropriates a certain amount of money for a given program, OMB generally will require that specified percentages of the appropriated amount be spent each quarter. Mechanically, the apportionment process begins when the appropriations bill is enacted and an affected spending agency submits a Form SF 132 to OMB, seeking approval for the proposed spending plan. OMB then considers and approves that plan, occasionally with limitations or restrictions. This process generally takes from one to three weeks.[4]

At the same time OMB is receiving, considering, and approving agencies' apportionment requests, the Treasury Department has a separate process by which it issues warrants authorizing spending. The appropriations legislation designates an amount of money that will be provided to the relevant "appropriations account" maintained by the Treasury Department, and the Treasury warrant is required before the funds that are appropriated to a specific account can be obligated.

After the apportionment and warranting processes are complete, authority to spend appropriated amounts is provided to the relevant Department or Agency. A series of steps must occur within the Department or Agency before the procurement official ultimately receives authority to obligate funds. For instance, in the Department of Defense, the funds must be

---

[1] Although the result of the presidential and congressional budget processes are discussed here, the details of those processes are beyond the scope of this discussion, because they occur before the Executive Branch allocates the money and provides authorizations to procurement officials. The congressional budget process is described at http://budget.senate.gov/republican/major_documents/budgetprocess.pdf, and the appropriations process is explained at http://appropriations.senate.gov/budgetprocess/budgetprocess.htm. A flow-chart explaining the overlap between the budget and appropriations processes can be found at http://budget.senate.gov/republican/analysis/budgetprocess.pdf.

[2] III GAO, *Principles of Federal Appropriations Law*, ch.1, at 1-2.

[3] *Id.* at 1-31.

[4] *Id.*; 31 U.S.C. §§ 1511-16.

released by the Office of the Secretary of Defense, (2) allocated by the Secretary of the relevant Service; and (3) sub-allocated (or allotted) by the Comptroller of the relevant program authority.[5] Each of those administrative approvals can be delayed or can, sometimes unexpectedly, involve holding back some portion of the funds apportioned to the program. After these steps are completed, the relevant program management office is authorized to obligate the funds to specified programs activities and execute agreements to spend the money. Although there is more variation in the length of time required to complete the different Department's and Agencies' release and allocation processes, those processes generally require approximately three weeks to complete. Thus, the overall apportionment, release, and allocation process requires approximately six weeks from the date the appropriations bill is enacted until the procurement official is empowered to obligate funds.

### B. The Decreasing Amount Of Time Available To Obligate Federal Funds Resulting From Delays In The Appropriations Process

Federal procurement officials do not know the precise amount of money their programs will be finally provided in any given year until the congressional budgeting and appropriations processes, *and* the Executive Branch apportionment, release, allocation, and any sub-allocation processes are all completed. Although the congressional appropriations processes should be completed before the beginning of the fiscal year,[6] in practice, they may not be finalized until several months of the fiscal year have passed. Although some necessary spending occurs in the interim pursuant to continuing resolutions, agencies generally may not spend, or commit themselves to spend, money in advance of or in excess of appropriations.[7]

Although procurement officials may experience substantial delay before the annual spending may be initiated, the date at the end of the fiscal year by which most funds must be obligated is inflexible. Many appropriations acts expressly provide that the appropriations are annual (or 1-year) appropriations, and all appropriations are presumed to be annual, unless the relevant appropriations act expressly provides otherwise.[8] "If an agency fails to obligate its annual funds by the end of the fiscal year for which they were appropriated, they cease to be available for incurring and recording new obligations and are said to have expired."[9] In addition, if money is not obligated, the potential to use those funds "may not be extended beyond the fiscal year for which [the appropriation] is made absent express indication in the appropriation act itself."[10]

In sum, procurement officials are caught in a bind. They do not control when the congressional and Executive Branch processes will ultimately release funds for obligation, but

---

[5] *See* 31 U.S.C. §§ 1513(d), 1514.
[6] *See, e.g.*, OMB Circular No. A-11, § 10.5 (available at http://www.whitehouse.gov/omb/circulars/a11/current_year/a11_toc.html).
[7] The Antideficiency Act, 31 U.S.C. § 1341.
[8] 31 U.S.C. § 1301(c); III GAO, *Principles of Federal Appropriations Law*, ch.5, at 5-4.
[9] III GAO, *Principles of Federal Appropriations Law*, ch.5, at 5-6.
[10] *Id.* at 5-5; 71 Comp. Gen. 39 (1991).

regardless of when that authority arrives, most of the money must be obligated by the end of the fiscal year. As a matter of standard operating procedure, procurement officials are warned that they will never receive the money for which they are responsible as quickly as they expect, and once the funds are received, they must be executed quickly or be lost.

During hearings and as part of other information gathering, the Panel received numerous complaints from procurement officials that, in practice, the amount of time available for obligating funds has been declining during recent years. Procurement officials generally perceive that this tightening of the annual schedule results in inefficiencies.

To analyze the source and extent of the delay in delivering spending authority to procurement officials, as explained above, there are two potential sources: (1) the congressional budget and appropriations processes, or (2) the Executive Branch apportionment and allocation processes.

Although the Executive Branch processes require some decision-making with respect to difficult or disputed apportionment or allocation issues, these processes appear to operate more mechanically than the congressional budget process. This results, in part, from the fact that the projections which were used to formulate the congressional budget originate in the spending agencies,[11] and those agencies monitor the congressional budget and appropriations processes closely. In short, Executive Branch procurement officials become adept at obtaining authorization to obligate funds as soon possible following final appropriation. Moreover, technology expedites the apportionment and allocation processes, as the relevant forms are submitted electronically to OMB and the relevant agencies.[12] Approvals from OMB generally follow within one to three weeks of submission of an apportionment requests,[13] and from our discussions with relevant officials, there is no reason to believe that inordinate delays occur during the agencies' allocation processes.

The delay experienced by procurement officials with respect to receiving final authorization to obligate monies needed to operate government programs – and the decreasing amount of time they have to complete their annual procurement responsibilities – appears to result primarily from the congressional budget and appropriations processes. During the past ten years, there have been years in which the appropriations process experienced particularly severe delay. For instance, for fiscal year 2003, 11 of the appropriations bills were completed on February 20 – four and one-half months into the subject fiscal year – and were enacted as part of a large omnibus bill.[14] But even putting aside the worst years, the trend is clearly toward delayed completion of the appropriations process. For instance, for fiscal years 2004-2006, the median

---

[11] *See* OMB Circular A-11, § 10.5.
[12] For instance, a SF 132 form proposing an apportionment plan must be submitted by the spending agencies as part of an Excel spreadsheet. *See* OMB Circular A-11, § 121 (available at http://www.whitehouse.gov/omb/circulars/a11/current_year/s121.pdf).
[13] *See* OMB Circular A-11, § 10.5.
[14] *See* http://thomas.loc.gov/home/approp/app03.html.

completion date for appropriations bills was December 1; in contrast, the median completion date for the years 1997-1999 was more than one and one-half months earlier, October 13.[15]

In addition to the increasing delays in finalizing appropriations legislation, Congress' increasing use of supplemental appropriations to fund substantial parts of DoD's budget are causing difficulties with planning and executing procurements efficiently. Officials interviewed by the Panel explained that the delays with respect to when the Global War on Terrorism (GWOT) funding will be enacted each year, and uncertainty as to the final amount of that funding, are causing extreme difficulties for procurement officials. For instance, in fiscal years 2002, 2003, 2005, and 2006, supplemental appropriations were enacted during the second half of the year and provided a substantial part of the total budget of significant offices within DoD. That money then had to be obligated by September 30, causing a rush to execute those procurements at the last minute.

### C. Effect Of Decreasing Amount Of Time To Obligate Funds And Procedures Procurement Officials Use To Mitigate The Negative Effect Of Appropriation-Related Delay

Among other negative effects resulting from delays in receiving final authorization to obligate funds in a given fiscal year, and uncertainty regarding the amount of those funds, are at least three major problems: (1) procurement officials believe they are unable to efficiently begin work on annual procurements until later in the year; (2) they have substantial uncertainty related to the amount and timing of supplemental appropriations needed to fund program activities; and (3) the compression of the schedule in which procurement decisions can be made results in inefficient year-end spending.

First, it must be noted that previous procurement panels have recognized that funding delay and instability are substantial factors reducing the efficiency of government procurement. For instance, in 1986, the Packard Commission complained:

> [D]efense managers and defense procurement personnel around the world must implement late congressional decisions after the fiscal year has started. They are confronted with numerous changes that alter and delay their program plans, schedules, and contract decisions. This instability, in turn, spreads outward to the defense

[15] *See* Exhibit __ (tracking annual information available from Congress' "Thomas" site, http://thomas.loc.gov/home/approp/app07.html, and, for earlier years, from the *Congressional Quarterly Almanac*); *see also* Exhibit __ (illustrating data from Exhibit __). This analysis is admittedly imperfect, as it does not adjust (or weight) the appropriations bills by size. For instance, the Defense appropriations are by far the largest and generally are among the earliest appropriations bills completed. In addition to the notion that other spending departments and agencies should not be given short shrift merely because their spending requirements are relatively small, the Defense Department's reliance on supplemental appropriations for substantial parts of its funding in recent years presents different, pressing problems.

> industry, whose investment and production plans must be hastily adjusted annually as a result of late congressional appropriations.[16]

As demonstrated above, the problem identified by the Packard Commission has become more substantial over time.[17]

In most years when the appropriations bills are not completed by the beginning of the fiscal year, the government does not shut down. Generally, the government continues to operate under a continuing resolution, which is a stop-gap legislative measure that does little to mitigate the harm of delayed final appropriations.

When operating under a continuing resolutions, a department or agency can spend money at a rate set by an OMB formula, which requires spending at a smaller daily rate than the agency expended money during the previous year.[18] Although the operations of the Department or Agency continue, continuing resolutions result in what officials interviewed by the Panel referred to as "procurement paralysis." Procurement officials are not, by law, permitted to execute contracts and obligate funds until the appropriation bill is signed. Because they do not know when that enactment will occur – or whether the amount requested for a program will be appropriated – procurement officials generally refrain from beginning competitions, even though such preparatory activities will be required (assuming the funds are appropriated) and are permissible while operating under a continuing resolution. In sum, procurement officials tend to "sit on their hands," understandably waiting until the uncertainty is resolved – as opposed to potentially wasting effort on procurements that cannot be completed if not funded in the appropriation bill.

Second, as noted above, since the events of September 11, 2001, Congress has appropriated a substantial part of DoD's overall budget as part of supplemental appropriations legislation. Procurement officials interviewed by the Panel explained that Service Commands are declining to release part of the funds needed by procurement officials responsible for various programs (*i.e.*, holding back part of sub-allocations) until they know the total amount of funding that will be provided in the GWOT supplemental appropriation. Procurement officials, in turn, have tended to exacerbate the problem, as we are informed they tend to decline to obligate funds until they know exactly how much will be allocated to the program for the year. Because the GWOT supplemental appropriations have been enacted relatively late in the recent fiscal years, the delayed obligations that have resulted have required procurement officials to engage in a "mad scramble" to execute contracts at the end of the fiscal year.

---

[16] President's Blue Ribbon Commission On Defense Management (Packard Commission), A Quest for Excellence, at 22 (1986) (available at www.ndu.edu/library.pbrc/36ex2.pdf).

[17] Indeed, the January 2006 *Defense Acquisition Performance Assessment Report* explained (at p.74) that when interview respondents (from government and industry) "were asked to identify areas" of concern that were not addressed by that Panel's initial study areas, "the area most identified, by a factor of three to one, was 'budget and funding instability.'"

[18] *See* OMB Circular A-11, § 123. When the final appropriation is executed, spending under the continuing resolution ultimately has to be reconciled with the spending permitted by the final appropriation.

Third, there is a general understanding among procurement officials that the compression of the amount of time during which procurement decisions can be made is resulting in less than optimal procurement decisions ultimately being made. Although one would likely assume that attempting to effect a significant percentage of a program office's contract execution in a relatively short amount of time at the end of the year would result in inefficient decisions, the Government Accountability Office has noted that it previously "conducted several studies of year-end spending and has consistently reported that year-end spending is not inherently more or less wasteful than spending at any other time of the year."[19] However, it must be noted that the most recent GAO study was performed in 1998,[20] before the substantial delays in appropriations legislation described above, and before the substantial supplemental appropriations being used for a substantial percentage of DoD's total funding. In light of these recent developments, the Panel believes that the large volume of procurement execution being effected late in the year is having a negative effect on the contracting process and is a significant motivator for many of the issues we have noted with respect to, among other things, lack of competition and poor management of interagency contracts.

[19] III GAO, *Principles of Federal Appropriations Law*, ch.5, at 5-17 (citing, among others, *Federal Year-End Spending: Symptom of a Larger Problem*, GAO/PAD-81-18 (Oct. 23, 1980)).
[20] *See id.* (citing *Year-End Spending: Reforms Underway But Better Reporting and Oversight Needed*, GAO/AIMD-98-185 (July 31, 1998)).