COMMERCIAL PRACTICES WORKING GROUP
FINDINGS AND RECOMMENDATIONS ADOPTED BY THE PANEL

- As of 8/29/2006 Meeting

Findings Adopted by the Panel:

F-1. Commercial "Best Practices" Generally [Adopted 21 July, 2006]

Finding: "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.

Discussion:

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 to clearly define their requirement. They use multi-disciplinary 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 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 also reserve the right to recompete before the contract has run full term.

F-2. Defining Requirements [Adopted 21 July, 2006]

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.[1] Gathering of requirements is a fundamental first step in commercial organizations' services acquisition strategy.[2] Companies with deep experience in services acquisition rate acquisition process governance as highly as selecting the provider that has the best functional expertise.[3] For buyers, detailed statements of work communicating specific contract requirements and expected levels of service quality are essential to a successful relationship with vendors.[4]

Private sector companies spend significant amounts of time and resources developing business cases for services acquisition.[5] Business case development helps to prevent 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.[6] Stated differently, total cost of service acquisition does not equal total value captured through sourcing.[7] Companies that conducted successful sourcing transactions focused on total value when planning requirements. They also used specifications with well-defined scopes of desired services.[8]

F-3. Competition in the Commercial Marketplace [Adopted 21 July, 2006]

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 its standard practice is to send RFPs to four leading vendors and holds discussions with at least two of the four.[9] Consultants recommend maintaining competition throughout the procurement process.[10]

Competition in the commercial marketplace is achieved by starting with an in-depth analysis of company needs, internal strengths and weaknesses and strategic goals.[11] The process often begins with wide-ranging requests for information ("RFIs") to gather information about

[1] Testimony of J. Menker, Concurrent Technology Corporation, May 17, 2005, p. 32 (culture change to focus on requirements definition is difficult, but the best written contract cannot fix poor requirements definition).
[2] Testimony of M. Stelzner, EquaTerra, August 18, 2005, p. 360.
[3] *Id.*
[4] Testimony of R. Miller, Proctor & Gamble, March 30, 2005, p. 80.
[5] Testimony of T. Furniss, Everest Group, March 30, 2005, p. 122.
[6] *Id.* at 121; Testimony of T. Scott, The Walt Disney Company, April 21, 2006, p. 11.
[7] Furniss, p. 116.
[8] Testimony of R. Casbon, Bayer, August 18, 2005, p. 218.
[9] Miller, p. 79.
[10] *See* Furniss, p. 142.
[11] *See* notes 1 – 32, *infra*, and accompanying text.

services and vendors available in the commercial marketplace.[12] 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.[13] 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.[14] 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 vendors understand their objectives and have profit-and-loss responsibility for their transactions.[15]

F-4. Contract Terms and Conditions Used in Commercial Contracts [Adopted 21 July, 2006]

Finding: Large commercial buyers generally require sellers to use the buyers' contracts which includes 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.

F-5. Pricing of Commercial Contracts by Commercial Buyers [Adopted 21 July, 2006]

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

[12] *See* notes 14-16, *infra*, and accompanying text.
[13] *See* notes 13, 33 – 34, 44 – 48, *infra*, and accompanying text.
[14] *See* notes 47 – 48, *infra*, and accompanying text.
[15] *See* notes 29 – 30, *infra*, and accompanying text.

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 (including a pending report by the DOD IG) show that the federal government continues to award a significant proportion of task orders noncompetitively. These noncompetitive contract actions are not limited to traditional procurements; they include commercial items services. 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.

F-6 "Commercial Practices" Adopted by the Government [Adopted 24 July, 2006]

(a) Findings: 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 differs in significant respects from commercial practice, even where government has attempted to adopt commercial approaches. Finding #10 highlighted the difference in the fiscal environment. Other reasons for this include 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 Working Group found that government practices vary from providing very structured processes on the one hand, to ill defined requirements and minimal, if any head-to-head competition on the other.

(b) Findings: 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 Sections [ ] in an effort balance corrections to the identified problems while preserving important benefits of such contract vehicles.

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

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

  Discussion:

  The Working Group noted the testimony expressing concern and criticism regarding the extremely broad scope of work in the solicitations for task and delivery order contracts.[16] The Working Group 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.[17] 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.

  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.

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

  Discussion:

  There is criticism that orders are placed under task and delivery order contracts with insufficient attention to requirements development. Testimony before the Panel by

[16] DoD IG, Audit Rep. No. 99-116, *DoD Use of Multiple Award Task Order Contracts,* pp. 4-7 (1999); GAO Rep. No. GAO/NSIAD, *Contract Management: Few Competing Proposals for Large DOD Information Technology Orders*, pp. 12-13 (2000); Testimony of Henry Kleinknecht, DOD Office of Inspector General, June 29, 2006, pp. 54-56.

[17] DoD IG, Audit Rep. No. 99-116, *DoD Use of Multiple Award Task Order Contracts,* pp. 4-7 (1999); GAO Rep. No. GAO/NSIAD, *Contract Management: Few Competing Proposals for Large DOD Information Technology Orders*, pp. 12-13 (2000); Testimony of Henry Kleinknecht, DOD Office of Inspector General, June 29, 2006, pp. 54-56.

senior agency procurement officials[18] and oversight organizations strongly indicates that these orders frequently involve insufficient requirements development.

- **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. 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.

  Discussion:

  Testimony before the Panel indicated concern that the Schedules may be used, in some instances, for large services procurements without the discipline and rigor normally provided by full and open competition.[19] Agencies placing large orders typically use a form of negotiated, best value-like process, but are not required to adhere to any particular procedures for defining of requirements, evaluating proposals, or making a source selection decision.

- **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 Working Group 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

[18] Testimony of Glenn Perry, Feb. 23, 2006, pp. 136,140-144, 146-151. Testimony of Shay Assad, Director, Defense Procurement and Acquisition Policy, June 14, 2006, pp. 25-28, 55-58, 96-97.

[19] Testimony of Glenn Perry, Senior Procurement Executive, Department of Education, Feb. 23, 2006, pp. 177-178.

Working Group believes these numbers to be understated because the numbers reflect single transactions, not the total order value (*i.e.*, base year plus options).

- **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 Working Group has reservations about whether the standards for competition are adequate.

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

- **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.

- **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 Working Group 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 Working Group finds that competition for services awards that is based

on good quality requirements definition likely will be more effective in establishing fair and reasonable prices for services on the Schedule.

F-7. Time & Materials Contracts [Adopted 21 July, 2006]

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.[20] They noted that commercial clients in-source, or bring the work in-house, rather than use T&M contracts.[21] 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…."[22] 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.[23]

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.[24] Another uses T&M contracts for unique work, such as building capital equipment that was designed internally.[25] 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.[26]

F-8. Statutory and Regulatory Definitions of Commercial Services [Adopted 21 July, 2006]

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.

[20] *See* Bajaj, pp. 203-6.
[21] *Id.* at p. 203.
[22] Bajaj at 205; Testimony of John P. McMonagle, Manager Corporate Sourcing, GE Corporate Initiatives Group, May 18, 2006, p 171.
[23] Testimony of B. Leinster, ITAA, August,18, 2005, p. 121-122.
[24] Direct communications with R. Casbon, Bayer, Spring 2006.
[25] Direct communications with R. Miller, Procter & Gamble, Spring 2006.
[26] Communications with Casbon and Miller, Spring 2006.

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 above. 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.

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 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). Therefore, the definition of commercial "services" significantly omits the phrase "of a type" used in the definition of commercial "item."

This definition for commercial services is adopted in FAR 2.101 as follows:[27]

> (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

[27] 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.

> 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).

The most critical element of this definition is that 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.[28]

F-9. Time Required for Commercial Services Contracts [Adopted 24 July, 2006] [NOTE: F-9 & F-10 have been renumbered.]

Finding: Commercial buyers can get under 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.[29]

F-10. Impact of the Annual Budget and Appropriations Processes [Adopted 24 July, 2006] [NOTE: F-9 & F-10 have been renumbered.]

Finding: A fundamental difference between the commercial and government acquisition is the fiscal environment in which decisions on acquisition processes are made. Commercial

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

[29] Testimony of B. Bajaj, TPI, August. 18, 2005, p. 192; Testimony of N Hassett, United Technologies Corporation, April 19, 2005, p. 123; Testimony of M. Bridges, General Motors Corporation, August 18, 2005, p. 191.

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 largely within fiscal boundaries set by Congress under its constitutional responsibilities through the annual budget and appropriations process. This process provides direction to federal agencies on discretionary spending for programs, but includes limits on the availability of funds for obligation under contracts as well as agency's flexibility in using funds for any purpose other than that for which the funds were specifically provided. For many agency accounts, the availability of funds is limited to one fiscal year and the ability obligate funds quickly is treated as one measure of program success both by Congress and within an agency. In contrast to commercial companies, agencies have a fundamental incentive to follow acquisition processes that allow them to obligate funding as expeditiously as possible. 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.

Recommendations Adopted by the Panel:

R-1. Definition of Commercial Services [Adopted 24 July, 2006]

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 statute defining commercial services does not include the phrase "of a type." The Working Group's research demonstrates that under basic rules of statutory construction, it is clear that where Congress used the phrase of a type for items, but not for services, it did not intend "of a type" to apply to services.[30] The Working Group proposes that the FAR simply reflect the statutory definition.

R-2. Improving the Requirements Process [Adopted 24 July, 2006]

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 bidding, and monitoring contract

[30] LINDH V. MURPHY, 521 U.S. 320, 326-330 (1997).

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 the statement of requirements by the program manager or user and the contracting officer, regardless of which type of acquisition vehicle is used. [Note that "statement of requirements" is not a term of art]

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." The Working Group's findings 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.

R-3. Improving Competition [Adopted 24 July, 2006]

(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. [Harmonize with small business recommendations]

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.[31]

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 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 applicable 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) <u>Recommendation</u>: The Panel recommends that in policy, procedures, training, and application, competitive procedures should be strengthened. 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.

<u>Discussion</u>:

Where acquisitions under interagency vehicles 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

[31] DFARS 208.405 and 216.505.

competition, but with a pre-qualified group of vendors. The Working Group 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 exception which requires advance approval of a waiver. The Working Group 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 Working Group 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.

R-4. New Competitive Services Schedule [Adopted 24 July, 2006]

Recommendation: The Panel recommends that 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 Working Group recommends that GSA be authorized to establish a new information technology schedule for professional services under which negotiation of the schedule contracts is limited to terms and conditions other than price. As part of the contract, the contractors would be required to post a current price list via GSA Advantage!. The contractors could adjust the pricing information on the website at their discretion; however, prices bid in response to a proposed order would be binding.

Any potential contractor 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. Pricing of all orders would be established based on a competitive procedure as described above (*i.e.*, through posting on e-Buy, use of "fair opportunity," or competition for large orders). This new schedule model should be reviewed in two years to see whether the process is producing competition and better pricing. If so, the Working Group believes it could then be considered for expansion.

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. Similarly, use of the Price Reduction clause today for such rates produces little useful information – the facts driving the cost of the project are the proficiency of the personnel and the mix of skills.

Under the proposed approach, the price of the order will be set by competition under the processes outlined above. 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, if the CO believes it necessary. Under this schedule

initiative, audits would more closely mirror the commercial market. Once the 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.

Currently, GSA and the contractors focus a great deal of time and energy on the negotiation of rates and audits of those rates. Under this 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 task order competition. This approach could provide a more efficient and effective program for delivering services to the federal government.

R-5. Improving Transparency and Openness [Adopted 24 July, 2006]

(a) Recommendation: Adopt the following synopsis requirements.

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 (SAT) placed against multiple award contracts.[32]

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 (SAT) placed against multiple award Blanket Purchase Agreements (BPAs).

Such notice 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 space and greater competition. Second, transparency promotes confidence in the awarding of government contracts.

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

[32] Multiple award contracts has the same meaning here as in Section 803 of the National Defense Authorization Act for 2002 (P.L. 107-107),

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 will provide public notice of the requirement, such that the government can determine that the sole source is warranted. It imposes no further restriction on urgency 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 Working Group sees no basis for not providing a debriefing to the unsuccessful offeror, 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 Working Group 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. Offers 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 task and delivery order contracts. The Working Group believes providing debriefings will increase confidence in the integrity of the procurement process.

R-6. Time & Materials Contracts [Adopted 25 July, 2006]

Recommendations: The Panel makes the following recommendations with respect to time & materials contracts. (1) Current policies limiting the use of time & materials contracts and providing for the competitive award of such contracts should be enforced. (2) Whenever practicable, procedures should be established to convert work being done on a time & materials basis to a performance-based effort. (3) The government should not award a time & materials contract unless the overall scope of the effort, including the objectives, has been sufficiently described to allow efficient use of the time & 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.

Current policies regarding contractor conflicts of interest (personal and organizational), inherently government activities, and personal services contracts should be reviewed and revised to address the wide-spread use of time & materials contracts throughout the government.

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.

R-7. Protest of Task & Delivery Orders [Adopted 25 July, 2006]

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 use of "orders" to conduct major acquisitions of complex services without review is of concern. The Working Group has obtained and analyzed data from FPDS-NG that shows a large percentage of acquisitions over $5 million being conducted as orders under IDIQ vehicles using competitive negotiation techniques to make best value type selections. It is the Working Group's view that these requirements are of sufficient significance that they should be subject to review.

R-8. Pricing When No or Limited Competition Exists [Adopted 25 July, 2006]

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 the Freedom of Information Act (5 U.S.C. 552(b)).

See proposed regulatory changes in Appendix A.

R-9. Improving Government Market Research [Adopted 25 July, 2006] [NOTE: R-9 has been renumbered.]

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 will 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.

APPENDIX A

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)).~~