

COMPETITION REQUIREMENTS UPDATE

This memorandum updates the article, Competition Requirements in Public Contracting: The Myth of Full and Open Competition, published in the FEDERAL CONTRACTS REPORT on July 17, 1995. The purpose of the update is to obtain reasonable assurance that there have been no major changes in the rules and practices in competition in government contracts expressed in the article subsequent to its 1995 publication.

In view of the time and budget constraints, this update will discuss only the sections of the article that could be relevant to the issues involving public-private competition; more specifically, the issue of substituting the competition provisions of FAR Part 15 for the current provisions of OMB Bulletin A-76 in public-private competition.

The headings in this memorandum will correspond to headings in the article. Much of this update will involve citation of subsequent decisions that confirm the views expressed in the article.

BASIC COMPETITION REQUIREMENTS

Rules of Competition

As a general rule, a procuring agency must give sufficient detail in a solicitation to enable competitors to compete intelligently and on a relatively equal basis. Jones, Russotto & Walker, Comp. Gen. No. B-283288.2, 99-2 CPD ¶ 111 at 5; ARAMARK Services, Inc., Comp. Gen. No. B-282232.2, 99-1 CPD ¶ 110 at 5-6. This means that offerors must be treated equally and be provided with a common basis for the preparation of their proposals. Lance Ordnance, Inc.,

Comp. Gen. No. B-281342, 99-1 CPD ¶ 23 at 3; Electronic Design, Inc., Comp. Gen. No. B-279662.2 et al., 98-2 CPD ¶ 69 at 10. A solicitation that does not set forth a common basis for evaluating offers, which ensures that all firms are on notice of the factors for award and can compete on an equal basis, is materially deficient. Lloyd H. Kessler, Inc., Comp. Gen. No. B-284693, 2000 CPD ¶ 96 at 3. However, there is no legal requirement that competition be based on plans and specifications that state the work in such detail as to eliminate completely all risk or remove uncertainty from the mind of every prospective offeror. Braswell Services Group, Inc., Comp. Gen. No. B-278521, 98-1 CPD ¶ 49 at 3.

The requirement to treat offerors equally includes the requirement to evaluate offers even-handedly against common requirements and evaluation criteria. Nations, Inc., Comp. Gen. No. B-280048, 99-2 CPD ¶ 94 at 6; Tidewater Homes Realty, Inc., Comp. Gen. No. B-274689, 96-2 CPD ¶ 241 at 3-4. When competitors have different reasonable assumptions as to what is required, such as when the solicitation is ambiguous, the result is unequal competition, which deprives the Government of the full benefits of competition. Allied Signal, Inc., et al., Comp. Gen. No. B-275032 et al., 97-1 CPD ¶ 136 at 11. The requirement to compete on an equal basis applies to public-private competition, Trajen, Inc., Comp. Gen. No. B-284310 et al., 2000 CPD ¶ 61 at 4, and even to the acquisition of commercial items, Metfab Engineering, Inc., et al., Comp. Gen. No. B-265934 et al., 96-1 CPD ¶ 93 at 2-3.

In preparing a solicitation, a contracting agency must specify its needs in a manner designed to achieve full and open competition. Winstar Communications, Inc. v. U.S., No. 98-480C, 17 FPD 107 (Fed. Cl. Sept. 9, 1998) at 3; Specialty Diving, Inc., Comp. Gen. No. B-285939, 2000 CPD ¶ 169 at 3. However, an agency is not required to neutralize the competitive advantage that a potential offeror may have over others by virtue of its own particular

circumstances, such as prior or current government contracts, where the advantage did not result from unfair motives or action on the part of the Government. Electronic Design, Inc., Comp. Gen. No. B-279662.5, 99-1 CPD ¶ 103 at 6.

The Comptroller General holds that the competitive advantage an incumbent contractor may have from contract performance is not an unfair or improper competitive advantage. PRC, Inc. – Recon., Comp. Gen. No. B-274698.4, 97-2 ¶ 10 at 2-3. An incumbent contractor may possess unique advantages and capabilities due to its prior experience, and the Government is not required to attempt to equalize competition to compensate unless there is evidence of preferential treatment or other improper action. Crofton Diving Corp., Comp. Gen. No. B-289271, 2002 CPD ¶ 32 at 6. Thus, an agency is not required to structure its procurements in a manner that neutralizes the competitive advantage that incumbent contractors may have. CW Government Travel, Inc., Comp. Gen. No. 283408 et al., 99-2 CPD ¶ 89 at 7.

Contracting officials have a duty to promote and provide for competition and to obtain the most advantageous contract for the Government. Precision Logistics, Inc., Comp. Gen. No. B-271429, 96-2 CPD ¶ 24 at 5. In fact, contracting officials must act affirmatively to obtain and safeguard competition. National Aerospace Group, Inc., Comp. Gen. No. B-282843, 99-2 CPD ¶ 43 at 8-9. Contracting agencies have broad discretion in determining their minimum needs and the best method of accommodating those needs, and the General Accounting Office will not question those determinations unless the record clearly shows they lack a reasonable basis. OPS, Inc., Comp. Gen. No. B-271835, 96-2 CPD ¶ 50 at 4. When a solicitation provision relates to human safety or national defense, it may be written to achieve not just reasonable results but the highest possible reliability and effectiveness. Caswell International Corporation, Comp. Gen. No.

B-278103, 98-1 CPD ¶ 6 at 3; Mossberg Corporation, Comp. Gen. No. B-274059, 96-2 CPD ¶ 189 at 2.

It has long been considered a fundamental rule of competitive government procurement that all offerors be provided a common basis for submission of proposals. Canberra Industries, Inc., Comp. Gen. No. B-271016, 96-1 CPD ¶ 269 at 4; Meridian Management Corporation, et al., Comp. Gen. No. B-271557 et al., 96-2 CPD ¶ 64 at 5. There was a significant rewrite of FAR Part 15 in 1997 published in FAC 97-02, 62 Fed. Reg. 51224 (Sept. 30, 1997). One change made in connection with that rewrite was an amendment to FAR Part 1 which states that “all contractors and prospective contractors shall be treated fairly and impartially but need not be treated the same.” FAR 1.102-2(c)(3). This provision allowing competitors to be treated differently clearly is subject to abuse, and many members of the procurement community believe that it is contrary to the Competition in Contracting Act’s mandate for “full and open competition” as well as principles of fundamental fairness.

Solicitations must include a statement of all significant factors and significant subfactors which the agency reasonably expects to consider in evaluating bids or proposals. 10 U.S.C. § 2305(a)(2)(A)(i); 41 U.S.C. § 253a (b)(91)(A). As required by FAR 15.305(a), agencies must evaluate competitive proposals solely on the factors and subfactors specified in the solicitation. D.F. Zee’s Fire Fighter Catering, Comp. Gen. No. B-280767.4, 99-2 CPD ¶ 62 at 6. Procuring agencies must evaluate proposals on the basis of the factors and subfactors disclosed in the solicitation and do not have the discretion to announce one evaluation scheme and then follow another in the actual evaluation. Analytical & Research Technology, Inc. v. U.S., No. 97-380C, 16 FPD 119 (Fed. Cl. Sept. 18, 1997) at 18-19; AudioCARE Systems, Comp. Gen. No. B-283985, 2000 CPD ¶ 24 at 4. This rule relates to the fundamental requirement that offerors

must be advised of the basis upon which their proposals will be evaluated. Rockwell Electronic Commerce Corporation, Comp. Gen. No. B-286201 et al., 2001 CPD ¶ 65 at 5.

The Government is obligated to consider offers in an honest and fair manner. CCL Service Corp. et al. v. U.S. et al., Nos. 98-664C, 98-692C, 18 FPD 62 (Fed. Cl. May 10, 1999) at 18. It is fundamental that the agency must evaluate offers even-handedly against common requirements in evaluation criteria. Pulau Electronics Corporation, Comp. Gen. No. B-280048.4 et al., 99-2 CPD ¶ 99 at 7. Contracting officers have the affirmative responsibility under FAR to assure that contractors receive impartial, fair, and equitable treatment. FAR 1.602-2(b); DGS Contract Service, Inc. v. U.S., No. 98-891C, 18 FPD 28 (Fed. Cl. Mar. 8, 1999) at 16.

Adequacy of Competition

The Competition in Contracting Act of 1984 requires contracting agencies to obtain full and open competition through the use of competitive procedures, the dual purpose of which is to ensure that a procurement is open to all responsible sources and to provide the Government with fair and reasonable prices. Navistar Marine Instrument Corp., Comp. Gen. No. B-277143.2, 98-1 CPD ¶ 53 at 3. Full and open competition is obtained when all responsible sources are permitted to submit sealed bids or competitive proposals. All Cape Corp., Comp. Gen. No. B-275736, 97-1 CPD ¶ 119 at 2-3. An agency meets the statutory requirements for competition when it makes a diligent, good-faith effort to comply with the statutory and regulatory requirements regarding notice of the procurement and distribution of solicitation materials and it obtains a reasonable price. Aluminum Specialties, Inc. et al., Comp. Gen. No. B-281024, 98-2 CPD ¶ 116 at 2.

PERMISSIBLE RESTRICTIONS ON COMPETITION

General

Procuring agencies are required to specify their needs in a manner designed to permit full and open competition and may include restrictive requirements only to the extent they are necessary to satisfy the agencies' legitimate needs (or as otherwise authorized by law). C. Lawrence Construction Co., Comp. Gen. No. B-289341, 2002 CPD ¶ 17 at 3; CHE Consulting, Inc., et al., Comp. Gen. No. B-284110 et al., 2000 CPD ¶ 51 at 4; Chadwick-Helmuth Co., Comp. Gen. No. B-279621.2, 98-2 CPD ¶ 44 at 3. Even the solicitation's evaluation factors and subfactors must be tailored to the specific acquisition. Sea-Land Service, Inc., Comp. Gen. No. B-278404.2, 98-1 CPD ¶ 47 at 6.

Experience

An agency may require competitors to have particular experience if such requirement is reasonably related to the agency's minimum needs. Industrial Maintenance Services, Inc., Comp. Gen. No. B-261671 et al., 95-2 CPD ¶ 157 at 1-2. In one case, the GSA required a security guard service contractor to demonstrate a minimum level of experience with contracts of a similar size and nature, and the agency ultimately required offerors to have had two similar contracts in the past five years. The Comptroller General said that he saw no basis to question the agency's position that such requirement was necessary to demonstrate a "minimally adequate track record." Integrity International Security Services, Inc., Comp. Gen. No. B 276012, 97-1 CPD ¶ 157 at 3. The agency's discretion to impose such requirements extends to determining whether key personnel need to have experience with work of a specific nature to be performed under the solicitation. Systems Application & Technologies, Inc., Comp. Gen. No. B-270672, 96-1 CPD

¶ 182 at 3. The agency discretion to require specific experience could have a significant impact on public-private competitions.

Bundling and Total Package Procurement

Bundled, consolidated, or total-package procurements combine separate, multiple requirements into one contract and, thus, have the potential for restricting competition by excluding firms that can furnish only a portion of the requirement. The Small Business Act, 15 U.S.C.A. § 631(j)(3), states that, to the maximum extent practicable, each agency shall avoid unnecessary and unjustified bundling of contract requirements that preclude small business participation in procurements as prime contractors. S&K Electronics, Comp. Gen. No. B-282167, 99-1 CPD ¶ 111 at 4-5; The Urban Group, Inc. et al., Comp. Gen. No. B-281352 et al., 99-1 CPD ¶ 25 at 9. When a bundled or consolidated agency requirement is challenged, the agency must respond with an explanation of its need for the consolidation. Phoenix Scientific Corp., Comp. Gen. No. B-286817, 2001 CPD ¶ 24 at 13-14. A consolidated or bundled requirement will be upheld only where it is shown to be necessary to meet the agency's needs. Pemco Aeroplex, Inc., Comp. Gen. No. B-280397, 98-2 CPD ¶ 79 at 8-9; Malone Construction Co., supra, at 2-3. The justification can involve factors such as reduction in the civilian workforce and decreases in government funding. Phoenix Scientific Corp., supra, at 12. The Comptroller General reviews bundling or consolidation of solicitation requirements to determine whether the agency's approach is necessary to satisfy the agency's needs. Virginia Electric & Power Co., et al., Comp. Gen. No. B-285209 et al., 2000 CPD ¶ 134 at 11. The Comptroller General will show deference to agencies' determination of their requirements, but those agency claims must be properly documented and reasonably related to the bundled or combined requirement. Pemco Aeroplex, Inc., supra, at 12-13. The same general rules apply to total

package procurements. Sprint Communications Co., Comp. Gen. No. B-262003.2, 96-1 CPD ¶ 24 at 10.

Contractor Qualifications

Because qualification requirements are inherently restrictive, an agency may use such provisions only where they comply with certain notice requirements imposed by the Federal Acquisition Regulation, including written justification for the requirement and an opportunity for qualification before award by publication of a notice. Gentex Corp., Comp. Gen. No. B-371381, 96-1 CPD ¶ 281 at 4. Qualification requirements often relate to testing or other quality assurance demonstrations that must be completed before the award of the contract. There is no requirement that an agency delay a procurement in order to provide a potential offeror an opportunity to demonstrate its ability to become qualified. Aircraft Braking Systems Corp., Comp. Gen. No. B-261968, 95-2 CPD ¶ 224 at 4-5.

Geographic Restrictions

Agencies may properly restrict procurements to offerors within a specified geographical area if the restriction is reasonably necessary for the agency to meet its minimum needs. American Connecting Source d/b/a Connections, Comp. Gen. No. B-276889, 97-2 CPD ¶ 1 at 3. In one case involving publications, the agency justified the requirement for a geographical restriction on the basis that a government representative would need to be present at the contractor's production facility for each of 16 press runs. The agency said it needed the ability to "reach out and touch someone." The Comptroller General concluded that the geographic restriction was unobjectionable. Thorner Press, Inc., Comp. Gen. No. B-283545, 99-2 CPD ¶ 83 at 4.

Other Restrictions

Another restriction that may be of particular interest in public-private competitions relates to minimum wages. In General Security Services Corp., Comp. Gen. No. B-280959 et al., 98-2 CPD ¶ 143 at 3-4, the agency specified minimum wages for evaluation purposes as a means to achieve a stable workforce without the disruption of a wage reduction. The Comptroller General found the approach unobjectionable in that it would eliminate the direct cause of prior labor difficulties that had been experienced. The Comptroller General said it would preclude the most experienced officers from having their wage rates lowered. The pricing methodology used in the case was described as essentially a “normalization” of cost with respect to a specific price factor. Normalization (generally applicable to cost-reimbursement contracts) involves the measurement of at least two offerors against the same cost standard or baseline in circumstances where there is no logical basis for differences in approach (or in situations where insufficient information is provided with proposals, leading to the establishment of a common “should have bid” estimate by the agency). Id. at 4.

EROSION OF COMPETITION REQUIREMENTS

Specifications

The determination of the Government’s needs and the best method for accommodating these needs are generally the responsibility of the contracting agency, and the Comptroller General will review such determinations only to confirm that they are reasonably based. Bannum, Inc., Comp. Gen. No. B-289707, 2002 CPD ¶ 61 at 3; Schering Corp., Comp. Gen. No. B-286329.3 et al., 2001 CPD ¶ 19 at 5. The adequacy of the agency’s justification for its requirements is ascertained through examining whether the agency’s explanation is reasonable;

that is, whether the explanation can withstand logical scrutiny. LBM Inc., Comp. Gen. No. B-286271, 2000 CPD ¶ 194 at 3. Specifications must be free from ambiguity and describe the minimum needs of the procuring activity accurately; however, there is no legal requirement that the specifications remove all uncertainty from the mind of prospective offerors. Jones, Russotto & Walker, Comp. Gen. No. B-283288.2, 99-2 CPD ¶ 111 at 5.

Evaluation Method

The Comptroller General's view is that an agency's method of evaluating the relative merits of competing proposals is a matter within the agency's discretion, because the agency is responsible for defining its' needs and the best method for accommodating them. Crofton Diving Corp., Comp. Gen. No. B-289271, 2002 CPD ¶ 32 at 10. Therefore, source selection officials in a negotiated procurement have broad discretion in determining the manner and extent to which they will make use of the technical and cost evaluation results. Creative Apparel Associates, Comp. Gen. No. B-275139, 97-1 CPD ¶ 65 at 6. Agencies have broad discretion in selecting evaluation factors appropriate for an acquisition. Oceanometrics, Inc., Comp. Gen. No. B-278647.2, 98-1 CPD ¶ 159 at 3-4; Staber Industries, Inc., Comp. Gen. No. B-276077, 97-1 CPD ¶ 174 at 2. An agency's source selection plan is an internal agency instruction and, as such, does not give outside parties any rights. Centech Group, Inc., Comp. Gen. No. B-278904.4, 98-1 CPD ¶ 149 Note 4 at 7.

The minimum requirements for requests for proposals are contained in FAR §§ 15.203 and 15304. One requirement is that "factors and significant subfactors that will be used to evaluate the proposal and their relative importance" be included in the RFP. FAR 15.203(a)(4). The Comptroller General's position is that an agency may properly disclose the relative weights

of evaluation factors in the solicitations simply by listing the factors in descending order of importance, provided that one of the factors is not weighted disproportionately to the others. Braswell Services Group, Inc., Comp. Gen. No. B-276694, 97-2 CPD ¶ 18 at 5-6. If a solicitation does not indicate the relative weights of technical and price factors, the Comptroller General will presume that they were of equal weight. Intermagnetics General Corp., Comp. Gen. No. B-286596, 2001 CPD ¶ 10 Note 7 at 8; Carol Solomon & Associates, Comp. Gen. No. B-271713, 96-2 CPD ¶ 28 Note 2 at 2. In other words, if the relative weights are not stated, they are considered to be of equal importance to each other. Ogden Support Services, Inc., Comp. Gen. No. B-270354, 96-1 CPD ¶ 175 Note 2 at 2; Hellenic Technodomiki S.A., Comp. Gen. No. B-265930, 96-1 CPD ¶ 2 Note 1 at 1.

As indicated above, source selection plans provide internal agency guidelines and, as such, do not give outside parties any rights. M-Cubed Information Systems, Inc., Comp. Gen. No. B-284445 et al., 2000 CPD ¶ 74 Note 2 at 6; Northrop Grumman Corp., et al., Comp. Gen. No. B-274204 et al., 96-2 CPD ¶ 232 at 10. Alleged deficiencies in the application of an agency's evaluation plan, therefore, do not provide a basis for questioning the validity of the award selection. GCI Information Services, Inc., Comp. Gen. No. B-282074, 99-2 CPD ¶ 2 at 4. Agencies are not even required to disclose evaluation guidelines for rating proposal features as more desirable or less desirable because they are not required to inform offerors of their specific rating methodology. Olympus Building Services, Inc., Comp. Gen. No. B-285351 et al., 2000 CPD ¶ 178 at 5.

Inasmuch as the source selection plans are internal documents, an award cannot be questioned even if the agency deviates from its' own source selection plan. Ameriko, Inc., Comp. Gen. No. B-272989, 96-2 CPD ¶ 167 Note 3 at 3. Undisclosed formulas for rating proposals

need not even be disclosed, and the use of price scoring formulas is relatively common. Heimann Systems, Inc., Comp. Gen. No. B-272182, 96-2 CPD ¶ 120 at 4. Agency check lists made to identify certain features of proposals that are particularly desirable do not even have to be disclosed to offerors. Lexis-Nexis, Comp. Gen. No. B-260023, 95-2 CPD ¶ 14 at 7.

One method of evaluation that is particularly subject to favoritism and abuse is the so-called “consensus” evaluation method under which evaluators meet as a group, discuss the merits and weaknesses of each offeror’s proposals, and then collectively agree on a single numerical consensus score. See LB&B Associates, Inc., Comp. Gen. No. B-281706, 99-1 CPD ¶ 74 at 6. Even if individual evaluators initially score proposals, a consensus score need not be the same as the score initially made by the individual evaluators. Andrulis Corp., Comp. Gen. No. B-281002.2, 99-1 CPD ¶ 105 at 4-5. The Comptroller General consistently holds that there is nothing inherently objectionable in an agency’s decision to develop a consensus rating. Alcan Environmental, Inc., Comp. Gen. No. B-275859.2, 97-1 CPD ¶ 139 Note 5 at 5. The Comptroller General’s view is that, when a consensus method is utilized, the final rating often differs from the ratings given by individual evaluators because such discussions generally operate to correct mistakes or misperceptions that may have occurred in the initial evaluation. Resource Applications, Inc., Comp. Gen. No. B-274943.3, 97-1 CPD ¶ 137 at 5; Roy F. Weston, Inc., Comp. Gen. No. B-274945 et al., 97-1 CPD ¶ 92 Note 7 at 4-5. When an agency does use a consensus evaluation, the consensus evaluation is controlling, and the fact that there may be inconsistencies among the individual evaluator’s findings is irrelevant in assessing the reasonableness of the overall evaluation. SWR, Inc., Comp. Gen. No. B-286229 et al., 2000 CPD ¶ 196 Note 5 at 6.

Undisclosed Evaluation Factors

The 1995 article discusses the history of the statutory requirement that all evaluation factors and subfactors be disclosed in the solicitation. It also discusses how the Comptroller General circumvented this requirement by holding that disclosure is not required if a subfactor is encompassed by, or related to, a disclosed factor. The article criticized the Comptroller General's position by pointing out that, under this logic, subfactors never would have to be disclosed because any subfactor, by definition, is reasonably related to or encompassed by the primary factor.

The Comptroller General continues to take the position that agencies are required to identify all "significant" evaluation factors and subfactors in a solicitation, but they are not required to identify all "areas of each factor" which may be taken into account, provided that the unidentified areas are reasonably related to or encompassed by the stated criteria. DSDJ, Inc., Comp. Gen. No. B-288438 et al., 2002 CPD ¶ 50 at 7; D.F. Zee's Fire Fighter Catering, Comp. Gen. No. B-280767.4, 99-2 CPD ¶ 62 at 6; Borders Consulting, Inc., Comp. Gen. No. B-281606, 99-1 CPD ¶ 56 at 1. Therefore, agencies are not required to identify all areas of each factor or subfactor which might be taken into account. North American Military Housing, LLC, Comp. Gen. No. B-289604, 2002 CPD ¶ 69 at 5; MCA Research Corp., Comp. Gen. No. B-278268.2, 98-1 CPD ¶ 129 at 8. Thus, a subfactor does not have to be disclosed if it is "reasonably related" to a disclosed factor. Olympus Building Services, Inc., Comp. Gen. No. B-285351 et al., 2000 CPD ¶ 178 at 5; JoaQuin Manufacturing Corp., Comp. Gen. No. B-275185, 97-1 CPD ¶ 48 at 2. Similarly, the subfactor does not have to be disclosed if it is "encompassed by" a disclosed factor. Mid-Atlantic Design & Graphics, Comp. Gen. No. B-276576, 98-1 CPD ¶ 132 at 3-4. The Comptroller General also has held that an area evaluation factor need not be disclosed where it is

(1) inherent in the evaluation of proposals, such as risk, Keane Federal Systems, Inc., Comp. Gen. No. B-280595, 98-2 CPD ¶ 132 at 11-12, or safety, Israel Aircraft Industries, Ltd., MATA Helicopters Division, Comp. Gen. No. B-274389 et al., 97-1 CPD ¶ 41 at 6-7, (2) implicit, DSDJ, Inc., Comp. Gen. No. B-288438 et al., 2002 CPD ¶ 50 at 7, (3) or intrinsic to the stated factors, Amtec Corp., Comp. Gen. No. B-261487, 95-2 CPD ¶ 164 at 4-5.

By way of example, the Comptroller General held that an offeror's quality assurance procedures were intrinsically related to and encompassed by the factor of "business practices." Techsys Corp., Comp. Gen. No. B-278904.3, 98-2 CPD ¶ 64 at 9. Similarly, the Comptroller General held that consideration of "organizational structure and transition/startup plan" did not have to be disclosed because they were logically related to the disclosed "staffing plan" factor. NCLN20, Inc., Comp. Gen. No. B-287692, 2001 CPD ¶ 136 at 2. In one protest involving an A-76 cost comparison study, the Comptroller General said it was proper for an agency to evaluate technical or price proposals against an undisclosed reasonable estimate of the appropriate staffing needed to perform the solicitation requirements where the RFP notified offerors that staffing was an area of evaluation. Gemini Industries, Inc., Comp. Gen. No. B-281323, 99-1 CPD ¶ 22 at 3.

Subjective and Unnecessary Evaluation Factors

The quality of competition in Government contracting has continued to erode because of the continued use of subjective evaluation factors as well as evaluation factors that have little relationship to the ability of the offeror to perform the contract. The use of subjective factors permits an agency to influence the outcome of the competition without risk of a successful protest inasmuch as that there is no objective standard against which the evaluation can be measured.

The use of such subjective factors creates circumstances that competition is intended to avoid (favoritism, fraud, overspending, etc.). Examples of such subjective factors include (1) user friendliness, Infection Control and Prevention Analysts, Inc., Comp. Gen. No. B-238964, 90-2 CPD ¶ 7 at 6, (2) aesthetics, Global Industries, Inc., Comp. Gen. No. B-270592.2 et al., 96-2 CPD ¶ 85 at 2, (3) plan for contract management and contract operation, Hughes STX Corp., Comp. Gen. No. B-278466, 98-1 CPD ¶ 52 at 2, (4) employee appearance, Scheduled Airlines Traffic Offices, Inc., Comp. Gen. No. B-253856.7, 95-1 CPD ¶ 33 at 21-22, (5) innovation, PRC, Inc., Comp. Gen. No. B-274698.2 et al., 97-1 CPD ¶ 115 Note 13 at 14, (6) intrinsic value, National Steel and Shipbuilding Co., Comp. Gen. No. B-281142 et al., 99-2 CPD ¶ 95 at 3, (7) level of confidence, UNICCO Government Services, Inc., Comp. Gen. No. B-277658, 97-2 CPD ¶ 134 at 3-4, (8) reputation, Consultants on Family Addiction, Comp. Gen. No. B-274924.2, 97-1 CPD ¶ 80 at 1-2; and (9) vision, Research for Better Schools, Inc., Comp. Gen. No. B-270774.3, 96-2 CPD ¶ 41 at 7.

One special type of subjective evaluation factor raises additional competition problems; namely, factors related to socio-economic programs. These include factors such as support for small business, small disadvantaged business concerns, and women-owned businesses. Tide-water Construction Corp., Comp. Gen. No. B-278360, 98-1 CPD ¶ 103 at 2; mentor protégé program plans, California Environmental Engineering, Comp. Gen. No. B-274807 et al., 97-1 CPD ¶ 99 at 2; mentoring business agreements, Clean Venture, Inc., Comp. Gen. No. B-284176, 2000 CPD ¶ 47 at 2, note 1; and, even cultural diversity, Scientific and Commercial Systems Corp. et al., Comp. Gen. No. B-283160 et al., 99-2 CPD ¶ 78 at 13-14. The use of this type of factor is particularly troublesome because it can result in the Government indirectly exacting socio-economic action from contractors that could not legally be required directly.

Responsibility-Type Evaluation Factors

The quality of competition also is diluted by the use of responsibility-type evaluation factors to compare the relative ability of offerors to perform the contract satisfactorily. The procurement regulations provide that contracts should be awarded only to “responsible” prospective contractors. FAR § 9.103(a). The general standards of responsibility are set forth in FAR § 9.104-1 and include factors such as adequate financial resources, ability to comply with delivery or performance schedules, satisfactory record of performance, satisfactory record of integrity and business ethics, and necessary organization experience, accounting and operational controls, and technical experience to perform the contract. Factors that are used to determine responsibility also can be included as technical evaluation criteria, and proposals then may be evaluated utilizing those criteria. A.I.A. Construzioni S.P.A., Comp. Gen. No. B-289870, 2002 CPD ¶ 71 at 2; Opti-Lite Optical, Comp. Gen. No. B-281693.2, 99-2 CPD ¶ 20 at 5; Dual, Incorporated, Comp. Gen. No. B-280719, 98-2 CPD ¶ 133 at 8.

Examples of responsibility-type factors that have been used in the evaluation of proposals include (1) business systems, Keane Federal Systems, Inc., Comp. Gen. No. B-280595, 98-2 CPD ¶ 132 at 8; (2) compensation levels, E.L. Enterprises, Inc., Comp. Gen. No. B-271251.2, 96-2 CPD ¶ 29 at 3-4; (3) compensation plan, ENMAX Corp., Comp. Gen. No. B-281965, 99-1 CPD ¶ 102 at 9-10; Chek F. Tan & Co., Comp. Gen. No. B-277163, 97-2 CPD ¶ 66 at 3-4; (4) computer systems, Matrix International Logistics, Inc., Comp. Gen. No. B-272388.2, 97-2 CPD ¶ 89 at 2-3; (5) continuity of service, Quality Elevator Co., Inc., Comp. Gen. No. B-271899, 96-2 CPD ¶ 89 at 4; (6) contract management, Hughes STX Corp., Comp. Gen. No. B-278466, 98-1 CPD ¶ 52 at 2; (7) corporate experience, Computer Systems Development Corp., Comp. Gen. No. B-275356, 97-1 CPD ¶ 91 at 4; Loral Systems Co., Comp. Gen. No. B-270755,

96-1 CPD ¶ 241 at 5; (8) efficiency, Systems Research and Applications Corp. Comp. Gen. No. B-257939.5, 95-1 CPD ¶ 214 at 7; (9) electronic data interchange, Randolph Engineering Sunglasses, Comp. Gen. No. B-280270, 98-2 CPD ¶ 39 at 2; (10) equipment, ATLIS Federal Services, Inc., Comp. Gen. No. B-275065.2, 97-1 CPD ¶ 84 at 2; (11) experience, GCI Information Services, Inc., Comp. Gen. No. B-282074, 99-2 CPD, ¶ 2 at 5; Food Services of America, Comp. Gen. No. B-276860, 97-2 CPD ¶ 55 at 4; (12) financial capability, Deployable Hospital Systems, Inc. – Reconsideration, Comp. Gen. No. B-260778.4, 96-2 CPD ¶ 6 Note 3 at 3; (13) key personnel, SWR Inc., Comp. Gen. No. B-286044.2 et al., 2000 CPD ¶ 174 at 3-4; (14) management, Ocean House Builders, Comp. Gen. No. B-283057, 99-2 CPD ¶ 53 at 1-2; (15) management plan, Davis Rail and Mechanical Works, Inc., Comp. Gen. No. B-278260.2, 98-1 CPD ¶ 134 at 2; Quality Elevator Co., Inc., Comp. Gen. No. B-271899, 96-2 CPD ¶ 89 at 5-6; (16) managerial capacity, International Resources Group, Comp. Gen. No. B-286663, 2001 CPD ¶ 35 at 2; (17) plant, equipment, and tools, Hadley Exhibits, Inc., Comp. Gen. No. B-274346, 96-2 CPD ¶ 172 at 1; (18) vendor relationships, Telestar Corp., Comp. Gen. No. B-275855, 97-1 CPD ¶ 150 at 2; and (19) ISO certification, LBM Inc., Comp. Gen. No. B-286271, 2000 CPD ¶ 194 at 4-5.

Exceeding Government Requirements

When the Government establishes its' requirements in a solicitation but then evaluates offers by giving extra evaluation credit to "exceeding" those requirements, offerors cannot compete on an equal basis because they do not know what they are competing for or what they are competing against. Nevertheless, it has become a common feature of government procurement for the agency to reserve the right to give evaluation credit for features that exceed the Government's objectives, Engineered Air Systems, Inc., et al., Comp. Gen. No. B-283011 et al., 99-2

CPD ¶ 63 at 3, or that exceed the technical requirements of the solicitation, CVB Company, Comp. Gen. No. B-278478.4, 98-2 CPD ¶ 109 at 6. In other solicitations, the offerors are instructed to provide information to assess the degree to which the proposal “enhances” the performance of each system above the minimum requirements. Mathews Associates, Inc., Comp. Gen. No. B-270210, 96-1 CPD ¶ 103 at 2. As an example, in Heimann Systems, Inc., Comp. Gen. No. B-272182, 96-2 CPD ¶ 120 at 1-2, the RFP requested offers for x-ray screening units. The solicitation set forth additional evaluation points for the degree to which the system’s performance and features exceeded the specifications in areas such as resolution and penetration. When offerors are allowed to submit proposals that are evaluated on exceeding the agency’s requirements to an undefined extent, it is difficult to conclude that the agency has met its obligation to advise offerors of the basis on which their proposals will be evaluated. See ACS Systems & Engineering, Inc., Comp. Gen. No. B-275439.3, 97-1 CPD ¶ 126 at 3.

Impact on Small Business Concerns

Government agencies have been able, effectively, to bypass the Small Business Administration’s program for certificates of competency by the use of responsibility-type evaluation factors. The type and number of the responsibility-type evaluation factors discussed above illustrates that this practice continues to have a prejudicial effect on small business concerns that cannot effectively compete against competitors with more equipment, more financial resources, more experience, and a greater scope of past performance.

The Minimum Needs Doctrine

Although the reasoning of and justification for the “minimum needs doctrine” continues, it has effectively disappeared from the types of challenges to government purchases. Basically,

this means that the Comptroller General defers to the agencies' determination of their own "needs." As stated in the 1995 article, this practice has led to sharply reduced competition and led to the anti-competitive practice discussed above, including undisclosed evaluation factors, evaluation of an offeror's proposal to exceed the Government's requirements, and the comparative evaluation of responsibility factors.

Source Selection

Source selection officials have broad discretions to determine the manner and extent to which they will make use of the technical and price evaluation results in negotiated procurements. Ready Transportation, Inc., Comp. Gen. No. B-285283.3 et al., 2001 CPD ¶ 90 at 12. The determining element is not the difference in technical merit, per se, but the contracting agency's judgment concerning the significance of that difference. Ares Corp., Comp. Gen. No. B-275321 et al., 97-1 CPD ¶ 82 at 10-11. The Comptroller General consistently holds that the evaluation ratings and scores are only "guides" to assist source selection officials in evaluating proposals. National Steel and Shipbuilding Co., Comp. Gen. No. B-281142 et al., 99-2 CPD ¶ 95 at 15. The Comptroller General holds that source selection officials are not bound by the recommendations or evaluation judgments of lower-level evaluators but may make their own judgments, subject to the tests of rationality and consistency with the evaluation factors stated in the solicitation. Jason Associates Corp., Comp. Gen. No. B-278689 et al., 98-1 CPD ¶ 67 at 5-6. Essentially, the Comptroller General states that the propriety of a comparative evaluation turns not on the difference in technical scores and ratings, per se, but on whether or not the source selection officials' judgment regarding the differences in the competing proposals was reasonable and adequately justified in light of the evaluation scheme in the solicitation. ATA Defense Industries, Inc., Comp. Gen. No. B-282511 et al., 99-2 CPD ¶ 33 at 12. There is not even a requirement for

source selection officials to quantify the dollar value of the benefits associated with a proposal rated technically superior to a lower priced offer. WPI, Comp. Gen. No. B-288998.4 et al., 2002 CPD ¶ 70 at 10; ECC International Corp., Comp. Gen. No. B-277422 et al., 98-1 CPD ¶ 45 at 8.

Bid Protests

As stated in the 1995 article, the bid protest system simply cannot “police” the competition requirements for government contracts in view of the subjective areas for evaluation and the broad discretion accorded to government agencies in establishing their requirements, stating the evaluation method to be used, and the actual evaluation of proposals. The best evidence of the reduced effectiveness of competition is the reduced use of sealed bidding by government agencies in the last decade as well as the reduction in the number of bid protests filed with the Comptroller General over the last few years. More and more often, unsuccessful offerors understand (or are advised by their lawyers) that the chances of winning a protest are remote in view of the “rules” of competition and the discretion accorded to the agency.

CONCLUSION

As discussed in an earlier section of this paper, the most important changes in the competition requirements in government contracts subsequent to the 1995 article were effected by the rewrite of FAR Part 15. The most significant part of these changes consists of the new provisions regarding “exchanges” between offerors and government personnel in the competitive process. These include pre-solicitation exchanges, exchanges before submission of offers, and clarification and award without discussions. They also include regulatory coverage on communications before a competitive range is determined and exchanges after the initial competitive range determination. Discussion of such exchanges is beyond the scope of an update

to the 1995 article on competition; however, a discussion of the changes made by the FAR Part 15 rewrite can be found in an article published by Federal Publications, Inc. Pactor, Shaffer, and Pirrello, The FAR Part 15 Rewrite, 98-5 Briefing Papers, Second Series (April 1998).

Another development was the adoption of the “Principles of Competition in Public Procurements” by the American Bar Association in 1998. Although most of the Principles are followed in theory by the Comptroller, several would minimize agency discretion and require disclosure of more information to competitors.