

MULTIPLE AWARD SCHEDULE ADVISORY PANEL

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MEETING

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MONDAY

SEPTEMBER 22, 2008

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The Advisory Panel met in the Board Room at the American Institute of Architects, 1725 New York Avenue, NW, Washington, D.C., at 8:00 a.m., Elliott Branch, Chairman, presiding.

PRESENT

ELLIOTT BRANCH, Executive Director, Contracts  
for Naval Sea Systems Command  
LARRY ALLEN, President, The Coalition for  
Government Procurement  
ALAN CHVOTKIN, Executive Vice President and  
Counsel, Professional Services Council  
JAN R. FRYE, Deputy Assistant Secretary,

Office of Acquisition and Logistics,  
Department of Veterans Affairs  
JACQUELINE JONES, Branch Chief and Contracting  
Officer, Consolidated and Language  
Services, U.S. General Services  
Administration  
JUDITH NELSON, Industry Specialist, Office of

Acquisition Management, U.S. General  
Services Administration  
GLENN PERRY, Senior Acquisition Executive,  
U.S. Department of Education  
LESA SCOTT, Director, IT Schedule Contract  
Operations of The Integrated Technology  
Service, U.S. General Services

Administration

PRESENT: (CONT.)

THOMAS A. SHARPE, JR., Senior Procurement  
Executive, Office of Procurement  
Executive, Department of the Treasury

DEBRA SONDERMAN, Director, Office of  
Acquisition and Property Management,  
Department of Interior

THEDLUS THOMPSON, Senior Assistant General  
Counsel, U.S. General Services  
Administration

ALSO PRESENT

PAT BROOKS, Designated Federal Official

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Adjourn

1 P-R-O-C-E-E-D-I-N-G-S

2 8:17 a.m.

3 MS. BROOKS: Good morning. We are  
4 going to get started this morning. I would  
5 ask that if you have not signed in, please  
6 sign in at the desk there outside. The  
7 material on the desk there are actually copies  
8 from the material that we had on Friday. I  
9 did not get any new written comments nor are  
10 we taking oral comments -- entertaining oral  
11 comments from this point on unless the panel  
12 makes a decision otherwise.

13 Please make sure you turn off all  
14 cell phones and pagers and I think everybody  
15 is familiar with where the bathrooms and  
16 things are by now, so I'm going to turn it  
17 over to Elliott.

18 CHAIRMAN BRANCH: Thank you, Pat.  
19 Good morning everyone. I think we did some  
20 good work on Friday. We certainly came a good  
21 ways through our discussion of services with  
22 respect to what recommendations we wanted to

1 craft and offer up to the Administrator. So  
2 today, I think it's probably wise of us to  
3 focus on solutions. We've talked about  
4 solutions as being a hybrid of supplies and  
5 services so I think most of our work today  
6 will be spent on discussing the nature of  
7 solutions as offered under the schedule  
8 contract and for us to determine whether there  
9 are any recommendations that we need to make  
10 to the Administrator with respect to those  
11 funded contracts.

12           Before we do that, however, I'd  
13 just like to start and go around and query  
14 each of the panel members to see if there's  
15 any cleanup we need to do from Friday's  
16 session which dealt primarily with service  
17 contracting as we have all understood it. So  
18 I'm just going to -- I'll start with Glenn and  
19 I'll just go around and poll the panel and see  
20 if there's anything that we believe we need to  
21 discuss further before we move to the area of  
22 solutions. Glenn, anything we need to talk

1 about?

2 MR. PERRY: No.

3 CHAIRMAN BRANCH: We're good?

4 Alan?

5 MR. CHVOTKIN: Mr. Chairman, I  
6 think somewhere, it's not unique to services,  
7 it's not unique to solutions, we had in the  
8 panel discussions several interpretations and  
9 several definitions of pricing methodologies.  
10 Some believe that it is most favored customer;  
11 others highlight -- read from the FAR, talked  
12 about relationships and I think it is  
13 important that we revisit that question. It's  
14 a threshold of how the contracts are formed in  
15 the first instance, whether it belongs here or  
16 on the general views, I think we need to  
17 address that.

18 CHAIRMAN BRANCH: Okay, thank you.

19 Judith?

20 MS. NELSON: Yeah, I have just so  
21 much cleanup from Friday or going into our  
22 discussions today. I do want to preface our

1 discussion today as we go into talk about  
2 solutions. Products and services are both  
3 sold under the GSA schedule contract.  
4 Solutions, as I see -- well, solutions as are  
5 sold under the contract, are those in which  
6 professional services and commodities and/or  
7 products are mixed together into a turnkey  
8 solution.

9           There are also what might be  
10 deemed services but aren't sold as products so  
11 let's call them fixed fee services but are  
12 sold as a -- that are sold as a product. So  
13 as we work at our discussion today, I want to  
14 make sure that we're not viewing those as a  
15 product and let me give a couple of examples.

16           Training courses, that is a  
17 service but they are sold at a fixed price.  
18 Okay, a mixture of licensed software and the  
19 maintenance that would go with that, I don't  
20 mean the maintenance that you pick up the  
21 telephone and you call for regular and  
22 recurring maintenance but the maintenance that

1 gets uploaded with that maintenance. It's  
2 sold as a product. So that is not the type of  
3 solution set that we're looking at today.  
4 Those are considered under the GSA schedules  
5 as fixed fee products that can be bought at a  
6 fixed price.

7 So I just wanted to preface that  
8 as we go into today.

9 CHAIRMAN BRANCH: Thank you.  
10 Jackie?

11 MS. JONES: Yes, I am going to  
12 join in with Alan on some of the comments that  
13 he made and just say that I think that we have  
14 more work to do regarding the implications of  
15 the Price Reductions clause because it impacts  
16 how our contracts are modified. It impacts  
17 how economic price adjustments are applied, it  
18 impacts how contractors disclose their  
19 commercial sales prefaces.

20 Our solicitations are issued under  
21 FAR Part 12 and the schedules are for  
22 acquiring commercial services. The pricing is



1 negotiated based on information provided in  
2 the commercial sales practices format during  
3 the contract formation period. Pricing  
4 objectives at the contract formation are based  
5 on obtaining prices that are equal to or  
6 better than this most favored customer term  
7 that we use which becomes the basis for award  
8 customer for price tracking purposes and the  
9 purpose of that is to maintain a discount  
10 relationship.

11 Since the price reductions clause  
12 in obtaining the basis of award customer is  
13 the foundation upon which GSA prices its  
14 contracts, it's my opinion that the panel not  
15 only recommends striking the price reductions  
16 clause but also recommend alternate methods to  
17 insure that the government is achieving the  
18 best possible price at the contract formation  
19 stage.

20 During contract formation, GSA  
21 acts as a single customer that provides a  
22 gateway to doing business with the government

1 and that is for small and large businesses.  
2 So in my opinion, we still need to leverage  
3 our buying power in a manner that represents  
4 a best price that is fair and reasonable to  
5 government agencies at the contract formation  
6 level and I conclude that by saying that in  
7 Part 8.404(d) there is a caveat that states  
8 that order and activities are not required to  
9 make a separate price determination for fair  
10 and reasonable but that GSA has already  
11 determined the prices of supplies and fixed  
12 price services and rates for services offered  
13 at hourly rates to be fair and reasonable.

14 CHAIRMAN BRANCH: Thank you.

15 Debra, anything?

16 MS. SONDERMAN: Well, following up  
17 on the notion of the services sold as  
18 products, I think we may find ourselves  
19 needing to relook at motion number 6. So  
20 that's all I have to say.

21 CHAIRMAN BRANCH: Okay. Jan?

22 MR. FRYE: Nothing from me, Mr.

1 Chairman.

2 CHAIRMAN BRANCH: Lesa?

3 MS. SCOTT: No, sir, nothing at  
4 this time.

5 CHAIRMAN BRANCH: Tom?

6 MR. SHARPE: If I may share  
7 Debra's view on Motion 6. As folks know, I  
8 missed part of Friday so I'll play catch-up.

9 CHAIRMAN BRANCH: Okay, Thedlus?

10 MS. THOMPSON: I do have some  
11 questions, well, actually some concerns, I  
12 guess, about recommending that the Price  
13 Reduction Clause be eliminated and my concerns  
14 have to do with what we're going to replace  
15 that clause with, sort of piggybacking on what  
16 Jackie has said. We're looking at basically  
17 now without the Price Reduction Clause, sort  
18 of a snapshot of fair and reasonable prices at  
19 the time of contract formation. And the  
20 intent of the Price Reduction Clause was to  
21 insure that, or one of the intents, that the  
22 contract provide fair and reasonable prices

1 throughout the term of the contract.

2 And without the Price Reduction  
3 Clause, I don't see where that ability now to  
4 state that we have fair and reasonable price  
5 in year 4 of the contract or year 5 of the  
6 contract.

7 Yes, the Price Reduction Clause  
8 may have been sort of a stick to encourage the  
9 vendor to come in and voluntarily disclose.  
10 Maybe we can think of areas where we can -- it  
11 will be more of a carrot where there would be  
12 incentive to do so, but I think it is  
13 necessary in terms of our statutory authority  
14 to insure that throughout the contract  
15 performance period, that we can say  
16 reasonably, that the prices on contract are  
17 fair and reasonable.

18 CHAIRMAN BRANCH: Okay, I want to  
19 thank the panel. Let me look at just kind of  
20 the cleanup work and I think this really falls  
21 into two pieces. And I'd like to just kind of  
22 throw that observation out there for the panel

1 and see if we can reach consensus that we're  
2 really looking at two issues. As I read this,  
3 we have the first bullet, the second bullet,  
4 the third bullet, that really deal with -- and  
5 the last bullet that really deal with the  
6 issue of if the Price Reduction Clause is gone  
7 from servicing contracting, so what then, how  
8 do you maintain the fairness and  
9 reasonableness of pricing throughout the  
10 contract term?

11 The second issue, I think really  
12 comes from I guess Bullet Number 3, if you  
13 will, which is how do you determine the price  
14 to be fair and reasonable to begin with. Do  
15 we have a consistent way of determining the  
16 price fair and reasonable to begin with? So  
17 as I read those cleanups, I guess I see the  
18 issue breaking into those two pieces. Is  
19 there a consensus amongst the panel that those  
20 are the two broad topics we need to discuss  
21 today?

22 Okay, I see head nods which are

1           inaudible indicating that we have a consensus  
2           on that, so for purposes of our  
3           transcriptionist. We will proceed to discuss  
4           those two issues. So I'll just frame, I think  
5           the first one and the one that there seems to  
6           be a lot of energy around very simply. So  
7           absent the Price Reduction Clause in services  
8           contracts, and let me qualify that by saying  
9           I think as Judith aptly pointed out, we're not  
10          talking about solutions contracts, nor are we  
11          talking about contracts in which services are  
12          sold as a product such as training, such as  
13          software maintenance for software upgrades and  
14          those sorts of things.

15                        So if we're talking about  
16          eliminating the Price Reduction Clause for  
17          services, I guess the question is, so what  
18          next? Do we need to replace the Price  
19          Reduction Clause or a mechanism that serves  
20          the purpose of the price reduction clause, and  
21          if so, with what? So I think those are our  
22          two questions on the table. Judith?

1 MS. NELSON: There are two  
2 instances within -- there are two clauses  
3 within the GSA schedule contracts at which  
4 time a contractor is required to updated their  
5 commercial sales practices. The first is at  
6 any time that a contractor comes in and  
7 requests and economic price adjustment. So  
8 when it comes to services, there are times  
9 when that becomes de facto, they have to come  
10 in. In other cases, they don't.

11 One methodology is if they come in  
12 with a commercial price list at the beginning  
13 and say that they're going to come in on an  
14 annual basis and request an adjustment, then  
15 each time they come in on an annual basis and  
16 request an adjustment, then at that time,  
17 they're going to have to disclose their new  
18 commercial sales practices or that there have  
19 been no changes to their commercial sales  
20 practices. So this would be a methodology to  
21 look at their -- whether or not the prices are  
22 fair and reasonable at that time.

1                   In another instance on  
2           professional services, and does happen on a  
3           regular basis, probably more often than the  
4           other, is that the uplift for commercial sales  
5           -- for labor rates is pre-negotiated based on  
6           a industry standard which is usually the  
7           Department of Labor and that's done at time of  
8           award. And so since this becomes the de facto  
9           in the annual basis, they don't come in and  
10          ask for an economic price adjustment.

11                   They're entitled to do that on an  
12          annual basis. And in that case, there is no  
13          redisclosure on an annual basis. The other  
14          time that a company is required to disclose  
15          their commercial sales practices is any time  
16          they come in and ask for an addition. Okay.  
17          And that clause, modification clause, requires  
18          that they disclose their commercial sales  
19          practices.

20                   Now, it is often likely that a  
21          professional services company may not come in  
22          and ask to add labor categories during the



1 period of their -- you know, the five-year  
2 period. So one of the thing that we may make  
3 a suggestion to -- suggestion in order to  
4 accommodate this if we truly believe that the  
5 Price Reduction Clause is not relevant to  
6 professional services, is to alter this to say  
7 that whether or not they are seeking --  
8 however they seek to do their economic price  
9 adjustment, is that on an annual basis they be  
10 required to re-disclose and update their  
11 commercial sales practices, because if the  
12 goal is to say that the pricing is still fair  
13 and reasonable, what we're really looking is  
14 to see whether or not they are still relevant  
15 to how they are doing business based on how  
16 they disclose their pricing.

17 I mean, I'm just throwing that out  
18 as one alternative.

19 CHAIRMAN BRANCH: Okay, I think --  
20 have we captured that? I think there's a more  
21 fundamental question, too, that we've got to  
22 answer before we look at alternatives, which

1 is do we need an alternative? You know, and  
2 I will speak for myself. And I will speak for  
3 myself from the standpoint that being a user  
4 who functions under 803, so here's our going  
5 in supposition, that labor rates really don't  
6 mean anything because labor rates do no  
7 represent pricing.

8 That if you get competition, that  
9 is now where you are shifting the burden of  
10 determining whether those prices, as they are  
11 constructed by attaching labor to labor rates,  
12 are fair and reasonable. That if you look at  
13 our motion which says that agencies will  
14 cooperate with GSA to build a system that  
15 actually reports what got bought in terms of  
16 tasks and hours and rates paid, that you  
17 really do not need to replace the Price  
18 Reduction Clause with anything because you  
19 essentially have a dynamic market in which  
20 prices are determined fair and reasonable  
21 every day.

22 So I'll just kind of put that on

1 the table but I think we need to decide before  
2 we talk about alternatives, whether we need to  
3 replace the Price Reduction Clause with  
4 anything.

5 MS. NELSON: I think, Elliott, the  
6 problem that -- it's not that we don't  
7 understand that. And I am a true believer in  
8 competition, competition and competition. I  
9 think that the problem that Thedi and Jackie  
10 and to an extent, myself are having with this  
11 is how to -- how to mesh this up with 8.4 as  
12 well as the statute that says it's GSA's  
13 responsibility to determine fair and  
14 reasonable pricing for the Federal Government.  
15 And unless the recommendation is that we alter  
16 8.4 and I still don't know what that does, you  
17 know. Thedi is going to over there and say  
18 there's still a statute.

19 CHAIRMAN BRANCH: Okay, let me see  
20 if I can get the order. I think Tom, you had  
21 your light on and the Debra and then Glenn and  
22 then Alan and then back to Thedlus who will

1 get the last word as our esteemed counsel.

2 MR. SHARPE: I know we talked  
3 about this on Friday and David cautioned us,  
4 you know, you need price to form a contract.  
5 I follow what you said, Elliott. I'm not sure  
6 if we need a price at the schedule level.

7 CHAIRMAN BRANCH: Yeah, I mean, I  
8 would agree with you. But I think I also  
9 heard David say there is this pesky thing  
10 called a statute that requires a price at the  
11 time of contract formation. So I think this  
12 is the say of doing that.

13 MR. SHARPE: Don't form a  
14 contract, form some type of agreement.

15 CHAIRMAN BRANCH: Okay. I mean,  
16 that certainly is an alternative. So let's  
17 capture that one. I think that's probably a  
18 parking lot item because I think that probably  
19 would go into the category of being related to  
20 but not directly addressed in our charter.

21 MS. THOMPSON: Yeah, that's  
22 statutory, we're talking statutory change at

1           that point because right now the statute says  
2           contracts and orders must result in the lowest  
3           overall cost alternative. So that suggestion  
4           is beyond the scope.

5                       MR. SHARPE: It wouldn't apply.  
6           There wouldn't be a contract or an order.

7                       MS. THOMPSON: But the statute now  
8           envisions a two-step process; that GSA enters  
9           into contractor based on fair and reasonable  
10          pricing or in activities, place orders  
11          underneath those contracts. It's an IDIQ.

12                      MR. SHARPE: Right.

13                      CHAIRMAN BRANCH: Okay, Debra.

14                      MS. SONDERMAN: Can we see the  
15          statutory language? We're in a situation  
16          where we're talking about something that  
17          sounds like it's very fundamental but -- and  
18          this conversation makes me feel like there's -  
19          - helps me observe that there is confusion or  
20          at least perhaps, not total unanimity within  
21          GSA about what the relationship of the Price  
22          Reduction Clause is to contract formation.

1           I understand what the relationship  
2           is to contract administration, but I'm still  
3           not clear because I've heard very different  
4           things from different people at GSA about what  
5           its relationship is to -- the relationship of  
6           the price reduction clause to contract  
7           formation and I'm still not seeing that  
8           there's any nexus with the initial  
9           determination of fair and reasonable pricing.

10           And I guess I would like to get  
11           clarification about what happens at option  
12           exercise. Because if I'm doing a contract and  
13           getting ready to do an exercise of an option,  
14           my contracting officers are required to  
15           evaluate the market to determine that the  
16           prices are still fair and reasonable before  
17           the exercise of the option. So I guess what  
18           I'm hearing GSA say is that that's not what  
19           they do when they exercise an option on the  
20           contract and so they are -- for the purposes  
21           of the tape, folks from GSA are saying that is  
22           what they do, but why do you -- so if you do

1           that, then why do you need the Price Reduction  
2           Clause?  Anyway.

3                         CHAIRMAN BRANCH:  Yeah, who's next  
4           up?  Glenn?

5                         MR. PERRY:  I was going to bring  
6           up -- I'm on the same theme as Debra.  I had  
7           not heard in previous testimony earlier, Mr.  
8           Chairman, from GSA and heard from various  
9           points.  What seems to have happened since we  
10          decided on Friday to eliminate the price  
11          reduction clause is the dependencies at  
12          contract formation on what seemed to be a  
13          linkage of regulatory or clause items.  And I  
14          would like to -- I think we ought to all see  
15          what those are now, if we're going to try to  
16          tackle this, because I'm not clear what -- I  
17          never saw -- I never connected as much as  
18          seemed to come out on Friday, the cause and  
19          effect of that particular provision.  So --  
20          and I would like to see the statute also, just  
21          so we can all be working off the same  
22          understanding, if we're going to do this.  I

1 know it's --

2 And I would also like to speak to  
3 my GSA colleagues at the table here. I think  
4 we really need to, for today, if we could, I  
5 would recommend we spend time on thinking  
6 about how it should work in order to get the  
7 fair and reasonable, versus trying to defend  
8 whatever the -- whatever the relationships are  
9 today between the different provisions during  
10 the contract formation stage. And I think  
11 we're -- I would hate to see us lose a lot of  
12 -- spend a lot of time trying to do the latter  
13 and I see us more doing what I suggested in  
14 the former. And that may -- that requires to  
15 relook at what -- how we're doing that.

16 CHAIRMAN BRANCH: Okay, thanks. I  
17 think, Alan, you have the mike next.

18 MR. CHVOTKIN: Thank you, Mr.  
19 Chairman. I put on the table the pricing at  
20 formation because I thought it was the better  
21 way to start than starting at the end of the  
22 process and working our way back. Schedules



1           are unique in many ways in the marketplace,  
2           but it's one of the only ones that I'm aware  
3           of where we make a fair and reasonable  
4           determination not only at contract formation  
5           as we do for every other contract in the  
6           federal marketplace, but also on a continuous  
7           basis.

8                         And just to remind my colleagues  
9           that what we did in the decisions on Friday  
10          was to clearly link the elimination of the  
11          Price Reduction Clause with a robust  
12          competition coupled with disclosure of prices,  
13          so that they -- at ordering, let's separate  
14          out the two types of schedule -- well, the  
15          schedules orders which are done by the  
16          ordering activities and at those order  
17          opportunities, that's when the contracting  
18          officer for the agency, whether it's Interior  
19          or Treasury or Education, would be in the best  
20          position to make the determination of fair and  
21          reasonable price on the specific order.

22                         So I think we need to move away

1 from the current paradigm, I think Glenn  
2 suggested and properly so, and look at the new  
3 construct we're putting in place. We still  
4 need to understand the basis for the  
5 contracting officer to make a fair and  
6 reasonable price determination. It was one of  
7 our recommendations for disclosure. We ought  
8 to understand what that is and I welcome the  
9 discussion about the relationship between fair  
10 and reasonable price at formation and the  
11 price reduction clause because I don't see one  
12 but that's the -- those are the two points of  
13 importance.

14 I think we need to make sure we're  
15 clear at the front end and probably little  
16 reason to keep that continued review of fair  
17 and reasonable all the way through until you  
18 get to the option period and then that's a new  
19 award and properly so. You make and fair and  
20 reasonable determination for an option.

21 CHAIRMAN BRANCH: Lesa, did you  
22 have --

1 MS. SCOTT: Yeah, I has a couple  
2 of comments. Thank you for letting me insert  
3 in front of Thedlus. As far as -- ever since  
4 we started the panel, I've agonized over  
5 whether or not what we do in the schedules  
6 program is as Tom said, something where we  
7 could do it as an agreement or whether we  
8 should be doing it, as we do it now, as a  
9 formal contract with pricing included. And I  
10 honestly have not reached a resolution in my  
11 own mind which is why I haven't brought it up  
12 and discussed it much here.

13 My problem is operationally  
14 without pricing, we do leave, I feel  
15 personally, the client agencies really in a  
16 lurch for market research because that is some  
17 place that I know I go to regularly to look  
18 for and at least find a place to start out  
19 base-lining when I'm trying to do my  
20 government cost estimate. And I keep thinking  
21 that's one area there if we were to do  
22 agreements and not have pricing out there on

1 the GSA advantage, for example, where would we  
2 go to get our market research. That would  
3 really, really present more of a challenge and  
4 add a lot of work at the client agency.

5 That's one area where I just  
6 cannot get myself reconciled to moving back to  
7 an agreement is all that research that you  
8 need to be able to develop your IGCE.

9 And then onto the Price Reduction  
10 Clause as it relates to the formation, I'm  
11 afraid that I probably am the person who's in  
12 contrast with my colleagues. I'm not quite  
13 there either. I haven't quite found the link  
14 for formation. Administration is very clear  
15 to me exactly where the link is and what we  
16 use it for and how we use it, but I do have  
17 issues with trying to figure out how it  
18 relates at formation.

19 CHAIRMAN BRANCH: Thank you.

20 Thedlus, you get the last word here.

21 MS. THOMPSON: I know there are  
22 some questions in regards to the statutory

1 authority for the program. Obviously, GSA has  
2 their general authority in Title 40 to procure  
3 goods and services for federal agencies but in  
4 41 USC 259 as part of the competitive  
5 procedures, and I'll just -- it's pretty short  
6 so I'll just read, "The term competitive  
7 procedures means procedures under which an  
8 executive agency enters into a contract  
9 pursuant to full and open competition. Such  
10 term also includes", and one of those is, "the  
11 procedures established by the Administrator  
12 for the multiple award schedule program of the  
13 General Services Administration if  
14 participation in the program has been open to  
15 all responsible sources and orders and  
16 contracts under such procedures result in the  
17 lowest overall cost alternative to meet the  
18 needs of the government".

19 So when I'm looking at the  
20 program, I always look at it in the confines  
21 of this authority. So most of my comments, 90  
22 percent of my comments will probably be with

1           this framework in mind, that the orders and  
2           contracts must result in the lowest overall  
3           cost alternative, which is why I'd indicated  
4           about, you know, the need for statutory change  
5           if we were going to BOAs or some other type of  
6           vehicle.

7                           CHAIRMAN BRANCH:  Yeah, I guess,  
8           I'm with my other colleagues here and the  
9           analogy that -- first of all, I you know, will  
10          concede that if you wanted to go to a basic  
11          agreement or a BOA, you'd certainly have to  
12          seek statutory change.  But going to, I think  
13          the question that we started with, the analogy  
14          I would draw would be to a non-IDIQ type  
15          contract.

16                          When I enter into a non-IDIQ type  
17          contract and I make a determination that the  
18          price is fair and reasonable, and then the  
19          next day some thing dramatic happens in the  
20          commodities market, I don't get a second bite  
21          of the apple.  I've signed an agreement that  
22          says I'm going to pay this price for fair

1 services rendered.

2 Now, if that contract has an  
3 option, as Debra points out, then I have a  
4 requirement to go survey the market before I  
5 exercise that option, and to insure that those  
6 prices are still fair and reasonable. So to  
7 the extent that GSA, and I think they do, make  
8 a determination based on the tools of analysis  
9 that they have at hand, the commercial sales  
10 practices data and other things, they clearly  
11 make a determination at the time of contract  
12 formation, that the price is fair and  
13 reasonable.

14 But I read nothing in the  
15 regulation, not do I read anything in the  
16 statute that says that is a continuing duty of  
17 GSA. The paradigm that I think we advanced  
18 on Friday was that we will insure that those  
19 pricing -- that the pricing is fair and  
20 reasonable through the operation of  
21 competition at the ordering level and that if  
22 you advance a system in which we accumulate

1 ordering data at the time of option exercise,  
2 GSA actually has a more powerful tool to  
3 obtain price concessions from the contractors  
4 and without the price reductions clause,  
5 because you have an obligation before you  
6 exercise an option on any contract to survey  
7 the market.

8 And it's at that point in time  
9 that you should seek adjustments in price or  
10 rates in this case, from the contractors based  
11 on the tools that you have at hand. So I  
12 guess I for one, and perhaps I'm a little  
13 dense here, but I do not understand the role  
14 that the price reductions clause plays at  
15 contract formation any more than say the  
16 reduction costs for non-current cost and  
17 pricing data plays at contract formation.

18 It certainly plays at contract  
19 administration but not at formation. So I  
20 guess I'm kind of curious why we keep going  
21 back to this issue except that we've been  
22 doing business this way for some time and



1           we're, perhaps, grieving over not doing  
2           business this way.

3                       MS. JONES:  Elliott, when I came  
4           in earlier, I passed a copy of the Price  
5           Reduction Clause  to you.  And I think it  
6           would benefit the panel to take a look at  
7           that, to see the impact that it does have on  
8           contract formation.  I think I mentioned this  
9           on Friday that it does not have an impact --  
10          the Price Reduction Clause does not have an  
11          impact in terms of GSA negotiating pricing and  
12          establishing fair and reasonable pricing.

13                      Okay, and it's really invisible to  
14          the customer.  It is inter-twined though, and  
15          I said this repeatedly on Friday.  It is  
16          inter-twined with establishing a basis of  
17          award customer and reviewing a company's  
18          commercial sales practices.  So the question  
19          is, in developing a fair and reasonable  
20          pricing determination --

21                      CHAIRMAN BRANCH:  If you can --

22                      MS. JONES:  -- at the contract

1 level --

2 CHAIRMAN BRANCH: Before you go  
3 on, if you'll indulge me for a minute --

4 MS. JONES: Sure.

5 CHAIRMAN BRANCH: Could you help  
6 me to understand the last thing you just said  
7 because I guess this is kind of where I fall  
8 off of the logical path. So how -- help us  
9 understand as an operational contracting  
10 officer, how the price reductions clause  
11 impacts the contracting officer's up-front  
12 analysis with respect to commercial sales  
13 price practices and picking the tracking  
14 customer, because I guess that's where I kind  
15 of lose your thread.

16 MS. JONES: Okay, basically, when  
17 you are negotiating a contract, the first  
18 thing we do is gather commercial sales  
19 practices information to see what prices the  
20 contractor is selling their services for in  
21 the general marketplace. Okay. Then we  
22 collect information on who is getting that

1 contractor's best price. The contractor is  
2 supposed to submit that information and we  
3 make a determination in terms of the pricing  
4 that that contractor's -- and I'm not going to  
5 use the word "most favored customer", but the  
6 customer that's getting that contractor's best  
7 price. We look at that in relation to what  
8 the contractor is offering GSA in relation to  
9 what they're selling it -- what they're  
10 selling their services for in the general  
11 marketplace, okay.

12 What we do is we negotiate to  
13 align the GSA scheduled pricing with that best  
14 customer's pricing, okay, and that may be  
15 different from what they're selling it for in  
16 the commercial marketplace. So we establish  
17 that relationship with who is getting that  
18 contractor's best price.

19 Okay, the Price Reduction Clause  
20 only comes in, it only comes in and it only  
21 comes into play when that contractor lowers  
22 its price to that customer that's getting

1           their best price and it means that they  
2           lowered GSA's pricing as well. We're entitled  
3           to get lower pricing at that point.

4                       CHAIRMAN BRANCH: Okay, so if I  
5           could just ask another question for  
6           clarification; so that relationship as  
7           maintained by the Price Reduction Clause  
8           though only happens after a contract award,  
9           correct?

10                      MS. JONES: The relationship is  
11           established at contract formation and it's  
12           administered after contract award, okay. So  
13           I guess what I'm saying is, is that the Price  
14           Reduction Clause is enforced after contract  
15           formation but the relationship and the  
16           establishing of the scheduled prices is  
17           related to the customer that the contractor  
18           discloses to us that's getting their best  
19           price. So the enforcement part is the Price  
20           Reduction Clause and the establishment of the  
21           pricing at contract formation is centered  
22           around the information gathering.

1 CHAIRMAN BRANCH: Debra?

2 MS. SONDERMAN: So I'm trying --

3 I'm still kind of falling off the edge of the

4 pier here. Are you saying that without the

5 Price Reduction Clause, you think contractors

6 are not going to be forthright with you about

7 who that customer is that gets their best

8 pricing? Is it really an enforcement tool?

9 Is it like you know, me getting my -- the log-

10 in to my children's college account so that I

11 can see their grades in addition -- you know,

12 they tell me what their grades are but, you

13 know, under the new laws, I'm not entitled to

14 actually have access to those because it's

15 their privacy data.

16 But, you know, our contract is, I

17 pay your tuition, you give me access to your

18 grades. Well, that's our contract and it's

19 working very well, and so I guess what I'm

20 trying -- yeah. What I'm trying to discern is

21 do you think that -- is your experience that

22 if you didn't have that threat sitting out

1           there somewhere, that contractors would not  
2           actually disclose who their best -- which  
3           customers would get their best terms?

4                       MS. JONES:  And that's why it's  
5           not popular because it is punitive.  The Price  
6           Reduction Clause is punitive.  And like Thedi  
7           said, you know, maybe we can explore some  
8           options and some alternatives that  
9           incentivizes contractors to continue to give  
10          us their best price absent of the price  
11          reductions clause.

12                      CHAIRMAN BRANCH:  So what I think  
13          I'm hearing and I appreciate your explanation  
14          because this is the first time, I think, we've  
15          perhaps had clarity on this.  So I think what  
16          I'm hearing is your view of the Price  
17          Reduction Clause is that it functions in a  
18          similar manner to the defective pricing clause  
19          in sole source contracts, so that what compels  
20          a sole source offerer to fully disclose  
21          defective cost and pricing data is the threat  
22          that I will seek a price reduction after award

1 in the event that the Defense Contract Audit  
2 Agency in our case, in DoD, can go into the  
3 books, determine that there was not current,  
4 accurate and complete cost data submitted at  
5 the time of contract formation and get the  
6 adjustment.

7 So the analogy I hear you putting  
8 on the table is, if I don't have a similar  
9 sanction at the time of contract formation, I  
10 will not get good data on my commercial sales  
11 practices or the contractor's commercial sales  
12 practices unless there is a threat out there  
13 that those could be reduced after contract  
14 award. Have I finally got it?

15 MS. JONES: Yes, I think you do.

16 CHAIRMAN BRANCH: Okay, thank you.

17 No, that's -- I think that's very helpful. So  
18 I guess the question -- well, let me kind of  
19 ask the folks who share Jackie's particular  
20 discomfort about eliminating the clause. Is  
21 that your view of the world? I mean, is that  
22 the reason we ought to be maintaining that

1 clause? No, I'm asking folks that kind of  
2 share your view of things.

3 You know, is there a consensus  
4 around Jackie's reasoning for those of you who  
5 share that view, that what this clause really  
6 does is it incentivizes the contractor to  
7 engage in full disclosure.

8 MS. THOMPSON: To be honest, I'm  
9 not so much wedded to the Price Reduction  
10 Clause as I am in insuring that there's some  
11 type of tool that will continue to enable us  
12 to have fair and reasonable prices from the  
13 vendor and not after contract award, that they  
14 make some reductions in their pricing that are  
15 not passed on to GSA, which they would be or  
16 required to be under the Price Reduction  
17 Clause.

18 So if there's another mechanism  
19 that you know, the panel can come up with that  
20 would get us to the same point, that's fine.  
21 I just haven't heard it.

22 CHAIRMAN BRANCH: Well, but if



1           you're in continuous competition, you will get  
2           those prices.

3                       MS. THOMPSON: Not at the contract  
4           level.

5                       MALE PARTICIPANT: Not those  
6           prices.

7                       MS. THOMPSON: Not at the contract  
8           level.

9                       CHAIRMAN BRANCH: Okay, but I will  
10          go back to the fundamental question. So in a  
11          services contracts, why do rates matter at the  
12          contract level?

13                      MR. SHARPE: If you have rates,  
14          they have to be fair and reasonable is the  
15          problem.

16                      CHAIRMAN BRANCH: Well, at the  
17          time of contract formation. But what GSA has  
18          done is they have departed from standard  
19          contract models here because in no other  
20          contract in the Federal Government that I can  
21          think of, no other IDIQ or any other type of  
22          contract, do we go back and assure the

1 continuous fair and reasonableness of pricing.  
2 So why do we do it here? This is  
3 philosophical, I think, not regulatory or  
4 statutory. It's philosophical.

5 MS. SCOTT: We also changed Ts and  
6 Cs on a reoccurring basis. Every time we do  
7 a refresh, we change the Ts and Cs. So we  
8 have a moving contract vehicle.

9 MR. PERRY: And I believe that  
10 based on the explanation of what happens at  
11 the formation stage, is that also we're  
12 hanging our hat on the fact that you think  
13 you're getting the best prices or the best  
14 prices and based on what you ask for from the  
15 offerer, they give you what -- they have the  
16 opportunity -- they volunteer to you what they  
17 think will work in this -- whatever this  
18 environment is and I can tell you that one,  
19 you don't have any consistency across the  
20 board. You see some very -- for doing  
21 business in the federal marketplace, you see  
22 some what I consider to be -- and I'm not

1           questioning you didn't come up with a basis  
2           for it, but they just don't make sense.

3                         And all we get when we compete it,  
4           then we find the real place where the real  
5           cost is for the effort that we need, and I  
6           would go back to the statute also. Your  
7           statute talks about setting in place a  
8           structure that gets you the best -- lower  
9           cost, but that doesn't happen until you  
10          actually get to the order that's made it to  
11          the agency. So I think you have a lot of  
12          discretion about how you get there during the  
13          process and you can put things at the order  
14          level that may not have to be there at the  
15          contract formation level in order to get  
16          there.

17                        Yes, you are charged with  
18          structuring it in a way that permits us at the  
19          ordering agency, to get the lowest overall  
20          cost, but it's -- but even in today's world,  
21          that is highly dependent on your contracts at  
22          GSA for the scheduled, in and of themselves if

1           they were to stand there by themselves, is not  
2           it even in today's structure.

3                       MS. THOMPSON: I don't disagree  
4           with you in the sense that if we did have  
5           discretion in terms of the terms and  
6           conditions that are applicable to our  
7           contracts and to the program. And I think  
8           that's what we're doing. That's what we're  
9           doing here is getting recommendations on how  
10          to better the program in terms of the pricing.

11                      CHAIRMAN BRANCH: I guess, I think  
12          though, that Jackie makes a very good point  
13          and I think maybe it would be useful for us to  
14          spend some time around that. So what I hear  
15          Jackie saying is elimination of this clause  
16          really introduces moral hazard. That the  
17          vendors not have no incentives to be candid  
18          with GSA with respect to initial pricing  
19          which, in turn, then hampers the GSA  
20          contracting officer's ability to determine the  
21          price fair and reasonable.

22                      So flux on that. Is that

1 something we should be concerned with and if  
2 so, what might we do with respect to  
3 recommendations to the Administrator in  
4 insuring that we have minimized that moral  
5 hazard?

6 MS. THOMPSON: Well, actually, we  
7 do have a defective pricing clause in the  
8 contracts. And so I just want to make sure  
9 you all --

10 CHAIRMAN BRANCH: That's  
11 interesting.

12 MS. THOMPSON: We do have a  
13 defective pricing clause.

14 CHAIRMAN BRANCH: So even though  
15 we have statutorily determined it needs to be  
16 competitive contracts, we use a defective  
17 pricing clause similar to one we have in sole  
18 source?

19 MS. THOMPSON: Well, I'm not sure.  
20 I don't know which clause that you are  
21 referring to, but we have a defective pricing  
22 clause that insures that the pricing initially

1           that was given to us was current, accurate,  
2           complete, et cetera.

3                         CHAIRMAN BRANCH: Debra?

4                         MS. SONDERMAN: So is the concern  
5           -- I heard a specific nuance which you may not  
6           have intended in what you just said. You  
7           said, we have a defective pricing clause that  
8           insures that the price at the time of initial  
9           award is based on current accurate data.

10                        Is the concern that you've got  
11           information today and you're making a  
12           determination but the contractor knows that  
13           they've got a big deal coming up next week and  
14           they're going to drop their price or you know,  
15           their supply -- whatever, something is  
16           happening in their world and their actual --  
17           their cost to provide you that labor rate is  
18           going to drop and so you know, based on what  
19           they've provided you today, your defective  
20           pricing clause enables you to say, you know,  
21           "On September 22nd this is a fair and  
22           reasonable price", but they can drop their

1 price next week and they don't have to come  
2 back and say, you know, "Hey, now we've just  
3 reduced our rates by 5 percent"?

4 MS. THOMPSON: Yes, in a sense.  
5 The economic Price Adjustment Clause that we  
6 do have that allows for increases and  
7 decrease, it does state that the contractor  
8 shall submit price decreases any time during  
9 the contract period. It's a requirement in  
10 the economic price. However, currently, it  
11 goes onto to say price decreases will be  
12 handled in accordance with the provisions of  
13 the Price Reduction Clause. So that's what it  
14 says now.

15 MS. SONDERMAN: So there's a  
16 circular thing that we need to correct or that  
17 needs to be corrected by someone. So it  
18 sounds like we need to develop a  
19 recommendation that the economic price  
20 adjustment clause which sounds like it would  
21 take the place of --

22 MS. THOMPSON: The defective

1 pricing clause -- or the Price Reduction  
2 Clause if they weren't tied to each other.

3 MS. SONDERMAN: Yeah, and sort of  
4 referring to the Price Reduction Clause which  
5 --

6 MS. THOMPSON: Which wouldn't  
7 necessarily still be in existence. It could  
8 contain that information right there, sure,  
9 uh-huh.

10 CHAIRMAN BRANCH: Jackie?

11 MS. JONES: Yeah, there's another  
12 GSAM clause that is also included in the  
13 contracts titled "Price Adjustment, Failure to  
14 provide accurate information", and it goes on  
15 to say that government at its election, may  
16 reduce the price of this contract or contract  
17 mod if the CO determines after award of this  
18 contract or modification that the price  
19 negotiated was increased by a significant  
20 amount because the contractor failed to  
21 provide information required by the  
22 solicitation or submit information that was



1 current, accurate and complete or discloses  
2 changes in their pricing practices.

3 FEMALE PARTICIPANT: Does that  
4 apply to services?

5 MS. JONES: It applies to our  
6 service contracts, yes.

7 MR. SHARPE: Just a question to be  
8 sure Im following this. I hear the thing  
9 about statute. It strikes me we're still  
10 spending a lot of time talking about a price  
11 that we're not going to use. And if there is  
12 a reduction, and you're going to require  
13 competition, where does the reduction go?  
14 Where would it be rippled? How would that get  
15 returned to customers through all these  
16 competitive acquisitions under the schedules?

17 Well, then what's the point here?

18 MS. JONES: Well, because the  
19 schedule price is a ceiling price. So that if  
20 a contractor's -- if the contractor lowers the  
21 price at the schedule level, it passes onto  
22 the agencies.

1                   MR. SHARPE: You have all these --  
2                   if we follow the motion we approved, we're  
3                   going to require this competition, I guess,  
4                   there will be a lot of fixed price performance  
5                   based, right, projects? I mean, how would you  
6                   ripple the reduction back to these customers?

7                   MS. NELSON: Tom, I think that one  
8                   of the things that we've determined, or at  
9                   least we're working on an assumption at this  
10                  moment is that GSA -- one of the value adds,  
11                  it's my understanding of my experience is what  
12                  is the value adds of the schedules program is  
13                  that they are contracts and not agreements.

14                  When the agencies can use them,  
15                  the contract is in place. Now, you can go off  
16                  and you can negotiate the pricing, but you  
17                  have a base contract in place. So the terms  
18                  and conditions --

19                  MR. SHARPE: I get all that. I  
20                  understand the pricing --

21                  MS. NELSON: So we're not saying  
22                  that we'll go back, but we do have a statutory

1 and regulatory requirement --

2 MR. SHARPE: There's a lot of time  
3 being spent on this. How do the price  
4 reductions come back?

5 MR. SHARPE: They don't at this  
6 moment, but we have a regulatory requirement  
7 as well as a statutory requirement to  
8 determine fair and reasonable pricing, and I  
9 recall that you've spent a lot of time telling  
10 us and the panel that the pricing is not fair  
11 and reasonable. So what we're trying to do is  
12 establish means --

13 MR. SHARPE: That's not what I  
14 said, I think we've found the prices are not  
15 very good. I haven't gone into the files to  
16 see if the CO has done some work to say  
17 they're fair and reasonable. We're spending  
18 a lot of time on two pieces of price that I  
19 think we're planning to never use.

20 MS. JONES: The prices come back,  
21 Tom and the --

22 MR. SHARPE: To who?

1 MS. JONES: -- in a way that the  
2 contract prices are lowered under the  
3 contract.

4 MR. SHARPE: To who?

5 CHAIRMAN BRANCH: I think Tom's  
6 question is, so how does an agency customer  
7 see a benefit from that in services? You  
8 know, remember we're talking about services  
9 now, so I'm buying widgets from you, I get  
10 that. But if I'm going to put a statement of  
11 work out there and I'm going to have a  
12 competitive bid on that, I think Tom's  
13 question, not to put words in his mouth  
14 because he'll spit them out if I'm putting  
15 them in his mouth, but his question is, so how  
16 does your lowering that ceiling price in a  
17 competitive environment really inure a benefit  
18 -- or convey a benefit to the agency?

19 MS. NELSON: I'm not sure that it  
20 does. It doesn't but --

21 MR. SHARPE: Then why are we  
22 spending the time on it?

1 MS. NELSON: Because we've made a  
2 recommendation to remove the Price Reduction  
3 Clause. In that recommendation to remove the  
4 Price Reduction Clause, as a panel we have a  
5 requirement to find a way to protect the  
6 pricing. Even if it doesn't happen, we still  
7 have to make a recommendation to the  
8 Administrator what to do in its stead.

9 MS. JONES: I can answer your  
10 question, Tom, about how that impacts the  
11 Agency. What it does is it lowers the pricing  
12 at the contract level so that when a company  
13 is proposing a labor mix to an agency for a  
14 service, to perform a service, then they are  
15 providing you with a fixed price that includes  
16 a labor mix at lower labor rates.

17 MR. SHARPE: For the new work?

18 MS. JONES: Right, for the new  
19 work once we've lowered the contract price,  
20 right for the future work.

21 MR. SHARPE: Okay, this is very  
22 circular to me.

1                   CHAIRMAN BRANCH: Yeah, I guess  
2                   the question I'd follow up on is, so why  
3                   wouldn't I get that in a competitive  
4                   environment? I mean, if there are structural  
5                   issues that cause a contractor to be able to  
6                   give me lower rates, and his ability to  
7                   provide me with the best value alternative is  
8                   a combination of pricing and skills, why do I  
9                   need lower ceiling rates in the contract  
10                  vehicle itself to get the advantage of the  
11                  contractor's good fortune or intentional  
12                  action?

13                  MS. JONES: Well, as a customer  
14                  agency, like I said, we have centers of  
15                  expertise that are industry specific. So with  
16                  that being said, how would you know it as a  
17                  customer, whether or not a price for a  
18                  consultant at \$250.00 an hour is fair and  
19                  reasonable if you are not surveying the  
20                  marketplace?

21                  CHAIRMAN BRANCH: Because the  
22                  motion is to compete it.

1                   MALE PARTICIPANT: Exactly.

2                   MR. SHARPE: I think this is  
3 reaching the point where it's almost  
4 ridiculous. Maybe the motion ought to be to  
5 change the statute and quit wasting time on  
6 prices that aren't being used. How many  
7 people do we have applied to this at GSA?

8                   MS. JONES: 8.4 says that the  
9 agencies do not have to seek further price  
10 competition.

11                  CHAIRMAN BRANCH: All right, but  
12 as a practical matter, when I buy services, as  
13 a practical matter, when I buy services, I  
14 cannot rely on the regs. I would price in a  
15 vacuum, so the recommendation is to  
16 essentially change 8.4 which is within the  
17 purview of the Administrator, to require  
18 competition similar as is -- similar to the  
19 requirement imposed on DoD and Section 8.3 or  
20 803 of the National Defense Authorization Act.  
21 So this is how that works.

22                  I issue a statement of work. I

1 issue to above the staff level, all the  
2 eligible holders of that schedule, and I need  
3 to -- we're to get at least three bids. So it  
4 would strike me that the forces of competition  
5 would drive you to the best value solution,  
6 whether that's skill mix or rates or  
7 quantities of hours. And the only thing I'm  
8 ever going to do with the GSA schedule rate,  
9 I think, as Lesa observed, is formulate an  
10 independent government estimate. I'm never  
11 going to use that to price services, ever,  
12 because I just don't buy hours that way.

13 MR. SHARPE: For the market  
14 intelligence, I thought we also had a motion  
15 to start capturing prices paid.

16 CHAIRMAN BRANCH: We do, we do.

17 MR. SHARPE: I see no argument to  
18 -- as I sit here this morning, no argument to  
19 maintain prices at the GSA contract level. I  
20 don't see it. I think we should pursue the  
21 statute change. We're wasting a lot of  
22 resources.



1 MS. SCOTT: The only other option  
2 would be also for the really tiny agencies  
3 that are ordering underneath the SAT because  
4 they do have the potential to order at the  
5 full price that's on the GSA schedule. Now,  
6 should they, no, you want to do price  
7 comparison at that point, but there is the  
8 possibility.

9 MR. SHARPE: Maybe they shouldn't  
10 use schedule.

11 MS. SCOTT: They have no choice.

12 CHAIRMAN BRANCH: Well, again,  
13 maybe I'm a little dense, okay, or I've led a  
14 sheltered life but I may have, you know, I may  
15 well have, but I have never in my life seen us  
16 simply go to a schedule, pick a labor mix,  
17 apply those rates, you know, put together a  
18 spreadsheet, pick three vendors, pick their  
19 rates and say, "Okay, I want a systems,  
20 analyst, you know, a junior systems analyst,  
21 an engineering technician, a production  
22 writer, just put together a spread sheet and

1 say based on my statement of work, I know  
2 these are the guys and the quantities that can  
3 do that work and I'm going to run a pay for  
4 competition. And if we are, shame on us.

5 MS. SCOTT: Well, that's true and  
6 I can tell you I have seen it done at the  
7 small agencies.

8 MS. THOMPSON: Can I just say, you  
9 know, it's very interesting, I'm listening  
10 here about what you're talking about  
11 competition at the order level and the FAR  
12 already provides for that. I guess I've led  
13 a sheltered life, because I'm not really  
14 understanding. Exactly what you're talking  
15 about is required for quite a few of the  
16 services requirement statement of work, which  
17 are listed.

18 They require that you issue an  
19 RFQ. They require you determine a labor mix.  
20 So I'm -- it seems like we're reinventing the  
21 wheel here.

22 CHAIRMAN BRANCH: No, but I guess

1           our point would be, I mean, my point would be,  
2           if anybody wants to associate themselves with  
3           my remarks, feel free, that if I compete --  
4           well, let me go back to I guess the top level,  
5           then the rates in a GSA schedule contract as  
6           Tom aptly points out, are meaningless. They  
7           are absolutely meaningless with purpose -- for  
8           purposes of order formation.

9                            They satisfy a statutory  
10           requirement to determine a fair and reasonable  
11           price a contract for me and in a perfect  
12           world, I think Tom was absolutely right. We  
13           would dispense with rates, but we don't live  
14           in a perfect world and since we have a statute  
15           that says we have to determine price of  
16           contract formation, we've come up with this  
17           way of determining price that as a practical  
18           matter, is essentially meaningless.

19                           MR. SHARPE: Well, let's do this  
20           then, and I think David advised us on this  
21           because I think the problem with the motion,  
22           as I think -- it's correct, we need

1 competition now. The motion says, go get  
2 competition. I mean, we're saying go do what  
3 you're supposed to anyway. I think what we're  
4 dancing around is the issue of that price and  
5 why don't we follow David's advice and unique  
6 price the former contract.

7 Say the price is not reasonable,  
8 it's not fair and reasonable. Don't rely on  
9 it. Now you have to get competition.

10 MS. SCOTT: No, just call it a  
11 ceiling price and that makes it easier.

12 MR. SHARPE: Well, no, I think the  
13 requirement is to get a price fair and  
14 reasonable. What we keep dancing around is  
15 whether it's actually fair and reasonable or  
16 at least a good price, and I think we're  
17 finding it's not, so let's say it's not.

18 MS. SCOTT: I disagree with you.  
19 It's not that it's not. It's that you don't  
20 like it apparently, but the prices -- they do  
21 work very hard and what they look at when they  
22 do set that price is a different then full and

1 open as you know at the task order level.  
2 They're not doing it head on, so it is a  
3 ceiling.

4 MR. SHARPE: You're right, I don't  
5 like the price. I think the prices are high.

6 MS. SCOTT: Some of them are.

7 MR. SHARPE: Okay, I think we  
8 ought to do something about that.

9 MS. JONES: I just have a comment.  
10 When we are awarding, we are looking at the  
11 commercial sales processes overall. There are  
12 quite a few companies that only sell to the  
13 government. Those prices don't look like  
14 they're commercial rates or other companies  
15 commercial rates that are selling similar  
16 services out in the commercial marketplace,  
17 which is way more competitive than the  
18 government marketplace and I just wanted to  
19 make that point.

20 MS. SCOTT: What I see, it's more  
21 of an issue to get to motion one is that we'll  
22 need a transition period. That's what I see

1           that it requires. We have to have some  
2           process to get there. We've still got to  
3           collect all that data from those task orders  
4           having met with the wonderful data loop to  
5           help us get back to something that's much more  
6           reasonable, but we're going to need a  
7           transition period.

8                         MR. SHARPE: I don't see how you  
9           get to that. These orders are to be firm  
10          fixed price. What data are you going to get?  
11          You're going to get nomenclature project so  
12          and so and a price.

13                        MS. SCOTT: No, the plan was to  
14          capture the actual content of the task force,  
15          so you get the labor categories that are used  
16          and --

17                        MR. SHARPE: What content?

18                        MS. SCOTT: The CLINS which are  
19          the task -- which are the --

20                        MR. SHARPE: And you're going to  
21          individual price each labor CLIN? How are you  
22          going to capture it and where are you going to

1 put the contingency and the risk which is the  
2 difference between a T&M and a fixed price?  
3 Is that on a separate line or in the bill  
4 rate? What's that?

5 MS. NELSON: You can't get it.

6 MR. SHARPE: Okay, then why are we  
7 saying we're going to get it?

8 MS. NELSON: I happened -- I  
9 didn't say we're going to get it.

10 MR. SHARPE: Okay, we're not going  
11 to get it, huh?

12 MS. NELSON: I happen to know that  
13 there's a study underway right now and even  
14 those who have been in the other agencies,  
15 who've been identified to participate by  
16 another agency, and mandated to participate,  
17 have declined so you can get it.

18 MR. CHVOTKIN: Tom, I might  
19 suggest that you may never create a data base  
20 for support for that element of the  
21 recommendation was not that we would ever  
22 create a database where you could look in and

1 of itself and make that comparison, but that  
2 you could draw some comparative data, pick up  
3 the phone and make the phone call and engage  
4 in that discussion where the volume is  
5 significant, where the price estimate is  
6 significant and it's worth that additional  
7 market research. It's a starting point.

8 Right now, we have no -- there's  
9 no information of who's bought anything about  
10 any pricing about any kind of mix and that's  
11 where that will start in my view. It's not  
12 the perfect solution. It won't -- it will  
13 never get to an automated system. Gosh, I  
14 hope we never do but at least it's a starting  
15 point for information.

16 CHAIRMAN BRANCH: Okay, there's  
17 been a lot of energy spun around this topic.  
18 Glenn?

19 MR. PERRY: I just -- it's a  
20 random thought, I apologize. I have those  
21 occasionally. The other thing that while  
22 we're arguing about what we want to do or keep



1           doing whatever, something keeps circling  
2           through my mind is at GSA your capacity to do  
3           whatever is being done today or what we  
4           propose as recommendations. How are we going  
5           to handle making recommendations about sort of  
6           any issue about the capacity to do what we're  
7           recommending?

8                         I heard -- during the time, I  
9           heard, for example, this whole conversation is  
10          about well, we do this and do that and then I  
11          heard a lot of information that in the first  
12          session about, well, we only do this like once  
13          every 10 people and we're short people here  
14          and we don't really do that, a lot of that or  
15          we do part of it here in this region and  
16          another region doesn't do it, those sort of  
17          things.

18                        Are we going to -- are we dealing  
19          with anything with that or having any  
20          conversation around what we really are able to  
21          do because I think whenever we come out with  
22          recommendations, let's make sure that they are

1            recommendations that if we implement or the  
2            Administrator implemented them, it actually  
3            would come through with the full force and  
4            effect that the marketplace would know that  
5            that was what was happening and the agencies  
6            knew that was happening and could rely upon  
7            it.

8                            CHAIRMAN BRANCH:    Okay, Judith,  
9            and then Lesa.

10                           MS. NELSON:    I recommend you all  
11            send 10 percent of your 1102s and five percent  
12            of your 343s and 15 percent of your 1101s and  
13            I think we'll be fine.

14                           CHAIRMAN BRANCH:    Which way are we  
15            sending those?

16                           (Laughter and Applause)

17                           MS. NELSON:    Just send them on  
18            over to me and we'll pass them around.

19                           MS. SCOTT:    I was just going to  
20            say I would put in a recommendation that we  
21            put it into resources.

22                           CHAIRMAN BRANCH:    Yeah, I think

1           that's probably appropriate. I think that's  
2           a really good point. Is there -- there's been  
3           a lot of energy around this topic this morning  
4           and it's almost 9:30. So I would like to  
5           suggest we do this; why don't we take a 15-  
6           minute break till about 9:40 and then if  
7           anyone would like to frame a motion for a  
8           recommendation around this, the Chair will  
9           entertain it at that time. If there is no  
10          motion or the motion fails to get a second, I  
11          think we probably need to move on to the  
12          question of methodology for determining the  
13          price fair and reasonable at contract  
14          formation.

15                        So let's take a break till about  
16          20 of 10:00 and come back and pick up.

17                        (A brief recess was taken.)

18                        CHAIRMAN BRANCH: As the Chair I  
19          will entertain a motion with respect to a  
20          recommendation around this topic. Does anyone  
21          have a motion?

22                        MS. JONES: I propose the motion

1           that we explore alternatives to the Price  
2           Reduction clause.

3                         CHAIRMAN BRANCH:   Okay, so a  
4           motion has been made that we explore  
5           reductions or alternative to the Price  
6           Reduction Clause.   Given that our motions have  
7           been generally cast as recommendations to the  
8           Administrator, could I ask you to rephrase  
9           that so that we address the purpose of our  
10          meeting today, which is to make  
11          recommendations to the Administrator.   If  
12          you're simply suggesting internal to the panel  
13          that we explore alternatives to that, I think  
14          that motion is really out of order with  
15          respect to what we're doing today.

16                        MS. JONES:   Okay, do you want me  
17          to rephrase that?   That we consider making  
18          recommendations to the Administrator an  
19          alternative to the Price Reduction Clause that  
20          achieves similar or the same objectives in a  
21          manner that is non-punitive but rather  
22          incentivizes contractors to propose best

1 pricing to the Federal Government.

2 CHAIRMAN BRANCH: Okay, so we have  
3 a motion to make recommendations to the  
4 Administrator to examine alternatives to the  
5 Price Reduction Clause that achieves the same  
6 or similar objectives in a manner that  
7 incentivizes contractors. Do I hear a second  
8 for that motion?

9 (No response.)

10 CHAIRMAN BRANCH: The motion fails  
11 for lack of a second.

12 MS. THOMPSON: Oh, I was going to  
13 second.

14 CHAIRMAN BRANCH: Sorry, we have a  
15 second. Okay, Thedlus has seconded it.  
16 Discussion on that?

17 MS. THOMPSON: If I could just ask  
18 to clarify. Are you recommending that the  
19 Administrator of GSA explore alternatives? Is  
20 that what I'm hearing or are you saying that  
21 we explore alternatives here?

22 MS. JONES: I'm recommending that

1 the panel proposes to the Administrator coming  
2 up with alternatives to the price -- GSA  
3 coming up with alternatives to the Price  
4 Reduction Clause, that it achieves the same or  
5 similar objectives.

6 MS. THOMPSON: So you're saying  
7 how does it -- we're just suggesting,  
8 recommending that GSA explore.

9 MS. JONES: Yes.

10 MS. THOMPSON: Okay.

11 CHAIRMAN BRANCH: All right, so  
12 the motion on the table is that the panel  
13 would recommend that GSA explore alternatives  
14 through the Price Reduction Clause that would  
15 obtain the same or similar objectives to the  
16 current Price Reduction Clause; is that  
17 correct?

18 MS. JONES: Yes.

19 CHAIRMAN BRANCH: Okay, so the  
20 motion and we have a second for that? Any  
21 discussion around that motion?

22 MR. PERRY: I would just reiterate

1 my comment that I don't see any connection so  
2 therefore, I don't know why we're having GSA  
3 try to find an alternative to something I have  
4 not seen any data or still any explanation of  
5 what the relationship is. So I'm still not  
6 there. So that's where I'm at.

7 CHAIRMAN BRANCH: Tom?

8 MR. SHARPE: I don't see what  
9 purpose it serves. I'm still on this idea of  
10 why a price. I would separately move we make  
11 a recommendation they pursue the authority to  
12 set up agreements and get out of the price  
13 business.

14 CHAIRMAN BRANCH: Okay, why don't  
15 we defer that until the disposition of this  
16 motion? Other discussion on this motion?  
17 Yes, Debra?

18 MS. SONDERMAN: I feel like I'm  
19 standing outside Union Station looking at the  
20 flock of pigeons that's often there and, you  
21 know, when the little kids run up, the pigeons  
22 all fly up in the air and they go around in a

1 big circle and then they come right back down  
2 to the same place. So I thought we decided or  
3 we made a recommendation on Friday to get rid  
4 of the Price Reductions Clause. So I'm  
5 concerned that we are stuck in a feedback.

6 CHAIRMAN BRANCH: Other discussion  
7 on this particular motion? Hearing none,  
8 we'll put the motion to a vote. All those in  
9 favor of the motion, signify by raising their  
10 hands. All those opposed?

11 The nays have it, the motion  
12 fails. Okay, Tom, since we deferred yours the  
13 Chair will entertain a motion from you.

14 MR. SHARPE: I'm not sure exactly  
15 how to frame it, but I think the reason we  
16 keep talking about the Price Reduction Clause  
17 is we got tangled up recommending we take it  
18 out, what it would do to price, and I'm at the  
19 point where after all the sessions, I don't  
20 see the value of price at the scheduled level  
21 other than the fact it's necessary to form a  
22 contract.



1                   We've learned that there's  
2                   legislation, there's statute that says GSA is  
3                   supposed to be forming contracts, thereby  
4                   needs price, that needs to be fair and  
5                   reasonable. So I'd say we reverse that and  
6                   make a recommendation that these be agreements  
7                   and they pursue the authority to just get out  
8                   of the price business and just set up the  
9                   agreements with the terms and conditions and  
10                  past performance, et cetera, but drop all this  
11                  around price.

12                  CHAIRMAN BRANCH: So I think what  
13                  you're hearing and I will attempt to frame  
14                  this for you, so feel free to modify it, but  
15                  I hear you moving that we should make a  
16                  recommendation to the Administrator to pursue  
17                  a legislative proposal to remove consideration  
18                  of price from GSA schedule contracts for  
19                  services. Is that an accurate reflection of -  
20                  -

21                  MR. SHARPE: Yeah, and just set up  
22                  agreements.

1                   CHAIRMAN BRANCH: Okay, do I have  
2                   a second to that?

3                   (No response)

4                   CHAIRMAN BRANCH: Not having a  
5                   second to that motion, the motion fails. Are  
6                   there any other motions people would like to  
7                   put onto the table around this particular  
8                   issue? All right, hearing none, then we will  
9                   move to the second issue that we identified in  
10                  clean-up, which is what tools should GSA be  
11                  using to determine fair and reasonable pricing  
12                  at initial contract award and this was an  
13                  observation by Mr. Chivotkin that we really  
14                  ought to be looking at how we help GSA  
15                  contracting officers indeed, determine the  
16                  price fair and reasonable contract award.

17                  So I will open the floor for  
18                  discussion with this point. Alan?

19                  MR. CHVOTKIN: Thank you, Mr.  
20                  Chairman. Throughout the course of our  
21                  discussions the last few days, certainly the  
22                  hearings, I've heard that the schedules are

1 the most favored customer. They're the lowest  
2 prices. They are fair and reasonable. They  
3 are lowest overall cost alternative to the  
4 government and probably a couple of other  
5 terms in between and I think it would be  
6 valuable for this panel and again, focusing in  
7 at the stage of contract formation to  
8 reconcile those terms at least for a  
9 recommendation to the Administrator, on how  
10 the contract -- what role GSA should play with  
11 respect to pricing and how the contracting  
12 officer should go about a methodology for  
13 determining the price to be fair and  
14 reasonable in the marketplace and so that was  
15 the purpose of it.

16 I don't have a formal motion as to  
17 that point, but I wanted to at least put those  
18 other -- that context for it and I'll try to  
19 scribble one if there's other discussion.

20 CHAIRMAN BRANCH: Other discussion  
21 on this issue anyone? Let me weigh in here  
22 and then we'll give other folks an opportunity

1 to speak. I think Alan is correct. We've  
2 heard a number of terms applied to the basis  
3 of GSA pricing. We've talked about fair and  
4 reasonable. We've talked about most favored  
5 customer. We've talked about basis of award  
6 and I think all of those terms miss the point.

7 The point -- with the exception of  
8 fair and reasonable, because that is the  
9 standard by which all government contracts are  
10 priced. So I think it would perhaps be useful  
11 to focus on shaping a recommendation that  
12 establishes, if you will, a set of tools and  
13 techniques by which a contracting officer in  
14 this type of contract, which is special,  
15 determines the price to be fair and reasonable  
16 along with some kind of discussion as to when  
17 those tools, under what circumstance the use  
18 of those tools is appropriate towards getting  
19 to fair and reasonable price because in some  
20 cases it may well be the most favored customer  
21 in the commercial marketplace. In others, the  
22 most favorable customer is dealing with or

1           that company is dealing with its most favored  
2           customer on a set of terms and conditions that  
3           we could not possibly put into a government  
4           contract.

5                         You know, the example, perhaps  
6           most cited is the fact that BestBuy, you know,  
7           goes to Dell and when it gets a price for a  
8           laptop computers or a desktop computers, the  
9           assumption is there or that Dell can source  
10          those components in India or China, whereas we  
11          have the Trade Agreements Act and Buy American  
12          Act to deal with. So I think it may be  
13          appropriate to assist GSA contracting officers  
14          by offering some clarity as to what types of  
15          techniques should be used to determine a fair  
16          and reasonable price and under what  
17          circumstances they would be used. So as we  
18          discuss this and as a motion perhaps develops  
19          out of discussion, I will most likely support  
20          it. Debra.

21                         MS. SONDERMAN: This is still  
22          within the context of services and not

1 products?

2 CHAIRMAN BRANCH: Yes.

3 MR. CHVOTKIN: Mr. Chairman, just  
4 my opening of this is really I think at a  
5 higher level than tools and techniques, and I  
6 think the contracting officer's wide range of  
7 tools and techniques from personal experience  
8 to market research, to CSPs and others. I,  
9 quite honestly, believe that there is  
10 considerable ambiguity around what it is the  
11 price objective is and it was at that level  
12 that I was putting the issue on the table, not  
13 simply the tools and techniques to arrive at  
14 fair and reasonable price and if I've confused  
15 you in the past, I apologize for that but your  
16 highlighting establishing the tools and  
17 techniques to determine price is fair and  
18 reasonable, I think is a right second step.  
19 I still think there's considerable ambiguity  
20 about what the price objective is.

21 CHAIRMAN BRANCH: Point taken,  
22 Judy.

1 MS. NELSON: As a follow-up to  
2 what Alan said, I'm a little uncomfortable  
3 with the way that you were going because I'm  
4 a strong believer in allowing the discretion  
5 of the contracting officer. I also believe  
6 that there are some -- there are a great deal  
7 of methodologies in place for the GSA schedule  
8 contracting officers in place, whether or not  
9 those be examining agreements that the  
10 contractors have in place, whether or not  
11 that's market research, whether or not that --  
12 you know, there's a lot of things in place  
13 already and I'm not sure, at least in my  
14 opinion, I feel strongly that it's outside of  
15 the scope from my perspective, of the panel to  
16 get into the discretion of the contracting  
17 officer and how they should be looking at that  
18 but I do feel, along Alan's line, that we  
19 should be looking at what the negotiation or  
20 how -- what is per the regulation, the  
21 negotiation objective of the GSA schedule,  
22 whether or not that is -- and I wish that I

1 had, and maybe somebody else does or we can  
2 get ahold of it, the GSAM in front of the  
3 negotiation objective because it does have it  
4 in there, the language and we really could use  
5 it right now. Maybe someone -- the CAO's  
6 office is here and maybe someone from the  
7 CAO's office can go grab it for us from across  
8 the street because it does go to the most  
9 favored customer and what that means, not just  
10 the most favored customer but the follow-up to  
11 that, and basis of award and in order for us  
12 to have a cognitive conversation about it.

13 FEMALE PARTICIPANT: Warren is  
14 sitting behind you, let's see if we can get  
15 him to do that.

16 MS. NELSON: Well, Jason because -

17 -

18 CHAIRMAN BRANCH: Just to kind  
19 follow-up on those comments, I think a couple  
20 of things that I think Mr. Chvotkin's point is  
21 spot on, you know, it's like how do you begin  
22 with the end in mind. So it's important to



1 define the end. Let me clarify my own  
2 comments. I think that's necessary but not in  
3 the context of regulation. I was thinking  
4 more in the context of the contract pricing  
5 reference guides for example, that FAI and DoD  
6 have collaborated on for years, so that there  
7 is a clear and standard body of knowledge of,  
8 you know, the universe of those techniques so  
9 that a contracting officer now has, you know,  
10 a basis to draw on that to exercise his  
11 independent judgment because it is not clear  
12 to me after having listened to all of our  
13 hearings and testimony and after reading the  
14 written record, that GSA regions essentially  
15 apply like techniques and like circumstances  
16 or even look at the question of what the basis  
17 of award is in a similar manner.

18 And I think that is part of the  
19 issue that leads to confusion for both the  
20 ordering agencies as well as industry. So  
21 while I would agree we do not need to  
22 constrain the regulatory -- or constrain the

1           discretion of the contracting office, you  
2           know, in a regulatory manner, it would  
3           probably be helpful to put some guidance out  
4           there which all contracting officers could  
5           refer to and all reviewers could use as a  
6           standard, you know, in the contract clearance  
7           review process.

8                       MR. PERRY:  Yeah, I would say I'm  
9           very sensitive to the discretion -- you know,  
10          what we do to the discretion of the  
11          contracting officers.  My experience is  
12          though, when you go into the territory to  
13          establish a contract vehicle even within and  
14          agency, across an agency, that acquisition  
15          officials of the agency have an obligation to  
16          let people know why this is a good contract  
17          arrangement and why people should use it.  And  
18          part of that process is you have to talk about  
19          what it was you were trying to achieve as far  
20          as pricing and you also have to communicate  
21          back to the contracting workforce, what do you  
22          still need to do for the customer when

1 fashioning individual responses to  
2 requirements.

3           And I realize that it does get a  
4 little bit -- you have to sort of handle the  
5 awarding contractor officer's discretion and  
6 what their decision process but if you're  
7 going to go out and say this is what it is,  
8 and you want everybody to use it, then that's  
9 what comes with that territory. You don't'  
10 have the luxury of saying, "I'm not going to  
11 tell you".

12           Now, I'm afraid -- you know, or  
13 it's going to effect my discretion in the  
14 future whatever it is. It's out there and  
15 that's what I think we're trying to get to.  
16 I don't care. I just want us to say and I  
17 don't know if I'm really speaking your point,  
18 if it's just -- let's just consistently say so  
19 everybody, if GSA is handling all this, then  
20 everybody is working towards it. If you're  
21 really only -- if you're only spending your  
22 time working on what a good ceiling price, for

1           example, is, for the schedule price, then  
2           let's let everybody know in the system. And  
3           then everybody knows after that what it is --  
4           what GSA is going to get, how far that's going  
5           to get and then that lets you know at the  
6           agency how far you've got to go to get that  
7           end best value price.

8                         We can't have it the way it is.  
9           It's too hard today to manage the way it's  
10          going on because you don't have the  
11          wherewithal at GSA to know that, "Well, we're  
12          trying to get the cheapest most favored  
13          customer rate in Region 9, but over here in  
14          this region, based on people or whatever it  
15          is, we're only going to the -- maybe we're  
16          going to a good or a fairly good ceiling price  
17          or whatever. It's too hard to manage. Let's  
18          just simplify it, know that's what it is and  
19          that's where it cuts off and let everybody  
20          know, let the world know what that is.

21                        And I don't think you need to get  
22          into some idiosyncrasy trade-offs the CO

1           might have made with that particular -- with  
2           a particular vendor but you can -- but after  
3           going through all this, this is all it  
4           represents and let everybody know that.

5                         CHAIRMAN BRANCH:   Okay, do we have  
6           the language up?   We have the language up.   So  
7           do you want to speak to that, Judith?   All  
8           right, why don't I -- for the record, I'll  
9           simply read it aloud.   So this is 52.270 or  
10          538.270 rather, "Evaluation of multiple award  
11          schedule offerers.   538.270(a), the Government  
12          will seek to obtain the offerer's best price  
13          (the best price given to the most favored  
14          customer).   However, the Government recognizes  
15          that the terms and conditions of commercial  
16          sales vary and there may be legitimate reasons  
17          why the best price is not achieved.

18                         (b) Establish negotiation  
19          objectives based on a review of relevant data  
20          and determine price reasonableness.   (c) When  
21          establishing negotiation objectives and  
22          determining price reasonableness, compare the

1 terms and conditions of the MAS solicitation  
2 with the terms and conditions of agreements  
3 with the offerer's commercial customers. When  
4 determining the Government's price negotiation  
5 objectives, consider the following factors;  
6 (1) aggregate volume of anticipated purchases,  
7 (2), the purchase of a minimum quantity or a  
8 pattern of historic prices, (3) prices taking  
9 into consideration any combination of  
10 discounts and concessions offered to  
11 commercial customers, (4) length of the  
12 contract period, (5) warranties, training  
13 and/or maintenance included in the purchase  
14 price or provided at additional cost to  
15 product prices, (6) ordering and delivery  
16 practices, (7) any other relevant information  
17 including differences between the MAS  
18 solicitation and commercial terms and  
19 conditions that may warrant differentials  
20 between the offer and the discounts offered to  
21 the most favored commercial customers. For  
22 example, an offerer may incur more expense

1 selling to the government than to the customer  
2 who receives the offerer's best price, where  
3 the customer, e.g., dealer, distributor,  
4 original equipment manufacturer or other  
5 reseller who receives the best price may  
6 perform certain value added functions for the  
7 offerer that the government does not perform.  
8 In such cases, some reduction in the discount  
9 given to the government may be appropriate.

10 If the best price is not offered to the  
11 government, you should ask the offerer to  
12 identify and explain the reason for any  
13 differences. Do not require offerers to  
14 provide detailed cost breakdown.

15 (d) you may award a contract  
16 containing pricing which is less favorable  
17 than the best price the offerer extends to any  
18 commercial customer for similar purchases if  
19 you make a determination that both of the  
20 following conditions exist; (1) the prices  
21 offered to the government are fair and  
22 reasonable even though comparable discounts

1           were not negotiated, (2) award is otherwise in  
2           the best interest of the government".

3                         Let me react to this language.

4           What jumps out to me immediately is that this  
5           language conflates the purchase of goods and  
6           services and so I guess I will make a motion  
7           to recommend that the Administrator ask  
8           specific policy guidance for determining the  
9           fairness and reasonableness of prices for  
10          rates to be incorporated into GSA service  
11          schedule contracts, because I look at that  
12          language and essentially, as a contracting  
13          officer, I'm kind of out in the middle of the  
14          woods because I'm looking at that and I'm  
15          looking at the example cited. Most of that  
16          applies to products and not services and I see  
17          very little guidance there that applies  
18          specifically to the acquisition of services --  
19          well, I'm sorry, the contract formation of  
20          services under GSA scheduled contracts. So I  
21          think that's a first step. You know, the  
22          Administrator needs to clearly articulate the



1 policy with respect to pricing for GSA  
2 services contracts.

3 MR. SHARPE: What would you have  
4 him do different, Elliott? You still have to  
5 come up with a price.

6 CHAIRMAN BRANCH: Oh, I totally  
7 agree with you there, but there are clearly  
8 pieces in here that do not apply to service  
9 contracts if we're talking about professional  
10 services, so I wanted to make it clear now,  
11 we're not talking about the things that Judith  
12 raised at the beginning of our sessions where  
13 services are sold as a product, and I am also  
14 not talking about solutions. But if I'm  
15 talking about something like the MOBIS  
16 schedule where the IT we're schedule on buying  
17 specifically services, the idea that the  
18 offerer, you know, has a different selling  
19 expense arrangement, with the government than  
20 he may with his commercial customers, is  
21 probably not there.

22 The thoughts about dealer,

1 distributor, original equipment manufacturer,  
2 other reseller aren't there, so there are a  
3 number of things in there that deal  
4 specifically with either solutions or with  
5 products that do not deal with services as we  
6 are talking about them today. How that  
7 language would be restructured, I'm not sure  
8 because I've never awarded a GSA scheduled  
9 contract, but my initial reaction to that is  
10 a contracting officer is left to exercise  
11 perhaps more judgment than he should be in  
12 sorting out the difference, you know, as to  
13 which parts of these to apply to services  
14 contracts, to supplies, to solutions. Alan?

15 MR. CHVOTKIN: And Mr. Chairman, I  
16 agree with you. It may be that a separate sub  
17 that they choose to separate the two but also  
18 instructive in my -- as you read through  
19 that, was nowhere in that language is any  
20 direction to meet the statutory test of lowest  
21 overall cost alternative to the government.  
22 And so that's why I said at the outset, we

1 have so many conflicting pieces and so at the  
2 appropriate time, I'm happy to further  
3 discussion around your proposal and I'll  
4 support it but I think we still need to come  
5 back to the price objective and I'm happy  
6 having a discussion around lowest overall cost  
7 alternative to the government or best price  
8 given to most favored customer in a commercial  
9 market as the two twin standards for the price  
10 objective, but I think we ought to make a  
11 recommendation out of this panel if we can on  
12 one or the other or a third if appropriate as  
13 the price objective. These become then  
14 techniques on the implementation.

15 CHAIRMAN BRANCH: Judith?

16 MS. NELSON: I'm strongly in favor  
17 of your comments. I know it's not emotion yet  
18 but your reaction to the language of the  
19 regulation. The other thing that I know is  
20 out of years of experience with the regulation  
21 that has become a vast confusion with all  
22 stakeholders is the fact that the negotiation

1 objective has become most -- is interpreted  
2 often to be most favored customer. As you can  
3 see, it's parenthetically put there, offer --  
4 "the government will seek to obtain the  
5 offerer's best price", parenthetically, the  
6 best price given to the most favored customer.

7 Now, everything after that is all  
8 of the exceptions to why the government may  
9 not be able to get the most favored customer's  
10 pricing. Now, it would be wonderful in all  
11 aspects, you know, going specifically and  
12 often to Tom's remarks, that it would -- you  
13 know, to get good pricing, it would be great  
14 if we could get the most favored customer  
15 pricing and I know we're talking about  
16 services at this moment, but wouldn't it be  
17 best if we could get Dell's best pricing but  
18 often we can't.

19 Well, wouldn't it be great if we  
20 could get, you know, I don't know, Lockheed's  
21 best pricing, but we can't for numerous  
22 reasons. And a lot of the reasons that are

1 specifically laid out there. But very often  
2 whether or not it be a contracting officer,  
3 contracting specialist, the OIG or whoever it  
4 is, and at that very first sentence.

5 And so whether or not wrapped in  
6 emotion that may come forward from you  
7 regarding splitting it between professional  
8 services and products, or as a separate  
9 motion, I would like to see that somehow we  
10 clarify what that initial negotiation  
11 objective be. I have really no issue around  
12 whether or not it be most favored customer or  
13 whether it not be basis of award or it be  
14 somewhere in between those but it needs to be  
15 clearly identified what it is that negotiation  
16 objective is so that the stakeholders involved  
17 are clear what the negotiation objective is  
18 because it causes vast amounts of confusion.

19 CHAIRMAN BRANCH: Debra?

20 MS. SONDERMAN: Yes, I was  
21 standing over there reading because I wanted  
22 to see what the language in 538.271 says and

1           if you look at (c) or (3), I can't tell now,  
2           "(c) State clearly in the award document, the  
3           price, discount relationship between the  
4           government and the identified commercial  
5           customer or category of customers on which the  
6           award is predicated". So you know, it says  
7           you've got to -- that's where it says you have  
8           to determine the price is fair and reasonable.  
9           I'm sorry, and I agree that we need to  
10          distinguish -- I agree with the suggestion  
11          that we should ask the Administrator to  
12          distinguish between products and services in  
13          the -- in the language but I see the point  
14          that you're making about the confusion because  
15          the regulation essentially says both things  
16          and it's very -- it's not -- at the moment it  
17          is not transparent, certainly not transparent  
18          to customer agencies. Was it the best price?  
19          Was it one of the other -- did you award, you  
20          know, through using one of these exceptions?  
21                            And you know, if it's otherwise,  
22          you can do that if it's otherwise -- if you

1 look at the last phrase in 270, "Award is  
2 otherwise in the best interests of the  
3 government", well, you know, could be  
4 anything. And so that does make it -- I agree  
5 that makes it very challenging for all of us  
6 but from your point in awarding the schedules  
7 and from our side in using them.

8 CHAIRMAN BRANCH: Yeah, I think  
9 our motion number 3 on Friday goes directly to  
10 that point because the language in the  
11 regulation says that the award document must  
12 state that but how many of us in user agencies  
13 have ever seen the award document? So motion  
14 three recommends that GSA disclose that basis  
15 and you know, if necessary, I will -- having  
16 voted for that motion, I will move to  
17 reconsider amending that because it was my  
18 intent -- that was my motion and it was my  
19 intent that that be a public disclosure so  
20 that the agency contracting officer could see  
21 that basis of award.

22 Now, clearly that thinking went in

1 here to the regulation but it did not go far  
2 enough because we almost never see in  
3 agencies, the actual award document. We see  
4 the literature and the brochure and the  
5 ordering guides that support that award  
6 document.

7 MS. SONDERMAN: And we don't even  
8 see the terms and conditions which may differ  
9 from other things and you know, one  
10 contractor's scheduled contract, even under  
11 the same schedule may have the same terms and  
12 conditions as another. They are not available  
13 to us unless we can coerce the contractor to  
14 give them to us.

15 MS. NELSON: Debra, the terms and  
16 conditions are absolutely public and they are  
17 required to provide them to you.

18 MS. SONDERMAN: The contractors  
19 are required to provide them to you. GSA does  
20 not make them available to us in an easily --  
21 they're not --

22 CHAIRMAN BRANCH: Yeah, they are



1 not easily accessible. I can tell you haven't  
2 been a schedule contractor. You know, to get  
3 a copy, you know, kind of picking up behind a  
4 previous director of contracts, our filing has  
5 been less than robust. We determined that the  
6 region's filing has been less robust, so as  
7 far as we know, there was no conformed copy of  
8 the contract award.

9 MS. NELSON: Let me clarify -- let  
10 me just understand and then I may ask for --  
11 that the panel make a motion. Are we talking  
12 about the negotiated term and conditions of an  
13 awarded contract of a contractor?

14 MS. SONDERMAN: Uh-huh.

15 MS. NELSON: Is that a yes?

16 MS. SONDERMAN: Yes.

17 CHAIRMAN BRANCH: Debra is  
18 indicating, yes, that's what she's talking  
19 about and I would agree.

20 MS. NELSON: So when we get to  
21 making motions, is there a contract -- is  
22 there a customer of GSA that would like to

1           make a motion to the Administrator that there  
2           be an improvement in the way in which these  
3           terms and conditions be made available to  
4           GSA's customers?

5                         CHAIRMAN BRANCH: I certainly  
6           think the Chair will entertain a motion and I  
7           looks like the -- from indications of the  
8           panel a motion -- that motion will likely be  
9           made.

10                        MS. SCOTT: I was just going to  
11           add that as a contracting office making awards  
12           against a schedule, when I put in my RFQs, I  
13           always made it a mandatory requirement that  
14           the contractor provide me a copy of the  
15           complete contract as part of their package.  
16           I guess I'm looking at you guys kind of in  
17           surprise.

18                        CHAIRMAN BRANCH: Yeah, and you  
19           know, I think we probably could sit from an  
20           ordering agency perspective and have, you  
21           know, a conversation about that but I think it  
22           would likely consist of a set of war stories.

1 We probably need to keep that -- we probably  
2 need to keep the discussion at a level of  
3 abstraction removed on that one. Glenn?

4 MR. PERRY: Yeah, the clause that  
5 we were -- had up before, it just leads you --  
6 all those items are separate and they're not  
7 really tied together and they leave you with  
8 very different answers, depending on what the  
9 CO used to depend upon. I guess I would -- I  
10 really would like to see -- now we've talked -  
11 - it just needs to be redone and have some way  
12 of you know, if you don't do this, I don't  
13 know if we'll get into this. You might get  
14 into it, if you don't do this, then you have  
15 to do that.

16 Because I've heard it does, in  
17 this part and Debra found it below, but for  
18 example in the price reduction clause, it does  
19 -- there's -- the first sentence really is --

20 CHAIRMAN BRANCH: Excuse me, if I  
21 could interrupt, could we scroll MAS Price  
22 Reductions up, so that's the policy, I guess,

1           that's the policy section that drives, I think  
2           the Price Reduction Clause. I just want to  
3           give everybody the benefit to look at the  
4           prescribing reg.

5                       MR. PERRY: The customary --  
6           anyway, the thing kind of key in this was, is  
7           that absent from -- this is after you -- from  
8           price reduction, and after you make award but  
9           up front in that determination, it looks like  
10          it had to be clear, it should be in there to  
11          say someone has to say who the category of  
12          customers are and then it's sort of everything  
13          falls out of that but the aggregated purchase  
14          data is really important and I've heard --  
15          like 1, 2 and 3, I've heard we don't have  
16          anything to even do that, so those are -- 1  
17          and 2, I believe on this one, on the purchases  
18          of minimum quantity, aggregate volume,  
19          anticipated purchases, you don't even -- based  
20          on data you have, I don't think GSA can even  
21          use that most of the time.

22                       And then you prohibit at the end

1           and I have a little confusion on that because  
2           I heard we did use cost buildup where absent  
3           any other sales data you had that they would  
4           use it, but here it says "do not require  
5           offerers to provide detailed cost breakdown."  
6           So I'm not sure what's happening there.

7                         Just, there's a bunch of questions  
8           I would have if I was looking at someone's  
9           price and then looking at this, I'd have a  
10          bunch of questions about what is it absent any  
11          information, what is it and which one of these  
12          lines was it based on? And based on which  
13          line you did that on, then I could move  
14          forward and know what I still had to do. But  
15          I just can't take it from just saying, well,  
16          I meant something within this clause, so  
17          therefore, take it for whatever it is.

18                        MS. NELSON: Glenn, where it says,  
19          "do not ask the offerer to provide detailed  
20          cost breakdown", that's specific to when an  
21          offerer is working with a dealer or a reseller  
22          that provides support to them. So if you had

1 a dealer or a reseller who is doing stocking  
2 and is going to trade shows and is providing  
3 training or something like that.

4 So what they're saying is, in that  
5 case, you may -- they may offer a lower price  
6 to those companies because they are providing  
7 extra service, that the government is unable  
8 to do. The government doesn't stock. The  
9 government doesn't go to trade shows. The  
10 government doesn't do all of these things. So  
11 in that case, they're saying, "Well, you know,  
12 maybe they get an extra five percent or an  
13 extra 10 percent but what they're saying is  
14 don't ask the manufacturer to give you a  
15 breakdown, well, it's one percent for  
16 stocking, it's three percent for going to  
17 trade shows. That's what that's referring to.  
18 It's not in the cost buildup of how much a  
19 labor category is.

20 CHAIRMAN BRANCH: You know, I'm a  
21 prisoner my own experience and my experience  
22 includes having been raised by a man who

1           taught high school English for 25 years. I  
2           don't read your interpretation in the plain  
3           reading of the language. And the reason I say  
4           that is because the only, you know,  
5           prescriptive statement in there is in the  
6           first line of (7) and then the second line  
7           goes on to start, "For example".

8                         So we are now talking about  
9           examples of where there may be conditions so  
10          then the last line doesn't necessarily, as  
11          it's currently drafted, simply relay itself to  
12          the examples and as such, I would read that to  
13          be a companion to the first line of that  
14          paragraph and not to the line that precedes  
15          it.

16                        So I guess I understand it's being  
17          interpreted that way and operationally, that  
18          it may be implemented that way but this again,  
19          I think, points to why we probably need to  
20          make a strong recommendation to the  
21          Administrator that this be revised for clarity  
22          because I don't get your reading out of that

1 paragraph.

2                   You know, I get a -- you know,  
3 here's a prescriptive, here's an example of  
4 where that, you know, may indeed, that  
5 situation may occur that causes you know, you  
6 to want to analyze those differentials, and  
7 then I see a clear declarative statement at  
8 the end of the paragraph that says, "Do not do  
9 this," and I guess I kind of look at that as  
10 an absolute, so, you know, again,  
11 operationally, and perhaps correctly,  
12 contracting officers at GSA are doing what  
13 makes sense, but I guess you know, my own view  
14 is that the regulations ought to make sense  
15 upon their plain reading and I'm not sure they  
16 do here.

17                   MS. NELSON: Elliott, I'm not  
18 going to turn on my mike but could I give you  
19 the telephone number for acting Deputy IG for  
20 Audits?

21                   MS. THOMPSON: If I could just say  
22 that the GSAM is currently being rewritten, so



1 I just wanted to let you know.

2 CHAIRMAN BRANCH: Okay. Let me  
3 follow up on your comment, Thedlus. So is  
4 there anything here in the GSAM rewrite, the  
5 proposed language we ought to be looking at as  
6 we go through and make these recommendations?

7 MS. THOMPSON: I'm not familiar  
8 with what is happening right now with 538,  
9 specifically. I know that there is going to  
10 be -- it's going to be published soon. So --

11 MS. NELSON: 538 was rewritten and  
12 it went to OIRA and then -- and it's a shame  
13 that David is not here. What went to OIRA has  
14 now been pulled back because there were  
15 massive changes to it in the rewrite of it  
16 again, I mean, because there were a lot of  
17 internal comments within FAS and the CAO's  
18 office. I'm not sure if the revisions have  
19 gone to OIRA now and they are at OIRA. So  
20 assuming that they send them forward, that  
21 will go but it is the understanding of both  
22 the Administrator's office, the CAO's office

1 and FAS that what's done on the panel will  
2 work hand-on-hand with what's done there.

3 So we should go forward as that's  
4 going forward and then the two will be --

5 CHAIRMAN BRANCH: Reconciled.

6 MS. NELSON: -- reconciled.

7 CHAIRMAN BRANCH: Thank you.

8 MS. THOMPSON: If I could just  
9 make a comment to an earlier discussion that  
10 there's problems in getting copies of the  
11 contracts and every ordering activity should  
12 be receiving a price list from the vendors and  
13 you can also go on line to see the  
14 solicitations which have -- which should be,  
15 not always but they should be similar as to  
16 what's in the particular contract.

17 I get a lot of calls about that  
18 and I normally tell the ordering agencies to  
19 look on line at the solicitations and then to  
20 call the MAS contracting officer to find out  
21 exactly what's in the contract, once they have  
22 the particular contract clause in mind.

1                   CHAIRMAN BRANCH: I guess though,  
2                   it's my experience that you're continually  
3                   refreshing that solicitation and given that  
4                   you have --

5                   MS. THOMPSON: Yes.

6                   CHAIRMAN BRANCH: -- 15-year  
7                   contracts in place, 20-year contracts in place  
8                   in some cases, I guess how would an ordering  
9                   agency know which particular iteration of that  
10                  solicitation was representative of that  
11                  particular offerer's contract.

12                  MS. THOMPSON: That's where I  
13                  always recommend they go to the MAS  
14                  contracting officer who's handling that  
15                  particular contract. They have that  
16                  information.

17                  MS. SONDERMAN: They don't  
18                  necessarily provide it. That's just real  
19                  life.

20                  MS. NELSON: Mr. Chairman, can I  
21                  make a recommendation --

22                  CHAIRMAN BRANCH: Yes.

1 MS. NELSON: -- that we take a --  
2 not that it's not a critical issue, but that  
3 we take it offline and perhaps the agencies  
4 can work with my office and we can help  
5 rectify some of these issues through my --  
6 through the Office of Acquisition Management  
7 as well as make a motion through the panel  
8 because it is -- I'm glad to hear it come up  
9 in the panel but I don't know that we're going  
10 to solve it right here on the panel.

11 CHAIRMAN BRANCH: So essentially,  
12 can we agree to kind of take the operational  
13 issue of contract terms and conditions  
14 disclosure offline? Okay, because I think  
15 that's appropriate because that's blocking and  
16 tackling. That's not an issue in the play  
17 book. But I think the issue -- the issue that  
18 we probably do need to kind of go around is,  
19 what are we telling contracting officers, what  
20 kind of guidance are we giving them with  
21 respect to determine a fair and reasonable  
22 price?

1                   MR. PERRY: I don't think -- I  
2                   don't want to -- we shouldn't spend a lot of  
3                   time on the how. I don't want to lose the  
4                   essence of the transparency. I don't want  
5                   that off the table.

6                   CHAIRMAN BRANCH: No, absolutely.

7                   MR. PERRY: And that includes the  
8                   terms and conditions around pricing.

9                   CHAIRMAN BRANCH: Duly noted and  
10                  that's a fair comment.

11                  MS. NELSON: Yeah, no, I agree  
12                  with Glenn. I think the motion should go up  
13                  as far as a motion, but to rectify some of the  
14                  current issues, I'd like to see some of your  
15                  frustration. Please feel free to contact me  
16                  in my office and I'll be happy to try and help  
17                  you.

18                  CHAIRMAN BRANCH: Debra?

19                  MS. SONDERMAN: I would -- Pat has  
20                  drafted a motion and I think it needs a little  
21                  bit of clarification. I think that we are  
22                  trying -- Motion Number 3, that the

1 Administrator clearly articulate pricing  
2 policy for GSA services -- scheduled services  
3 contracts. Is that -- that is what we're  
4 trying to articulate, the pricing policy.

5 CHAIRMAN BRANCH: No, I think it's  
6 more what the price negotiation objective is,  
7 just kind of hearing the discussion.

8 MS. SCOTT: Methodology, pricing  
9 methodology.

10 MS. SONDERMAN: The price  
11 negotiation objective.

12 CHAIRMAN BRANCH: Yeah, I think  
13 this is -- if I can kind of summarize what I  
14 think we've all kind of reacted to. So the  
15 first line of the award policy, which is in  
16 general, supplies and services, say, go get  
17 the most favored customer price. Then the  
18 rest of that section -- well, not the rest of  
19 it, but a good deal of it (c) says, "But we  
20 understand you really can't do that, you know,  
21 that that's a nirvana. So these are the  
22 things you ought to go look at in the

1 alternative".

2 And (d) says, "You know, you may  
3 not be able to get there at all. Here are the  
4 conditions under which you may drop back 10  
5 and punt". And I guess, you know, my reaction  
6 to that and I think there's a consensus to  
7 that is that the way it's constructed, that  
8 does not necessarily provide useful guidance  
9 to the contracting officer.

10 You know, I just kind of throw out  
11 -- and I don't want to construct this in the  
12 form of a motion because again, I think we  
13 need to stay away from trying to fix the  
14 problem but you know, one thing you could do  
15 with that piece is you could say, "This is the  
16 order of precedence, you know, this is the  
17 preferred in which you will determine fair and  
18 reasonable. The best case is that you get a  
19 fair and reasonable price based on most  
20 favored customer.

21 In the event that you cannot do  
22 that, you know, you'd get a most -- you'd get

1 a fair and reasonable price based on a basis  
2 of award or a tracking customer considering  
3 these issues. You know, and if you can't do  
4 that, but it's still in the best interests of  
5 the government to allow this contractor to  
6 have a scheduled contract, you will make the  
7 following finding and determinations, that the  
8 prices are indeed fair and reasonable, you  
9 know, through whatever techniques you're going  
10 to use and that you determine if the award is  
11 in the best interests of the government.

12 That is just an example of a way  
13 you might clarify. You know, alternately, you  
14 might take out the first sentence all  
15 together, you know, the first paragraph all  
16 together and say, "Look, you know, we're going  
17 to trust your judgment and look at your tool  
18 kit, your experience as a contracting officer,  
19 rely on the resources of your industrial  
20 specialist, get to a fair and reasonable price  
21 and these are the things you ought to  
22 consider".



1                   So I mean, there are a number of  
2                   ways to fix it. I don't want to really get  
3                   into a discussion of that but I think it's  
4                   clear, at least from my perspective that we  
5                   need to make a recommendation to the  
6                   Administrator that; (a) services be broken out  
7                   from goods because the pricing dynamics for  
8                   those two are very different and that  
9                   secondly, the way the objective is articulated  
10                  for pricing here be clarified so that  
11                  operational contracting officers have a clear  
12                  path as to you know, what fields they ought to  
13                  be trying to take, so to speak.

14                  I think Pat is probably kind of  
15                  framing a motion on that, so we'll give her  
16                  some time. Okay, yeah, we'll take five and  
17                  kind of work the language of that. So let's  
18                  do that at 10:45.

19                  (A brief recess was taken.)

20                  CHAIRMAN BRANCH: During our  
21                  break, we've kind of developed some language  
22                  around a motion. I think the way to proceed

1 is to simply put that on the table and revise  
2 that language through amendment and  
3 discussion, if we need to. So I will move  
4 that the GSA Administrator develop specific  
5 guidance for the establishment of fair and  
6 reasonable prices for GSA multiple work  
7 schedule contracts for services.

8 This guidance should be separate  
9 and distinct from fair and reasonable price  
10 guidance provided for GSA multiple award  
11 contracts for products. Do I hear a second?

12 MS. SCOTT: Second.

13 CHAIRMAN BRANCH: The motion is  
14 seconded. Discussion?

15 MS. JONES: I have a point to  
16 make. You had mentioned earlier about  
17 establishing guidance for negotiation  
18 objectives. FAR 15.44 establishes guidance  
19 already for determining fair and reasonable  
20 prices for commercial acquisition in terms of  
21 doing a price analysis. So I think that needs  
22 a little more clarity.

1 CHAIRMAN BRANCH: Judith?

2 MS. NELSON: Yeah. This is not --  
3 to my knowledge, this was not the motion that  
4 we had discussed. We had discussed a specific  
5 motion around negotiation objective, not fair  
6 and reasonable.

7 CHAIRMAN BRANCH: Okay, so we'll  
8 entertain an amendment to that language. How  
9 would you restructure it?

10 MS. NELSON: I would say that the  
11 GSA Administrator develop specific guidance  
12 for the establishment of negotiation objective  
13 for GSA MAS schedule -- well, MAS contracts  
14 for services rather than fair and reasonable?

15 CHAIRMAN BRANCH: Right, and I'd  
16 certainly have no objection to that amendment  
17 and we would then change that language in the  
18 last part of the motion and take fair and  
19 reasonable price guidance out and substitute  
20 the words above, "negotiation objectives", or  
21 "objective guidance", I guess, yeah. Okay.  
22 Alan?

1           MR. CHVOTKIN: Mr. Chairman, two  
2 elements. First of all, I fully agreed with  
3 the earlier direction which is we want to make  
4 sure that the regulatory implementation is  
5 consistent and that there's a separation in  
6 the formation. My own personal view is that  
7 we should see if we could help the  
8 Administrator establish that by making a  
9 recommendation on an negotiation objective.

10           The way the motion reads today in  
11 my view we are punting on the question of what  
12 the negotiation objective is between the  
13 statute and other terms and I'll, at the  
14 appropriate time, make a motion if appropriate  
15 to clarify the negotiation objective. So I  
16 would -- but for purposes of the review rather  
17 than make a recommendation on the GSA  
18 Administrator -- rather than the panel make a  
19 recommendation of the GSA Administrator,  
20 whatever negotiation objective we establish,  
21 the GSA Administrator develop specific  
22 guidance for the implementation of the

1 negotiation objectives and then I'll make a  
2 motion on establishing the negotiation  
3 objective or the price objective.

4 CHAIRMAN BRANCH: Yeah, I'm okay  
5 amending this motion to take out the words,  
6 "negotiation objective", if you have some  
7 specific thoughts on what that ought to be.

8 MR. CHVOTKIN: Well, I was going  
9 to -- sorry, mine is on the establishment, the  
10 use of the word, "establishment" because it  
11 would be for the implementation of the  
12 negotiation objectives. I agree that's where  
13 the GSA Administrator's role would come. I  
14 would hope that the panel would choose to make  
15 a recommendation on the price objective. So -  
16 - but I'm happy to put that motion on the  
17 table, so the people can at least see how one  
18 panel member would address it.

19 CHAIRMAN BRANCH: Well, the, I  
20 guess I'll move that we table Motion Number 3  
21 and entertain a motion from you. I'm not sure  
22 that motion number -- you know, given that

1 philosophy that Motion Number 3 makes a whole  
2 lot of sense, until we've had a discussion  
3 with respect to whether we want to recommend  
4 a specific set of words to the Administrator  
5 with respect to negotiation memorandum. So I  
6 move that we lay Motion Number 3 on the table.

7 MS. JONES: Second.

8 CHAIRMAN BRANCH: Okay. Motion  
9 Number 3 is tabled. The Chair will entertain  
10 a motion at this time.

11 MR. CHVOTKIN: Mr. Chairman, I  
12 move the following motion; for purposes of GSA  
13 schedules for services, the exclusive price  
14 objective for determining fair and reasonable  
15 price is the lowest overall cost alternative  
16 to the Government.

17 Again, for purposes of GSA  
18 schedules, for services the exclusive price  
19 objective for determining fair and reasonable  
20 price is the quote "lowest overall cost  
21 alternative to the government". And my reason  
22 -- I think it's important that we do a couple

1 of things. I'm trying to accomplish a couple  
2 of things in this motion. First of all, to  
3 help eliminate some of the clutter that exists  
4 around the various terms throughout the -- not  
5 only the FAR but the implementing guidance,  
6 contract terms and conditions clauses.

7 Secondly, to make sure that we  
8 have maintained the standard of fair and  
9 reasonable pricing because that is ultimately  
10 the standard for contract formation yet,  
11 recognize that the statute provides that the  
12 procedures that GSA has to adopt result in the  
13 lowest overall cost alternative to the  
14 government. And so while it's not exactly  
15 clear through the legislative history of that  
16 statutory provision, and certainly there's no  
17 more regulatory guidance around it, I don't  
18 think it's necessary at this point that we go  
19 take on the statute.

20 So I've just concluded that the  
21 best way to join those issues is to define  
22 fair and reasonable by reference to the

1 statutory standard and from that would flow a  
2 set of guidance implementation from the  
3 Administrator that would be applied  
4 consistently through the schedules program for  
5 services.

6 CHAIRMAN BRANCH: Other discussion  
7 on this motion? Debra?

8 MS. SONDERMAN: Well, I guess as a  
9 taxpayer, I should be jumping up and down and  
10 saying, "Yahoo, whoopee", but I am concerned  
11 that what I have heard from my colleagues, all  
12 of my esteemed colleagues on the panel is that  
13 in practice, what we get on the schedule is a  
14 ceiling price and so I'm really concerned  
15 about the discord that we are creating, the  
16 cognitive dissidence that this creates between  
17 the reality and the theory.

18 You know, in theory there's no  
19 difference between theory and practice but in  
20 practice there is. And so I am very concerned  
21 about saying that the schedule price objective  
22 is the lowest overall cost to the government



1           because I fear that in practice that would  
2           require a level of competition in the  
3           establishment of the schedules that is not  
4           currently present.

5                       MR. ALLEN:   Just to further  
6           Debra's comments, I think that you know, -- I  
7           think she's exactly right.  GSA has marketed  
8           over the last several years the ability to  
9           spot price on the schedules program and  
10          customers now expect, I think in a great  
11          majority of cases, to be able to obtain a spot  
12          price and spot discount.  I think you can have  
13          the program set up in theory either way.

14                      Either you have it set up where  
15          there is not little room in the negotiated  
16          price or there is.  My concern is that if you  
17          change it from one to the other, overnight,  
18          that you're not going to -- you're going to  
19          end up with customers who come and ask for a  
20          lower price and it may not be there.  You also  
21          are going to be looking at companies who are  
22          going in suspecting strongly that their

1 customers are going to continue to ask for a  
2 lower price and at the task order level, we've  
3 heard substantial testimony that pricing is  
4 really driven at the task order level, not at  
5 the contract formation level.

6 I think I understand the intent  
7 here. The intent is to keep the scheduled  
8 program consistent with the CICA definition  
9 but I'm not -- in practice I share Debra's  
10 concerns.

11 CHAIRMAN BRANCH: Judith?

12 MS. NELSON: I have two serious  
13 concerns with the suggestion on the table.  
14 The first in general, is in practice how would  
15 such a negotiation objective even be achieved,  
16 just by the average contracting officer with  
17 data in front of them.

18 The second is, and more  
19 overarching, is my personal opinion is that  
20 this is not a task that the panel should be  
21 taking up. I think that it's a -- it has an  
22 enormous amount of legs, not only for how the

1 contract -- how we could possibly form the --  
2 you know, the contract formation but at  
3 contract administration, the ramifications at  
4 possible contract protest both at GAO and  
5 Justice. It just -- it has enormous legs that  
6 can go in a lot of different directions, the  
7 negotiation objective and so I think it  
8 deserves far more than an afternoon's  
9 discussion by many different stakeholders and  
10 many different experts and it's not a simple  
11 discussion that can be sort of run out there  
12 and looked at. So I have very serious  
13 concerns about a two or three-hour discussion  
14 and a recommendation going forward. That's my  
15 --

16 CHAIRMAN BRANCH: Judith, my  
17 apologies for getting out of order here.

18 MS. THOMPSON: At first glance, I  
19 guess, you know, I should be happy that we're  
20 using the most over a cost alternative since  
21 that is statutory but I do have some fears  
22 that this would be misinterpreted, you know,

1 as lowest overall cost because that's  
2 generally what everybody looks at. They  
3 forget about the alternative which is factors  
4 that are applicable to the acquisition other  
5 than price.

6 So and I also am somewhat  
7 concerned, just when we say exclusive price  
8 objective, I don't want the Administrator to  
9 be boxed in, in terms of determining price  
10 objectives. And my concern, I guess also is  
11 that this is not totally within the scope of  
12 what we're looking at because I think  
13 interpreting our statute, which admittedly is  
14 very diminimus but that is normally the  
15 purview of the agency itself and so I'm a  
16 little hesitant here when we're actually using  
17 a terminology that I think GSA should be the  
18 ones to define.

19 CHAIRMAN BRANCH: You know, I've  
20 listened to the level of discomfort and I  
21 certainly understand it but not to put words  
22 in Alan's mouth, but I think where he's

1 heading is that as we look at 538.270, it  
2 isn't clear to me that policy lays out a road  
3 map for contracting officers to obtain a  
4 business arrangement that is faithful to a  
5 clear objective. So I think what we're trying  
6 to do with those words as he's advanced them,  
7 is to recommend to the Administrator, "In  
8 order for your contracting officers to do  
9 their jobs well, there must be a clear road  
10 map as to what their objective is".

11 So maybe lowest overall cost  
12 alternative to the government is not right  
13 because we've got that in statute. It's kind  
14 of a term of art that, in fact, GSA has, if  
15 you will, interpreted in the regulation since  
16 the statute came into effect. I mean, that's  
17 essentially what 538.270 does. It says, "So  
18 here's what we think to be the road map. The  
19 road map to get to lowest overall cost  
20 alternative for you is the most favored  
21 customer cost". And then it goes into, I  
22 think, trying to reflect the reality that we

1 are not going to get that from this vendor.

2 So, you know, while I certainly  
3 applaud Alan's attempt to do this, I think  
4 that while actually getting to that may  
5 warrant a discussion that is longer than we've  
6 allowed time for, it's a laudable goal. So  
7 the question is, what do we say to the  
8 Administrator around this because I think we  
9 owe the Administrator a duty to say, "You've  
10 not given your CO's a clear road map to what  
11 you want them to accomplish.

12 CHAIRMAN BRANCH: Yeah, Jackie and  
13 then Alan.

14 MS. JONES: Okay, I'd like to  
15 comment on that because not only does it  
16 impact the CO's, it also impacts the industry  
17 in terms of knowing how to frame a price  
18 proposal when they submit it to GSA for the  
19 evaluation of a schedule award.

20 CHAIRMAN BRANCH: And I think  
21 you're absolutely right. Alan.

22 MR. CHVOTKIN: Mr. Chairman, thank

1       you. There's two clarifications. It can be  
2       my intended, I may not have said it, to  
3       address Larry's point. This is only a  
4       contract formation. We've pushed the rest --  
5       the pricing discussions down to the task order  
6       -- to the ordering level and that's where I  
7       fully agree, but we're stuck with the  
8       conundrum of having to create a contract at --  
9       a contract formation that has pricing and I  
10      was looking for a price objective.

11                To Judith's question about how is  
12      this to be achieved, it would be achieved  
13      through the tools and techniques that we had  
14      talked about earlier in your Motion Number 3,  
15      which I still support in making sure that the  
16      GSA Administrator, the Contracting Officers,  
17      have the tools and techniques to determine  
18      price reasonableness using 538.270 and other  
19      techniques. So I chose not to link those two  
20      together but my intent all along was to  
21      establish that price objective and then have  
22      the Administrator flesh that out through the

1 regulatory process, but just so it's clear  
2 before I would conclude on this, I would  
3 modify my motion so that it says the exclusive  
4 price objective for determining fair and  
5 reasonable price at the time of contract  
6 formation. So if we would add the words,  
7 "price at the time of contract formation".

8 Don't erase that, keep it in.  
9 Just add the phrase, "at the time of price  
10 formation", "contract formation, at the time  
11 of contract formation".

12 CHAIRMAN BRANCH: Go to the "the",  
13 yeah, okay. Go to the "the" at the end of the  
14 third line, and that should be "time of  
15 contract formation".

16 MR. CHVOTKIN: Don't erase it,  
17 don't erase that. Okay, go ahead and take  
18 out, what you have, Pat, "determine fair and  
19 reasonable price at the time of contract  
20 formation", so fix that up so it says, "at the  
21 time of contract formation". Take out the  
22 rest of that, just delete it and add in before



1 the period, "is lowest overall cost  
2 alternative to the government", period. Now,  
3 Mr. Chairman, this is not my preferred  
4 standard, but I think in the effort of trying  
5 to pick another standard would require an  
6 amendment to the statute and I think that is  
7 a hill too high, if you will, please. So it's  
8 not my preferred standard, I don't think it is  
9 the standard that is applicable in the  
10 marketplace, but I think the Administrator  
11 would have some clear flexibility as he and  
12 she have had and exercised in the past 20  
13 years in defining more specifically what that  
14 term "lowest overall cost alternative" is but  
15 at least it would be very clear that there is  
16 a single standard that's to be applicable.

17 CHAIRMAN BRANCH: Thedlus?

18 MS. THOMPSON: I have a suggested  
19 amendment. I'm looking at the original  
20 sentence and I think part of my problem with  
21 it is the way it's framed. So let me just  
22 throw out what I have and see what you think.

1 "For purposes of GSA schedules for services,  
2 the price objective, in order to obtain lowest  
3 overall cost alternative, is to obtain fair  
4 and reasonable prices at the time of contract  
5 formation". "The price objective, in order to  
6 obtain lowest overall cost alternative to" --  
7 comma, "is to obtain fair and reasonable  
8 pricing at the time of contract formation",  
9 period.

10 I'm sorry.

11 MS. SCOTT: I would suggest  
12 changing the first obtain to achieve, "in  
13 order to achieve the most".

14 CHAIRMAN BRANCH: Not that one.  
15 Not that one. The first one and the second  
16 one.

17 MS. THOMPSON: Any concerns with -

18 -

19 CHAIRMAN BRANCH: Well, I think  
20 this is a knit. I think he can just take out  
21 -- you can take out "purposes of". So it  
22 would just say, "For GSA schedules for

1 services". That's just cleanup. I guess  
2 that's offered in the nature of a friendly  
3 amendment; is that satisfactory to you, Alan?

4 MR. CHVOTKIN: What I was -- I'm  
5 still working my way through it mentally. It  
6 doesn't -- it still doesn't set the price  
7 objective to me. It says that -- to get to  
8 lowest overall price, obtain fair and  
9 reasonable pricing. What I was trying to do  
10 is to equate fair and reasonable pricing as  
11 the lowest overall cost objective and so this  
12 says that there is some other intermediary  
13 standard between lowest overall cost and fair  
14 and reasonable, if I interpret Thedi's  
15 modification, taking out "for purposes" of  
16 makes some sense as well, but I was trying to  
17 set up a stark one equals one or A equals B  
18 analysis and I'm not sure that that  
19 modification does that but it moves us down  
20 the path. It's not as far as I would have  
21 liked to have gone, but it moves us down the  
22 path. It's not as far as I would have liked

1 to have gone but it does move us down the path  
2 and I think it's a reasonable alternative.

3 CHAIRMAN BRANCH: Judith.

4 MS. NELSON: I'm going to go back  
5 to the discretion of the contracting officer  
6 and quote unquote "the definition or lack of  
7 definition of fair and reasonable". There  
8 cannot be a stark comparison or one-on-one  
9 between anything and fair and reasonable that  
10 is why sometimes there's a difficulty around  
11 fair and reasonable. When -- so we -- I'm  
12 very uncomfortable with anything that equates,  
13 whether or not it's lowest cost alternative or  
14 anything else, which is why there is confusion  
15 and difficulty with 538.270 and the  
16 negotiation, what are we calling it,  
17 negotiation objective. So fair and reasonable  
18 is the -- in the eyes of the contracting  
19 officer based on the information they have in  
20 front of them.

21 It may not -- it well may not be  
22 and it often is not the lowest cost and so

1 even though that is the statute, the statute  
2 is the lowest cost available -- lowest cost  
3 alternative. Right, the lowest cost  
4 alternative and just as most favored customer,  
5 is often misunderstood because most favored  
6 customer and .... multiple long paragraph most  
7 favored customer in the following instances,  
8 lowest cost alternative will again just like  
9 most favored customer, be misunderstood and  
10 I'm very, very uncomfortable with doing that  
11 especially with the notion that we're trying  
12 to set up a stark one-to-one between what is  
13 lowest cost alternative and fair and  
14 reasonable.

15 In no instance do we want to take  
16 away the discretion of a contracting officer.  
17 That's why they have a warrant.

18 CHAIRMAN BRANCH: Thedlus and then  
19 I'm going to reserve the right to insert  
20 myself into it, too.

21 MS. THOMPSON: I just wanted to  
22 say I'm sorry, I've got to leave. (Inaudible)

1           \*\*\* 11:24.

2                         CHAIRMAN BRANCH:  Actually, I'm  
3           comfortable with rendition.  I don't know what  
4           you want because I see where Alan is trying to  
5           go and we, you know, historically and, you  
6           know, have granted the contracting officer  
7           wide latitude with respect to determining what  
8           is a fair and reasonable price.

9                         What troubles me about 538.270 as  
10          drafted is it seems to be sending some very  
11          mixed messages to the Contracting Officer, and  
12          I'll start with most favored customer but, you  
13          know, the reality of it is, these are all the  
14          reasons you can't get to that, so, you know,  
15          go consider these things.  And at the end, you  
16          know, if you can't get there and you think  
17          it's a good deal to have this vendor on  
18          schedule, do it anyway.

19                        So I guess here's my thought  
20          pattern as I look at this language.  What  
21          we're really saying to the Contracting Officer  
22          is, when you do a determination with respect

1 to what fair and reasonable pricing is, we  
2 expect you to do that within the context of  
3 the statute which requires you to achieve the  
4 lowest overall cost alternative to the  
5 government.

6 Now, I think what we probably need  
7 to do in implementation is we probably need to  
8 make it clear to GSA Contracting Officers that  
9 that is not a burden that they bear alone,  
10 that what their job really is, at least with  
11 respect to pricing a services contract, is to  
12 create a framework in which the ordering  
13 agency can do the rest of that job. So I  
14 guess I'm comfortable with that language  
15 because as we come back to a discussion we've  
16 had previously, we don't really have a  
17 definition of fair and reasonable.

18 What we have is a set of tools and  
19 techniques that a contracting officer uses in  
20 concert with his judgment to determine what's  
21 fair and reasonable. What we are doing now  
22 really is saying, "Contracting Officer, when

1           you use these tools and techniques to  
2           determine fairness and reasonableness, you  
3           will do it in the context of setting a  
4           framework that will provide ultimately the  
5           lowest of real cost alternatives to the  
6           government.

7                         So from that standpoint, I'm  
8           uncomfortable with that and you know, I  
9           apologize if I'm over-intellectualizing it,  
10          but I think at some point, you know, if we are  
11          going to put a pen in the hand of a  
12          Contracting Officer through the granting of a  
13          warrant, then we should -- we should at least  
14          attribute some level of intelligence,  
15          experience and judgment to that. I don't  
16          think -- you know, I think we need to give  
17          them more credit than we, perhaps, are here.

18                        MS. NELSON: This is what I think  
19          and presented company excepted. I see a  
20          meeting with my Inspector General, GSA's  
21          Inspector General, that looks at every  
22          contract and says, "Was not the lowest cost



1 available", and they're not going to say  
2 alternative. They're going to say for every  
3 one of these contracts, it was not the lowest  
4 cost.

5 CHAIRMAN BRANCH: And I won't  
6 dispute that discussion will, indeed, take  
7 place. Alan, did you and then Glenn?

8 MR. CHVOTKIN: Mr. Chairman, the  
9 Contracting Officer for GSA or every  
10 Contracting Officer has got to make the  
11 determination of fair and reasonable pricing,  
12 so I don't -- to help to move the ball along,  
13 I don't think it answers the question and if  
14 I could impose on you, Mr. Chairman, to write  
15 the committee report around that because I  
16 don't think your English professor would find  
17 as many words as you did in the second part of  
18 that language.

19 But if your intent is reflected in  
20 that paragraph, then I can support it.

21 CHAIRMAN BRANCH: And I'm happy to  
22 take that on. Jackie?

1 MS. JONES: I just have a comment  
2 and a concern. The language is fine. I don't  
3 have any objections to the language. I'm just  
4 thinking about putting this into practice, if  
5 you will. So when a contractor submits a  
6 proposal to GSA, this is where we need to have  
7 a meeting of the minds between the CO's and  
8 the industry and the community industry  
9 partners. So when a contractor submits the  
10 proposal to GSA, then by interpreting that, it  
11 should be understood that they're going to  
12 prepare a price proposal to us that results in  
13 the lowest overall cost alternative to the  
14 government so that we can establish fair and  
15 reasonable pricing. Is that what we're  
16 telling them?

17 CHAIRMAN BRANCH: Yes, Lesa?

18 MS. SCOTT: I'm having a little  
19 trouble with this wording because when I read  
20 it, the price objective is to obtain fair and  
21 reasonable pricing at the time of contract  
22 formation. I am very afraid that

1           parenthetical will be dropped out when people  
2           read this. So right at this moment, my  
3           suggested alternative wording would be the  
4           price objective is to obtain fair and  
5           reasonable pricing at the time of contract  
6           formation by pursuing -- put that verb  
7           "pursuing" in quotes, or maybe a better verb,  
8           by pursuing the lowest overall cost  
9           alternative to the government.

10                        So take that parenthetical and put  
11           it at the end of the sentence to make sure it  
12           doesn't get lost or left out of the reading as  
13           an idea.

14                        CHAIRMAN BRANCH: Glenn?

15                        MR. PERRY: Actually, no, I'll try  
16           again. I think that was a good attempt but my  
17           problem with the second paragraph is that it  
18           still leaves you with -- it still leaves us  
19           having to clean up what fair and reasonable is  
20           and what the conditions are for it, that's  
21           where it leaves me. That's not going to be  
22           right. And the first one, the standard is

1           pretty steep at that schedule contract  
2           formation because my understanding is in some  
3           circumstances, you could -- maybe the focus is  
4           to just have a marketplace for something and  
5           get that -- get those products in the  
6           marketplace and in some circumstances, I  
7           believe, we didn't do all you needed -- you  
8           may not have gone far enough in lowest overall  
9           cost but you at least got it out there so you  
10          could have some kind of competitive ordering  
11          process at the agency level.

12                         And that's okay. Actually, in  
13          some ways, that's okay sometimes, as long as  
14          you've got that other recommendation that we  
15          have out there, and just say that that's what  
16          we did in this case, to get it on the  
17          marketplace through -- on the schedules rather  
18          than every agency having to go off and create  
19          that marketplace on their own. That's part of  
20          the advantage of that. So I guess I was  
21          listening to the third version of that and the  
22          pursuit of that's the normal objective but

1           somehow you're going to -- we have to  
2           acknowledge what those other things were.  And  
3           that's what I want.  I just want to know what  
4           the other -- if there was something else that  
5           got in the way of getting there, what -- let  
6           us know what that was and how we write that in  
7           here and the previous one as far as the  
8           implementation and the -- because I was going  
9           to have a comment on the earlier one that  
10          besides just for the -- whatever it said up  
11          there, putting the policy in place that we  
12          would clarify and make consistent the -- what  
13          everyone's understanding as to how that's to  
14          be implemented and how that's to be carried  
15          out, not just have a policy.

16                   CHAIRMAN BRANCH:  Yeah, I think,  
17          though, you know, we may be falling into the  
18          trap of trying to architect the solution.

19                   MR. PERRY:  Word-smithing, yeah,  
20          okay.

21                   CHAIRMAN BRANCH:  Well, not word-  
22          smithing but I guess I -- you know, I think of

1 the motion that lays on the table currently is  
2 one that really talks more to implementation.  
3 I think this one really talks more to the  
4 goal. So I guess, you know, my view is what  
5 we're really trying to do is tell the  
6 contractor, you know, if you look at the  
7 policy as written, it lays out a goal and then  
8 in its implementation, it essentially, you  
9 know, eviscerates it.

10 You know, it says, "Go get the  
11 lowest" -- you know, "go get the most favored  
12 customer price unless this series of things  
13 happens". And I think it would be very  
14 interesting to have the data. I'm not sure  
15 how useful it would be at this point, but I  
16 think it would be very interesting that if we  
17 went through the files on scheduled services  
18 contracts, to see how many times a Contracting  
19 Officer actually documented getting that  
20 vendor's most favored customer price, my guess  
21 would be that that is in the minority. That  
22 the basis of award would likely be some

1 customer more analogous to the way we order  
2 and that it would make extensive use of those  
3 exceptions in paragraph (b) of that guidance.

4 So I think what we're really  
5 trying to do is to say what goal really  
6 reflects reality here, and craft, you know, a  
7 single goal that tells the Contracting  
8 Officer, look if you can get the most favored  
9 customer price, because the market dictates  
10 that you are equivalent to the most favored  
11 customer and that's our expectation.

12 But if that's not true, you know,  
13 let's -- you know, let's get the price that's  
14 realistic for the market we happen to be in  
15 with this specific vendor. So, I mean, as I'm  
16 listening to the discussion, I think that's  
17 the spirit of that Alan is trying to achieve  
18 here, to back off of this rather impossible  
19 unobtainable standard in every case of getting  
20 the absolute most favored customer price  
21 because, let's face it, we aren't necessarily  
22 the most favored customer. Yeah, Judith?

1 MS. NELSON: The one point I would  
2 make, Mr. Chairman, is that recommendation --  
3 while I absolutely and have maintained from  
4 the beginning that I am not a fan of MFC, and  
5 I would like to see the Administrator or  
6 someone at least either clarify MFC or remove  
7 it, I -- you know, I'd like to see a motion go  
8 on the table either in the guise of your  
9 Motion Number 3, which we have currently  
10 tabled. So what I'm saying is that you are  
11 somewhat saying that Motion Number 4 is the  
12 only motion by which we are making a  
13 recommendation that we remove most favored  
14 customer.

15 So I don't want the discussion or  
16 the recommendations to move in that direction.

17 CHAIRMAN BRANCH: No, I guess for  
18 clarity and the reason that I moved that my  
19 original motion be tabled, is I saw some value  
20 in Alan's trying to lay out the goal, if you  
21 will, of the schedule pricing and that Motion  
22 Number 3 would then be worked to recommend to



1 the Administrator what steps he might take to  
2 implement reaching that goal, but I thought  
3 there was some value to Alan's observation.

4 You know, we need to make a clear  
5 statement of what the goal is and then we need  
6 to -- you know, to kind of buttress that with,  
7 you know, now that we've told you what the  
8 goal is, here are some of the things that you  
9 can use to achieve the goal. But I mean, the  
10 reading of the current construction of the  
11 reg, I mean, the two are conflated. So I  
12 definitely agree, it was not my intent to back  
13 off of making that recommendation but I was  
14 some merit in Alan's trying to parse those  
15 into two separate and distinct pieces of  
16 policy.

17 Well, I tell you, this seems to be  
18 a conundrum and it's 11:36, so why don't we  
19 break for lunch, come back at quarter till  
20 1:00 and pick up where we left off? Maybe,  
21 you know, some small quiet space for  
22 reflection will help everyone clarify their

1 thoughts a little bit. Okay, so back at 12:45  
2 from lunch, please.

3 (Whereupon at 11:37 a.m. a  
4 luncheon recess was taken.)

5

1 AFTERNOON SESSION

2 1:13 p.m.

3 CHAIRMAN BRANCH: Okay, I think  
4 where we left off, we were kind of struggling  
5 with the idea that Alan advanced, which is,  
6 "Hey, how can we articulate what the terminal  
7 objective, if you will of the GSA Contracting  
8 Officer should be with respect to pricing  
9 during contract formation"? And I think we  
10 probably have three alternatives up on the  
11 board.

12 Folks have had time to kind of  
13 think these over during lunch. So I guess the  
14 question on the table, then is where are we on  
15 these? Are we ready to proceed? Do we want  
16 to pick one of these three? Is one of these  
17 three, the one we want to work with and modify  
18 further until we get it right or do we want to  
19 decide that this was a good idea but it's  
20 somewhere on the order of curing world hunger  
21 and to just call it a day?

22 So anybody kind of up? You know,

1 I'm comfortable with Alternative 1. So I'll  
2 just say that now. I think Alan is right. I  
3 think we have to draft language in the report  
4 that explains the spirit of that but that is  
5 essentially what we ask Contracting Officers  
6 to do, you know, determine a fair and  
7 reasonable price, and it's in the context of  
8 the statutory language which requires us to  
9 achieve the lowest overall cost alternative  
10 and I think that word "alternative" is  
11 critical to it.

12 So I can actually live with any of  
13 those three but my preferred option is Option  
14 1.

15 MR. CHVOTKIN: Mr. Chairman, I'll  
16 vote for all three of them but I'd like to --  
17 but my guess is that not every other panel  
18 member might and so if -- however you want to  
19 proceed. I think my original motion is the  
20 one that sets up that stark standard. Lesa's  
21 suggestion, I'll call it Alternate 2, is also  
22 similarly -- closer to my concept which is

1           establishing a set of price objectives though  
2           I quibble at the language and maybe we could  
3           do that later.

4                         And then I think the Alternate 1  
5           is less effective in establishing that  
6           standard and clearing the clutter out but it  
7           is better than what we have today which is not  
8           guidance whatsoever. So just from a process  
9           approach, I might suggest starting, going at  
10          Number 1 first, sets up that standard, then  
11          Alternate 2, then Alternate 1 as I said, I'll  
12          be prepared to vote for all three of them.

13                        CHAIRMAN BRANCH: Thedlus?

14                        MS. THOMPSON: I believe that  
15          Alternate 1 best effectuates the intent of the  
16          pricing policies MAS has in the statutory  
17          framework because the goal is to result in the  
18          lowest overall cost alternative. That's the  
19          goal and the way to obtain that is to obtain  
20          fair and reasonable pricing. So to me,  
21          Alternate 1 lays it out very well in terms of  
22          what our objective is and how we're going to

1           attain it.

2                         CHAIRMAN BRANCH: Other comments  
3           on our alternatives here? Okay, you buzzed in  
4           at the same time, so ladies first, we'll go  
5           with Debra and then with Larry.

6                         MS. SONDERMAN: I think I'm swayed  
7           in the direction of Alternate 1 because it  
8           does focus on what the objective is or, you  
9           know, what the goal of the program is in  
10          focusing on achieving the lowest overall cost  
11          alternative, although I still would like to  
12          see the statutory context for that.

13                        CHAIRMAN BRANCH: Larry?

14                        MR. ALLEN: I hate to maybe set  
15          things back or maybe not. I understand that  
16          fair and reasonable price part of this and I  
17          think fair and reasonable price is a good way  
18          to go and I even understand the concept of the  
19          seek a definition, but my concern is similar  
20          to the one that was echoed this morning by  
21          Judith. Putting one lowest overall cost  
22          alternative, I think we may understand what

1           our intent is but down the road, when you get  
2           into individual negotiations and the IG  
3           reviews and other forms of oversight, I'm not  
4           sure that everyone else would.

5                        Lowest overall cost alternative  
6           can be interpreted different ways by perfectly  
7           well-meaning people and I think it largely  
8           depends on the perch they occupy at the time,  
9           what the to pursue which is in Alternate 2,  
10          which I technically like better than Alternate  
11          1, pursuing the lowest overall cost  
12          alternative to the government is similar, I  
13          think, to the intent of the existing guidance  
14          which is that's your objective. That's what  
15          you're aiming for. That's what you're trying  
16          to get but it's not a mandate that you end up  
17          with that and there are understandings about  
18          why you don't, different terms and conditions,  
19          things of that nature.

20                      And what does matter, I think, a  
21          little bit in this, you put in the pricing  
22          objective up front to obtain lowest overall

1 cost. I think that's where people will  
2 probably end. And again, what does that mean  
3 when you're in a negotiations? Does that mean  
4 that at the contract formation level, you end  
5 up trying to go for the best price, which is  
6 how it would be interpreted in many cases, I  
7 think, and in the absence of that, you don't  
8 get an award.

9 I can see where people could  
10 interpret it that way and I don't know that  
11 that's the intent. So I'm struggling a little  
12 bit, you can tell, and certainly a little bit  
13 with the phraseology here and if the intent is  
14 to obtain fair and reasonable pricing and if  
15 that's our intent as a panel to make that  
16 recommendation, we ought to just say just that  
17 and leave it to that and then extrapolate with  
18 it in the report as well as down the line with  
19 the Administrator and any other interested  
20 party.

21 CHAIRMAN BRANCH: We've had a lot  
22 of discussion around these this morning. We've



1 kind of picked up on that this afternoon and  
2 let me tel you what I think I guess I'm  
3 hearing is that while most of us could live in  
4 spirit with all of these, the discussions have  
5 really centered around Alternative 1 and  
6 Alternative 2.

7 So this is what I propose we do.  
8 Why don't we start with the Alternatives one  
9 at a time, vote them up or down, you know, and  
10 then continue our discussion before we vote on  
11 the next one. So what I would propose is  
12 let's close discuss on the original motion as  
13 we have it drafted here, vote up or down on  
14 that, continue our discussion then between one  
15 and two if Motion Number -- or the original  
16 motion fails and then just proceed until we've  
17 essentially eliminated, you know, totally have  
18 kind of an understanding as -- I know that's  
19 somewhat unusual but I think it's probably the  
20 best way to kind of move through this.

21 Do I have the panel's consent that  
22 that's a good approach? All right, then we

1 will -- I'll start with the original motion  
2 and just call, you know, for a vote. All  
3 those in favor of the original motion for the  
4 one shown on the screen. Motion 4 (price  
5 object), all in favor signify by raising their  
6 hand. Opposed? Okay, abstentions? Okay, so  
7 we have dispositioned the original language  
8 and now I think the discussion really is to a  
9 preference between Alternatives 1 and  
10 Alternatives 2.

11 I guess I'll start the discussion.  
12 And this is the beauty, I think, of having a  
13 wide variety of opinion. Since I've listened  
14 to folks here, I guess my thinking has changed  
15 in the last few minutes. I understand what  
16 folks are saying about Option Number 2,  
17 perhaps better conveying the spirit of the  
18 original sentence. So I, for one, plan to  
19 support Option Number 2 of the two remaining  
20 options.

21 So I'll open the floor for any  
22 discussion between Options 1 and Option 2 at

1           this point.

2                       MS. JONES: I just have a comment  
3           on Option 2. Pat, can you bring that up,  
4           please? Okay, and this is just comment in my  
5           opinion. When we say by pursuing the lowest  
6           overall cost alternative to the government,  
7           that can be interpreted by the CO, let's say  
8           that's negotiating that contract, that that is  
9           what they're supposed to do in the end is to  
10          pursue this lowest overall cost alternative.

11                      And that concerns me because we  
12          have issues now with pricing information in  
13          terms of gathering pricing information to make  
14          a determination of price reasonableness. And  
15          I'm concerned by saying that that is what you  
16          are to do is to pursue that end. It could  
17          create more difficulties in terms of being  
18          able to establish a reasonable price whether  
19          or not it is the lowest overall cost  
20          alternative and not over-burdening the offer  
21          with data gathering.

22                      CHAIRMAN BRANCH: Other comments

1 on the alternatives? Glenn?

2 MR. PERRY: I guess I like Number  
3 2 more because when I read the word  
4 "objective", you don't necessarily have to  
5 meet it. And I guess I'm not so missing at  
6 fair and reasonable is not acceptable. If we  
7 don't quite get there on the lowest overall  
8 cost alternative, then that would be okay and  
9 that would leave the Administrator some  
10 discretion as to how to -- what criteria goes  
11 around that and in implementation you can  
12 address the issues that the CO's at GSA have  
13 as to how they meet that. That's kind of my  
14 read on it.

15 CHAIRMAN BRANCH: Debra, then Lesa  
16 and then Thedlus?

17 MS. SONDERMAN: Well, and I guess  
18 in the context of our report, I envision this  
19 and in a future regulatory you know, language,  
20 this is the contract formation but I think  
21 what we have discussed in this panel and what  
22 our other motions represent is that achieving

1 the lowest overall cost alternative is done at  
2 the order level. So this goes -- this is very  
3 tightly wed, at least in my brain, to our  
4 previous motions that say we recommend a  
5 requirement for an 803-like process for  
6 competition where the price will be  
7 established at the order level.

8 So I'm moving in the direction of  
9 Alternate 2 or at least that's the way it's  
10 forming in my mind.

11 CHAIRMAN BRANCH: Lesa?

12 MS. SCOTT: My Alternate 1, the  
13 word that bothers me is the word "achieve" in  
14 the common phrase, because to me I feel that  
15 achieve versus the word "pursue" in Alternate  
16 2 is one of it means I've got to do it and the  
17 other one means, I need to try. I'm not  
18 wedded to the word, "pursue", but that was the  
19 best I could come with at the moment.

20 I realize what it is about  
21 Alternate -- the very first one that bothered  
22 me when I thought about it finally, but

1 "exclusive", the word "exclusive", so that's  
2 what bothered me about the very, very first  
3 one is that word "exclusive". I kept trying  
4 to find another way to phrase that and I  
5 didn't come up with anything else. So anyhow,  
6 my problem between 1 and 2 as they stand now  
7 is the word "to achieve" in Number 1. I feel  
8 that's making it a mandatory and then in  
9 Number 2 is changing that to using "pursue" or  
10 some other equivalent that says try to make it  
11 like a target or something to go after but not  
12 being wedded to that, so it's like Glenn said,  
13 being able to go after fair and reasonable.  
14 It is cold in here, or is it me?

15 CHAIRMAN BRANCH: No, it's cold in  
16 here.

17 MS. SCOTT: Okay, I'm freezing.

18 CHAIRMAN BRANCH: Thedlus?

19 MS. THOMPSON: I think part of the  
20 problem is that we're attempting to conduct  
21 sort of a statutory interpretation here and  
22 that is the problem because it's a little

1 outside the scope here of -- I think of the  
2 panel. The problem with Alternate 2 is the  
3 very word "pursue". The statute does not  
4 allow us to pursue the lowest overall cost  
5 alternative. You must -- it must result in.  
6 Result in is different than pursuing. So that  
7 is my fundamental disagreement with Alternate  
8 2.

9           Alternate 1 again, states the  
10 goal. The goal is the statutory goal, lowest  
11 overall cost alternative. How do we get  
12 there? We've determined we're going to get  
13 there through fair and reasonable pricing.  
14 But we must -- and again, I'll -- and  
15 unfortunately we don't have -- you don't have  
16 the statutory language, maybe we can have that  
17 put up at another time, but okay, maybe we can  
18 -- let's see if we can get that up because it  
19 says the orders and contracts under such  
20 procedures result in the lowest overall cost  
21 alternative to meet the needs of the  
22 government.

1                   So that is -- there is -- it is  
2                   not the discretion that presuming has. So  
3                   again, we're getting involved in statutory  
4                   interpretation issues. The agency to whom the  
5                   statute is given has the authority to  
6                   determine and actually provide information  
7                   regarding the intent of that particular  
8                   statute. So if there's ever any question as  
9                   to interpretation, it is in GSA's purview to  
10                  do that, as with other agencies as well would  
11                  have their own particular statutes.

12                  CHAIRMAN BRANCH: Debra and then  
13                  I'll reserve the right to insert myself into  
14                  the discussion.

15                  MS. SONDERMAN: Well, I guess I'm  
16                  a little troubled by the level of purity that  
17                  is expected because if we are going to make a  
18                  statement that at the schedule contract level  
19                  we have achieved lowest overall cost and I  
20                  accept what you say the statute says although  
21                  you said that in a couple of different ways,  
22                  so I've -- I still would like to see the



1 language. Then I think we're back to what Tom  
2 suggested which is we should just ditch the  
3 schedules program and start over with  
4 something else because we're not going to get  
5 there.

6 We can't look outside and say,  
7 "That tree is purple" and make it so. That --  
8 because it isn't. And so to look at a process  
9 that we -- the process is that it's open to  
10 all comers or you know, those that are  
11 determined to be responsible through a  
12 rigorous process and a process of determining  
13 prices that are fair and reasonable at the  
14 schedule contract level, that's not -- those  
15 schedule contracts, I would not say and I  
16 don't know that -- I don't know how many GSA  
17 officials would be willing to say that the  
18 schedule contract prices represent the lowest  
19 overall cost alternative to the government.

20 So I just think we need to be  
21 really careful about that.

22 CHAIRMAN BRANCH: Okay, I guess a

1 couple of things that strike me. First of  
2 all, I am in absolute agreement with Debra on  
3 the idea that this is a two-part move. So I  
4 think what we really ask GSA to do at the  
5 contract level when they're pricing is take  
6 part at that level. You know, give us a set of  
7 prices that essentially convey information  
8 about the marketplace in general, that we  
9 believe fairly represent, given the  
10 circumstances under which a Contracting  
11 Officer of GSA determine would be fair and  
12 reasonable, kind of the baseline.

13 And I think if you look at the  
14 resolutions we've passed so far, we also  
15 understand that there's a second piece of that  
16 move that is in the hands of agencies. So I  
17 don't -- I don't see this as a burden that  
18 solely rest on the shoulders of GSA.

19 And I, you know, agree with you  
20 Thedlus, in that the statute clearly says  
21 results in the lowest overall cost to the  
22 government and you cannot deny the plain

1 reading of the statute. What troubles me,  
2 however, is when I read the reg as the agency  
3 has implemented it, they really appear, in my  
4 view, to recognize a reality that that isn't  
5 going to happen. That while you start with  
6 the most favored customer, that there is this,  
7 you know, plethora of exceptions under which  
8 you may depart that and I think really, the  
9 intent of this recommendation to the  
10 Administrator is to recognize that reality and  
11 say, draft the policy such that you are not  
12 sending a mixed message to your workforce. To  
13 pursue the spirit of the contract price in the  
14 first move resulting in the lowest overall  
15 cost to the government, try to obtain for  
16 whatever context you've established at the  
17 time of contract formation a fair and  
18 reasonable price.

19 So, you know, I don't know that  
20 any of us are all that far apart. I think  
21 what we're trying to do is reconcile the  
22 practical operation of GSA's policy with the

1 words that are in the statute and we certainly  
2 aren't looking to in any way vitiate the  
3 prerogatives of the Administrator to make that  
4 determination.

5 CHAIRMAN BRANCH: Larry and then  
6 Debra.

7 MR. ALLEN: I would say that I  
8 think you're on the right track with that.  
9 GSA has the ability to put in good contracts  
10 but just because GSA doesn't get the overall  
11 cost alternative, lowest cost alternative at  
12 the contract level, does not mean that the  
13 contract and the vehicle itself are not  
14 adhering to statute.

15 I think if you're looking at the  
16 task order level, and that's where we should  
17 be focusing, there's a difference at the task  
18 order level making sure that the Agency is  
19 making a conscious decision that this  
20 transaction adheres to the requirement that's  
21 where we should be looking at the lowest cost,  
22 overall cost alternative. So I think, Mr.

1 Chairman, you have it about right there with  
2 the fact that it's kind of a two-tiered  
3 process and that's very consistent with the  
4 testimony that this panel has received.

5 MS. SONDERMAN: Well, I guess I  
6 observe in reading the statutory language that  
7 paragraph -- I can't tell what -- (b), I guess  
8 that is, there isn't a paragraph (b) that  
9 says contracts under such procedures result in  
10 the lowest overall cost alternative and a  
11 separate paragraph that says, orders under  
12 such procedures result in the lowest overall  
13 cost alternative.

14 It says, "Orders and contracts  
15 under such procedures result in the lowest  
16 overall cost alternative." To me that means  
17 they work together. You have to have  
18 contracts in order to place orders. I don't  
19 think we -- I don't think the GSA schedules  
20 are orders. So I guess it looks to me like  
21 the language is supporting this notion that  
22 we've been discussing, that there are two

1 parts to this equation; the schedule contracts  
2 and the orders that are placed under them.  
3 And together, they result in the lowest  
4 overall cost alternative.

5 MS. THOMPSON: I don't disagree  
6 with you that is definitely a two-step  
7 process. But in terms of the contracts, we  
8 have said that we're going to pursue fair --  
9 we are going to obtain fair and reasonable  
10 pricing for -- and that's what we're dealing  
11 with right now in terms of looking at -- we're  
12 looking at -- we're achieving that fair and  
13 reasonable price.

14 And again, we are stepping into  
15 statutory interpretation issues here. So I'm  
16 not sure that that again, is within the  
17 purview of the panel very gently.

18 MR. PERRY: But my assumption is  
19 that I guess I was under the impression that  
20 we had this panel together because, we got it  
21 together because I believe that we can put on  
22 the table things that go beyond the existing

1 constraints or recommend things that may alter  
2 the existing constraints that you may have.  
3 I think the language you have in GSA is sort  
4 of reflective of the fact that until you have  
5 -- I think Elliott gave us some economic  
6 lesson last time on Friday.

7 That you know, you can't get to  
8 some of this until you get to the order stage,  
9 because we haven't put any skin in the game  
10 yet and that's when you're really going to get  
11 to the point where it is really you get the  
12 best value for the order. So, you know, what  
13 you have today is sort of an attempt to try to  
14 deal with that world. I think we're  
15 recommending that maybe we need to go -- we  
16 need to clean that up and be more clear about  
17 what we should drive towards at each stage and  
18 then what's left for that last piece on when  
19 we actually have something to put towards the  
20 -- some money to put towards the contract,  
21 something that people pay attention to.

22 CHAIRMAN BRANCH: Yeah, we could -

1           - could you bring up the alternatives for a  
2 minute? I guess my suggestion would be to  
3 further amend Motion 2 to put a comma in front  
4 of government as opposed to a period and to  
5 insert words to the effect "consistent with  
6 the statutory construction of lowest overall  
7 cost", which would -- and then period which  
8 would clearly recognize that it's within the  
9 Administrator's purview to make that call.

10                         Now, I think -- you know, I think  
11 Thedlus has a perfectly valid point which is  
12 we are not empowered to make such a  
13 construction, that construction starts with  
14 the Administrator pursuant to the  
15 Administrative Procedures Act and is further  
16 interpreted by boards and courts. So perhaps  
17 simply a recognition of that fact will be  
18 enough to make clear what our intent as a  
19 panel which is this is something you've got to  
20 go address.

21                         The fact that it is not clear,  
22 perhaps, to the workforce what the prime



1 objective is in pricing these at the  
2 contractor level. So I offer that as a  
3 possible amendment.

4 MR. CHVOTKIN: It raises a  
5 separate part but maybe I'd just encourage you  
6 to put a period after the word construction  
7 because we've already fallen in the trap of  
8 changing the statutory definition of lowest  
9 overall cost alternative by stopping at cost  
10 and that's exactly what would happen.

11 So if we just put it consistent  
12 with the statutory construction, I think you -  
13 -

14 CHAIRMAN BRANCH: That's  
15 acceptable, or consistent with the statute  
16 actually, you know, understanding that it's a  
17 pretty well-established process in  
18 administrative law how those things are  
19 determined. So either one of those is  
20 acceptable to me.

21 MS. JONES: I think you still have  
22 pursuing in there.

1 MS. SONDERMAN: What's wrong with  
2 pursuing?

3 MS. THOMPSON: The statute doesn't  
4 provide for GSA pursuing that as a goal but it  
5 must result in -- it's a requirement.

6 MS. SONDERMAN: The statute says  
7 that in orders and contracts result in --

8 MS. THOMPSON: Yes. You may be  
9 reading it separately. It's also subject to  
10 interpretation. It is subject to  
11 interpretation.

12 CHAIRMAN BRANCH: And I think  
13 you're absolutely right but I think we make it  
14 clear as to who has the right to make that  
15 interpretation. I mean, if it's consistent  
16 with statutory construction, I would argue  
17 then it's a well-settled matter of law who in  
18 the Federal Government has the right to make  
19 such constructions. It certainly isn't us.  
20 So if that recommendation goes forward, it  
21 will be read properly with the assistance of  
22 counsel, which should take this tangle off the

1 table within the agency.

2 MS. SCOTT: I'd like to call the  
3 question and we vote on these.

4 CHAIRMAN BRANCH: All right, the  
5 question has been called. All those in favor  
6 of Alternative 1 signify by raising their  
7 hand. Option Alternative 1, we'll do these  
8 one at a time. Okay, all those opposed? All  
9 those abstaining? Okay, the motion fails to  
10 carry.

11 All those in favor of Alternative  
12 Number 3, signify by raising your hand. All  
13 those opposed? The motion carries.

14 All right, let's see. I'm going  
15 to request so I will be -- I will move that  
16 the motion that I made earlier simply continue  
17 to lay on the table and die. Lesa, I think,  
18 has much more constructive language that's  
19 come out of our discussion, so I would move  
20 that the previous motion just remain on the  
21 table.

22 MR. ALLEN: I'll second that.

1                   CHAIRMAN BRANCH: Okay. All those  
2                   in favor? Opposed? The motion remains on the  
3                   table. Lesa, you have the alternative to  
4                   offer?

5                   MS. SCOTT: An alternative wording  
6                   to offer for Motion 3 is "Recommend the GSA  
7                   Administrator issue implementing guidance that  
8                   basis developing negotiation guidelines on  
9                   achieving the lowest overall cost alternative  
10                  to the government."

11                  CHAIRMAN BRANCH: And I think that  
12                  language probably conveys the other piece of  
13                  that which is we understand that there's  
14                  policy that has to be put into place and  
15                  naturally, it's inappropriate to -- so I will  
16                  second that motion. Discussion on that  
17                  motion?

18                  MR. ALLEN: Forgive me for being  
19                  obtuse, but I don't understand that relative  
20                  to the motion we just heard. It seems to me  
21                  a motion for -- that we just passed directs  
22                  the Administrator to do certain things which

1 are perfectly fine and valid and that  
2 therefore that may make Motion 3 moot.

3 I think what we were trying to do  
4 is we were trying to really decompose this  
5 into two pieces to say to the Administrator,  
6 "You need to articulate a single goal for your  
7 Contracting Officers to use in a negotiation  
8 objective", and that this motion really  
9 follows up and says, "and you really need to  
10 tell them what's in the toolbox for getting  
11 there". So that's -- I think that's the  
12 distinction between these two motions.

13 Now, whether that's necessary or  
14 not at this point, I think is a question  
15 that's perfectly valid for discussion but I'd  
16 just clarify that that's kind of where we were  
17 headed to kind of break this up into a two-  
18 move process.

19 MR. CHVOTKIN: Mr. Chairman, it  
20 may be possible that now to combine Motion 4  
21 and the alternative it was agreed upon motion  
22 on the price objective and conclude that

1 resolution with an additional phrase that "and  
2 recommends that the GSA Administrator issue  
3 such implementing -- appropriate implementing  
4 guidance". Now we will not have confused the  
5 difference between fair and reasonable price,  
6 lowest overall cost alternative but just bring  
7 the two together now that we've disposed of  
8 them separately. And think we'll answer the  
9 question without introducing new challenges.

10 CHAIRMAN BRANCH: Is that  
11 acceptable to you, Lesa?

12 MS. SCOTT: Yes.

13 CHAIRMAN BRANCH: All right, so  
14 we'll essentially in the nature of a friendly  
15 amendment, to amend the previously passed  
16 motion to include those words.

17 MR. CHVOTKIN: So my motion would  
18 be to modify Motion Number 4, Alternate 2 to  
19 add at the end a new sentence that says, "The  
20 GSA Administrator shall issue implementing  
21 guidance on this price objective or to  
22 implement this price objective".

1                   CHAIRMAN BRANCH: Or we further  
2 recommend something like that.

3                   MR. CHVOTKIN: Yeah, something  
4 like that.

5                   CHAIRMAN BRANCH: Yeah.

6                   MR. PERRY: Is it possible to add  
7 something to the effect to -- in that added  
8 sentence, "Uniform and consistent negotiation  
9 guidelines", or something to that effect?

10                  CHAIRMAN BRANCH: The inference  
11 that I -- the inference I think from that is  
12 that GSA's Contracting Officers aren't going  
13 to listen to the Administrator.

14                  MR. PERRY: If I just literally  
15 read that, I could still end up with the same  
16 negotiations guidelines that are currently in  
17 the clause that we discussed quite a bit  
18 earlier.

19                  CHAIRMAN BRANCH: Yes, point  
20 taken.

21                  MS. SONDERMAN: My concern about  
22 putting those two things together is that we

1 lost the clear language in the revised Motion  
2 3 that says we're going to achieve the lowest  
3 overall cost alternative. And that I think is  
4 an important thing at least for esteemed  
5 counsel.

6 MR. CHVOTKIN: But Debra, we  
7 rejected that in the Alternate 2 discussion.  
8 There was some clear discussion about it.  
9 Okay, by me because I voted for all of them,  
10 but we -- and I did so intentionally, but we  
11 discussed the difference between achieving and  
12 pursuing and the majority of the panel  
13 rejected achieving and adopted pursuing. So  
14 I don't think -- I mean, we will revisit the  
15 issue, I'm happy to do that. You'll know  
16 where my vote's coming.

17 MS. THOMPSON: But I did note that  
18 Lesa's recommendation had achieving in it.  
19 And we were quibbling over pursuing the prior  
20 motions. But I'm all for achieving.

21 MR. CHVOTKIN: Mr. Chairman, I  
22 don't think we properly captured my thought.



1 I don't want the GSA Administrator to issue  
2 implementing guidance to implement the  
3 guidance. That's probably not very clear. I  
4 think what I said was to issue guidance to  
5 implement the price objective. And it's the  
6 price objective that we describe in the first  
7 sentence. So the GSA -- "recommend the GSA  
8 Administrator issue guidance to implement the  
9 price objective".

10 MS. SONDERMAN: "In a clear and  
11 consistent manner"?

12 MR. CHVOTKIN: "In a clear and  
13 consistent manner".

14 CHAIRMAN BRANCH: At the risk of  
15 too much word-smithing, I think you need to  
16 move clear and consistent manner because all  
17 that tells the Administrator is to do a good  
18 job writing the guidance. It really isn't  
19 sending the message that he believes anybody  
20 should follow. So I think you mean, clear and  
21 consistent guidance to implement the price  
22 objective.

1 MS. SCOTT: We want the guidance  
2 to be clear and convincing not the objective  
3 as much.

4 CHAIRMAN BRANCH: And you can take  
5 out the word "manner" and that period there.  
6 No, not guidance, yeah. Period after  
7 objective. So that amendment to the  
8 previously accepted motion would now read,  
9 "For GSA schedules for services, the price  
10 objective is to obtain fair and reasonable  
11 pricing at the time of contract formation by  
12 pursuing that lowest overall cost alternative  
13 to the government consistent with the  
14 statute". I think you need to put a period  
15 there and start a new sentence. And just say,  
16 "We recommend that the GSA Administrator issue  
17 clear and consistent guidance to implement the  
18 price objective".

19 MS. JONES: I just have an  
20 observation and I know that we already voted  
21 on this but if the statute says that we are to  
22 achieve the lowest overall cost alternative

1 and we're saying that we're going to recommend  
2 pursuing it, we then add that we want the  
3 Administrator to do it consistent with the  
4 statute. So there's a contradiction there.

5 CHAIRMAN BRANCH: I'll address  
6 that. I think what we're really saying is the  
7 statute is ambiguous and it's within the  
8 purview of the Administrator to interpret it.  
9 So you can look at that and you can look at  
10 the statutory construction and it says  
11 contracts and orders. Some people interpret  
12 those to be thing that stand alone. Others  
13 say they have to stand together because if  
14 they don't stand together, it makes no sense.  
15 So I think what the intent of the words  
16 "consistent with statute" is, is, "Hey,  
17 Administrator, you have an obligation to  
18 interpret what that statute means and then to  
19 implement that consistent with your  
20 understanding of what it means."

21 Now, I, for one, again go back to  
22 kind of the English and say they can't stand

1 alone and the reading of that paragraph, it's  
2 impossible for them to stand alone because at  
3 least in services you have no price until you  
4 have a scope of what -- there are others who  
5 believe differently. So I think what we're  
6 really doing is we're putting the  
7 Administrator on notice in perhaps a somewhat  
8 indirect way and maybe we should flesh this  
9 out in the narrative that surrounds a  
10 recommendation that there's an ambiguity and  
11 we believe you've got to address it, but I  
12 think that's really kind of the intent, not to  
13 create a contradiction.

14 Okay, other discussion on this  
15 motion as revised? Okay, hearing none, all  
16 those in favor of the revised motion, signify  
17 by raising their hands, please. All those  
18 opposed? Okay, the motion carries.

19 Okay, with that, I think we have  
20 dispositioned the two major items that were  
21 raised this morning for cleanup. I would hope  
22 we can kind of put services to bed. We have

1 eaten a little bit into our schedule on  
2 solutions but I think it's probably  
3 appropriate that we at least start some of  
4 that work. And I would like to suggest that  
5 we need to find a common term of reference.  
6 I do not believe solutions as we have been  
7 discussing them is defined in the regulation.  
8 I believed that essentially, we've been using  
9 that term in order to convey a certain  
10 business arrangement both from an industry  
11 perspective as well as from a requirement  
12 perspective when we ask industry to bid on our  
13 requirements.

14 So I think if we -- I'd like to  
15 simply take a single topic for the rest of the  
16 afternoon and that's that we try to gain  
17 consensus around what we mean as a solution.  
18 If we can gain consensus around what we mean  
19 as a solution and we come to that with a  
20 common framework, that will give us time to  
21 come back in our October meetings and then  
22 talk about whether there are specific issues

1 with respect to solution sales on the -- well,  
2 actually, I think a couple of issues. Number  
3 one, do we want to use schedules? Do we want  
4 to recommend to the Administrator that  
5 schedules are just not appropriate for  
6 solution sales.

7 Number 2, if they are appropriate, are  
8 there particular issues with respect to the  
9 policy that would govern solution sales that  
10 we need to address? So if nothing else, I'd  
11 like to try to get a common definition on  
12 solutions and I'll open the floor to that  
13 because I think we're in totally uncharted  
14 territory here. Debra?

15 MS. SONDERMAN: I apologize for  
16 not following your direction, but we did have  
17 the start of another motion on the table that  
18 --

19 CHAIRMAN BRANCH: Oh, okay, I'm  
20 sorry. I apologize for --

21 MS. SONDERMAN: -- I'd like to be  
22 able to at least have the floor when --

1                   CHAIRMAN BRANCH: The Chair has  
2                   lost synch. I apologize. Okay, so we have a  
3                   remaining motion on the table to disposition,  
4                   which is that GSA provide a better way to make  
5                   contract prices, terms and conditions easily  
6                   accessible for ordering agencies. Is there  
7                   discussion around that?

8                   MS. JONES: Yes, I'd like to add a  
9                   comment to that. I'm not sure what is meant  
10                  by providing a better way but there are e-  
11                  tools available for customer agencies to  
12                  gather some of that information and there's  
13                  GSA Advantage which lists contract prices.  
14                  There are also contractor price lists on  
15                  Advantage with Ts and Cs. I know that we've  
16                  implemented contracts online in which agencies  
17                  can review awarded contracts in Schedule E  
18                  Library as a result.

19                  So I'm not clear about what is  
20                  meant by a better way.

21                  MS. SCOTT: I don't know if we up  
22                  changing it from provide a better way in

1           increase and/or simplify visibility to the  
2           contract prices and terms and conditions.

3                         CHAIRMAN BRANCH: I think Judith  
4           put this notion on the table. Is that  
5           correct?

6                         MS. SONDERMAN: Right and as I  
7           recall from the discussion, we actually did  
8           not use prices. We were specifically  
9           referring to terms and conditions. I think  
10          prices are available. It's the terms and  
11          conditions that are less easily accessible to  
12          ordering agencies.

13                        I had jotted down that the  
14          Administrator improved the manner in which  
15          terms and conditions of schedule contracts are  
16          provided to ordering agencies.

17                        MS. THOMPSON: Debra, how would  
18          you envision that? What mechanism would you  
19          like to see or what -- how would you like the  
20          data displayed? Can you sort of give an idea  
21          of --

22                        MS. SONDERMAN: I'm not sure. I



1 think from an operational standpoint, what I  
2 hear is that we have to ask the contractors to  
3 provide us those things. We don't have things  
4 available and in particular when terms and  
5 conditions change, there is no way to find out  
6 before they are changed that they are being  
7 renegotiated. And so for example, I've had  
8 the experience where in placing an order  
9 against a schedule contract, my Contracting  
10 Officer negotiated a specific term and  
11 condition for an order and then when the -- a  
12 point in time after that, the contractor  
13 failed to perform. When challenged by the  
14 Contracting Officer, the contractor said,  
15 "Well, GSA changed the terms and conditions of  
16 the schedule contract against which this order  
17 is placed and so I don't have to conform to  
18 your -- to the term that was in that order  
19 because the underlying schedule contract has  
20 been changed.

21 So we had no visibility in to that  
22 change being made and of course, it was in the

1 contractor's interest to get GSA to change.  
2 GSA didn't know that we had negotiated a  
3 special condition around that particular  
4 thing, anyway, and so you know, there was --  
5 we had a failure to communicate that ended up  
6 in the government, you know, well, at least  
7 this part of the government not being happy  
8 and having to pay a whole lot more money.

9 So that -- I don't really know  
10 except that my experience tells me that  
11 reliance on the contractor to provide that  
12 information is not neutral. So I would like  
13 for it to be provided by GSA rather than the  
14 current practice which I think is more heavily  
15 reliant on the contractors providing that  
16 information to the ordering agencies.

17 CHAIRMAN BRANCH: Yeah, let me  
18 cast the discussion a little bit differently,  
19 but I think consistent with Debra and perhaps,  
20 not consistent with policy and this may go to  
21 the training issue. If you talk to the  
22 average government Contracting Officer not in

1 GSA, what this represents is a set of vendors  
2 for which pricing is available that have been  
3 pre-qualified and who hold a government  
4 contract.

5 I believe what often happens is to  
6 meet an agency's peculiar set of needs that  
7 most contracting officers very often will  
8 draft a special what we would call a C type  
9 contract, a special contract requirement.

10 Since those terms and conditions  
11 are not readily -- in the GSA contract are not  
12 readily visible to our contracting officers,  
13 and I would start with what perhaps is the  
14 most important one and it kind of goes to  
15 Debra's example, the order of precedence  
16 clause, then I may well draft a provision that  
17 is either inconsistent with the terms and  
18 conditions of the original contract or which  
19 essentially in terms of the order of  
20 precedence clause has no real force and  
21 effect. So I think what we are probably  
22 suggesting, I don't -- certainly don't want to

1 put words into my colleagues whose ordering  
2 agencies, but I think what we're suggesting is  
3 that responsible contracting officers had --  
4 they had easy access to the terms and  
5 conditions of those contracts could then  
6 tailor whatever the terms and conditions of  
7 those orders are to meet the agency  
8 requirement while respecting the integrity of  
9 the contract and leading to a forcible -- or  
10 an enforceable agreement.

11 That's, I think, the problem we're  
12 trying to solve with this. So I just kind of  
13 cast it in terms of what we're trying to solve  
14 as opposed to a recommendation.

15 MS. SONDERMAN: So would it  
16 benefit the motion to have -- to be amended to  
17 say in order to -- in order to --

18 CHAIRMAN BRANCH: In order to  
19 insure that orders are written in a manner  
20 consistent with the original terms and  
21 conditions of the contract, or the current  
22 terms and conditions of the schedule contract.

1 MS. SONDERMAN: In a consistent  
2 and enforceable contract.

3 CHAIRMAN BRANCH: Yeah. Yeah, I  
4 think with the schedule contract -- well, no,  
5 I think we can just say with the schedule  
6 contract.

7 MS. SONDERMAN: Yeah, and it may  
8 be that it's consistent with the schedule  
9 contract and enforceable or something like  
10 that.

11 CHAIRMAN BRANCH: I guess my only  
12 question would be do we have to say  
13 enforceable. If we're really consistent with  
14 the schedule contract by definition, it ought  
15 to be enforceable. We could probably just put  
16 a period after schedule contract.

17 MS. SONDERMAN: Okay.

18 MS. SCOTT: I like the exclamation  
19 point the word enforceable.

20 MS. SONDERMAN: I do, too.

21 CHAIRMAN BRANCH: Put it back.  
22 I'm easy.

1 MS. SONDERMAN: I think we can  
2 cover that in the narrative, at least to say  
3 there have been issues with agencies issuing  
4 orders that are not able to be enforced  
5 because of changes in terms and conditions  
6 that are not transparent to the ordering  
7 agencies.

8 MR. PERRY: And this is the point  
9 where you ultimately do have to achieve the  
10 lowest overall cost alternative. And if you  
11 can't do this, then you can't assure that --  
12 then we truly haven't done our job.

13 MS. SCOTT: Well, and in the  
14 discussion, we need to make sure that it's GSA  
15 making it available, that it's not GSA saying,  
16 "Go to the contractor's website to get it".

17 CHAIRMAN BRANCH: Okay, and  
18 further discussion on this motion? Resources?  
19 And I think that's an appropriate issue that -  
20 - the issue of money, I don't know that it  
21 needs to be part of the motion.

22 MS. THOMPSON: Instead of written

1 can we say awarded, orders are awarded? I'm  
2 not sure written is appropriate.

3 CHAIRMAN BRANCH: Yeah, placed.

4 MS. THOMPSON: Placed.

5 CHAIRMAN BRANCH: Yeah, that's the  
6 word. Okay, further discussion on this  
7 motion? Okay, hearing none, let's put it to  
8 a vote. All those in favor, signify by  
9 raising their hand. Unanimous, the motion  
10 passes unanimously. Okay.

11 All right, if we could proceed to  
12 I think probably two things that I'd like to  
13 start on this afternoon and you know, we kind  
14 of -- well, as we set out our plan of work, I  
15 thought we anticipated that there would be a  
16 robust discussion around what we did with  
17 respect to services. I further think as we've  
18 gotten more deeply into services that this has  
19 helped to have formed out thinking going  
20 forward with respect to solutions and I think  
21 we're probably going to have to revise our  
22 work schedule to devote some more time to

1           this.

2                           But I'd like to at least get  
3           started on our thought process today. So it's  
4           10 after 2:00. Why don't we take a quick  
5           break, 2:20 and then come back and at least  
6           attempt by the end of the day to get a  
7           consensus definition of what solutions are.  
8           Depending how quickly we coalesce around that,  
9           maybe we can start on the second question  
10          which is our schedules appropriate for  
11          solution sales, but if not, you know, let's  
12          commit to taking that up as the first order of  
13          business next month.

14                        Okay, so let's take 10.

15                        (A brief recess was taken.)

16                        CHAIRMAN BRANCH: We looked at  
17          some of the GSA GWACs. We did not find a good  
18          definition but it did stimulate our thinking,  
19          so I will offer that definition of solutions  
20          up to the panel as a place to start for  
21          discussion. So the definition I'm proposing  
22          is, "Solution is defined as a performance



1 based approach to an agency need under which  
2 a vendor provides an integrated set of  
3 products and services. Procuring those  
4 products or services separately is unlikely to  
5 result in the lowest overall cost alternative  
6 for the government." Yes, Debra?

7 MS. SONDERMAN: I'm good with the  
8 first sentence. I'm not sure that that  
9 necessarily leads to a conclusion that  
10 procuring the products or -- I would say  
11 rather that procuring the products or services  
12 separately is unlikely to result in the best  
13 solution to meet the government's needs. But  
14 I don't know that it's necessarily so that  
15 it's unlikely to result in the lowest of all  
16 cost alternative.

17 CHAIRMAN BRANCH: All right, so  
18 thoughts on that? I mean, I think there are  
19 several ways to come at that. I'm not wed to  
20 that but I guess I constructed it that way  
21 based on our previously robust discussion on  
22 the objective of the schedules.

1                   MR. ALLEN: I'm concerned about  
2                   getting in to the area of solutions now for  
3                   two reasons. One, in the definition that you  
4                   put forth talks about products and we have yet  
5                   to tackle product recommendations in this  
6                   panel, just doing the services part. I'm also  
7                   a little concerned that while there, I think,  
8                   are reasonable definitions in the Federal  
9                   Lexicon about products and what constitutes  
10                  services, there may not be an existing  
11                  solutions definition which leads me to believe  
12                  that we may be transcending the scope of our  
13                  panel here by getting into a solutions  
14                  discussion.

15                  In fact, during the break we had  
16                  some discussion and we talked about, for  
17                  example, that some times that a solution be  
18                  all services. Arguably there could be some  
19                  times in the vast Federal Government that it  
20                  could be all services. If there is not a  
21                  federal definition existing for what  
22                  constitutes a solution, I get a little bit

1 more uncomfortable about this panel proceeding  
2 to try and carve out new ground in the  
3 scheduled program. So I'll just let that  
4 stay.

5 But at a minimum, I would suggest  
6 that if we want to go in and look at  
7 solutions, that we look at product  
8 identifications first because we are here  
9 contemplating products and services. But I --  
10 my gut tells me that even though it's tempting  
11 to try to define what a solution is and then  
12 talk about its applicability on schedules, the  
13 fact is that schedules contracts do provide a  
14 lot of solutions type work today on varying  
15 scopes, varying service and product mixes.  
16 It's all kind of lumped under the services  
17 now. I'm not sure that that's an ill that  
18 needs to be cured. I'm not sure it's an ill  
19 at all. So I would feel better if somebody  
20 else had given us a -- some leeway and some  
21 head start here on okay this is a solution and  
22 then we could define what that means in the

1 schedules program.

2 CHAIRMAN BRANCH: Yeah, let me  
3 just kind of respond to that briefly. I could  
4 certainly see where we might want to defer  
5 this discussion until after we've done  
6 products and maybe that's the right answer.  
7 But in -- I guess the other observation I  
8 would make is that the reality of it is and  
9 you're now selling solutions under GSA  
10 schedule contracts, we're allowing schedule  
11 holders to team services with hardware.

12 While I don't believe that there's  
13 a government-wide definition for solutions and  
14 we've not done extensive research here, but  
15 the brief due diligence we've done I think as  
16 well as the collective experience of a panel  
17 would say that there's not. So this is where  
18 I was trying to head.

19 Now, almost like, you know, going  
20 back to, you know, one of those blue book  
21 exams in college, you get at least partial  
22 credit if you define your assumptions. So I

1 think we need to establish if we're going to  
2 tackle this issue, we need to establish a  
3 working definition from the panel's  
4 perspective of what a solution means knowing  
5 full well that you know, our definition  
6 carries absolutely no substantive weight.

7 I also think that we are going to  
8 have to deal with this issue because I can  
9 foresee a potential circumstance where we may  
10 decide that let's say while we've decided that  
11 the Price Reduction Clause is not appropriate  
12 for services, if we decide it is appropriate  
13 for products and we have this mixed bag, so  
14 now you're in the position of writing an order  
15 that constitutes the Lawyer's Full Employment  
16 Act because one kind of wonders as a policy  
17 question, well, does the Price Reductions  
18 Clause apply to software maintenance and  
19 upgrade or does it not?

20 So I think we're going to have to  
21 eventually tackle this area. I think, Larry,  
22 you raise an excellent point, is now the time.

1 But I guess we were talking about this in  
2 terms of the schedule we had originally laid  
3 out, you know, and the true value of a plan is  
4 it allows you to have a baseline to deviate  
5 from. So I am not opposed to deviating from  
6 that baseline if that is a consensus of the  
7 panel but I would at least like us to come to  
8 a working definition for ourselves of this  
9 because I think that will be necessary to  
10 address, you know, where the price -- what the  
11 role of the Price Reduction Clause is in terms  
12 of all of the things agencies order under GSA  
13 schedule. So with that I will stop talking  
14 and give others a chance to kind of voice  
15 their view.

16 MR. CHVOTKIN: Mr. Chairman?

17 CHAIRMAN BRANCH: Yes, Alan.

18 MR. CHVOTKIN: I think you're both  
19 right. If we come to some consensus or at  
20 least clarity or at least discussion around  
21 the solutions, we may find that it's premature  
22 to go farther down the path until we figure

1 out the second part of it which is the product  
2 side, but I don't think the effort is wasted  
3 to see where that -- if there's a consensus in  
4 a couple of hours.

5 And I'd just suggest that as I've  
6 thought about and talked to some folks during  
7 the break, I think they really come in three  
8 flavors. The solutions, I don't really have  
9 a definition but I think they're in three  
10 types. First, you sort of eluded to here,  
11 which is a performance based approach. I put  
12 that as sort of an agency perspective, as a  
13 performance objective to meet a need in which  
14 the vendor is asked to provide an integrated  
15 set of products and services as the response.

16 The second approach is the agency  
17 establishes the elements of the performance  
18 objective and simply solicits from piece  
19 parts, if you will, and does that to achieve  
20 the performance objective. And a third or  
21 almost -- and not a definitional word but  
22 prepackaged types of activities. They could

1 be services, they could be a help desk.

2 Someone suggested and HSPD-12  
3 subscription services, a wide variety of  
4 activities that stop short of where I think  
5 Mr. Drabkin, if he were here, would say that's  
6 a commoditized but it's well understood as we  
7 talked on Friday about prepackaged kinds of  
8 activities. I think those are the three  
9 flavors of solutions that I can see.

10 Performance based with the vendors providing  
11 the recommendation, a second where the agency  
12 -- performance based where the agency is  
13 providing the components and the third would  
14 be pre-packaged.

15 CHAIRMAN BRANCH: Other discussion  
16 around this? Debra?

17 MS. SONDERMAN: Is this happening  
18 in any area other than information technology?

19 MS. JONES: Yes.

20 MS. SONDERMAN: Can you give us an  
21 example?

22 MS. JONES: At the annual GSA



1       expos there's often training surrounding  
2       solutions and acquiring solutions and when we  
3       think of solutions in the services arena,  
4       because I don't buy products but in the  
5       services arena, basically it's referencing a  
6       service that exceeds or goes beyond the scope  
7       of one single individual schedule and falls  
8       within the scope of more than one schedule.

9                 That's how a solutions approach is  
10       defined from a services standpoint in the  
11       schedules program.

12                CHAIRMAN BRANCH:  If I could just  
13       ask a clarifying question here, Jackie.  So  
14       you're talking about -- I'll just give an  
15       example.  I'll make one up.  So if I buy  
16       changed management under the MOBIS schedule,  
17       and I determine that a piece of change  
18       management is reskilling the workforce, then  
19       I might cross over to 69 and by training under  
20       69, is that the type of thing you're talking  
21       about?

22                MS. JONES:  Yes.

1 CHAIRMAN BRANCH: Okay, thank you.

2 MR. CHVOTKIN: That's a much  
3 easier approach. If we're defining it simply  
4 in terms of crossing multiple GSA schedules,  
5 then we don't have to get into the what.  
6 We've defined it by the how.

7 MS. SONDERMAN: And I don't know  
8 that we should limit it to that but I do think  
9 we should identify that as one of the kinds of  
10 solutions because that is a real challenge at  
11 the operational level when you have a  
12 particular contractor who has multiple  
13 schedules or contracts under multiple  
14 schedules and they come back to you and say,  
15 "Well, I can offer you this pricing under this  
16 schedule, or I can offer you this under this  
17 other schedule". So wow.

18 So I don't know -- and maybe we  
19 need to say an integrated set of products  
20 and/or services that could come from multiple  
21 -- that would be from more than one GSA  
22 schedule, that fall within the scope of

1 multiple schedules. That's good.

2 CHAIRMAN BRANCH: This discussion  
3 is, as I listen to it, is kind of improving.  
4 Because I would think and I hate to go around  
5 Robin's barn again, but in the hypothetical  
6 that I gave, there would be no Price Reduction  
7 Clause because those are both services. So I  
8 guess the problem, if you will, we're trying  
9 to solve really goes, I think, more to Alan's  
10 three categories and I like his three  
11 categories in terms of bounding the scope of  
12 what we mean by solution.

13 So we're talking about that  
14 definition as proposed. The definition by  
15 which -- and I hesitate to use this word but  
16 I can think of no other, where the government  
17 essentially requires that vendor to assemble  
18 a bundle of services because they've already  
19 determined what the mix of hardware and  
20 services are and they just want a price or an  
21 approach to doing that.

22 And then this idea of prepackaged

1 activities such as training courses, a help  
2 desk, things that are, perhaps, not  
3 commodities but if you will, the scope and the  
4 range of approaches to delivering those  
5 services are so well defined as to make them  
6 susceptible generally to fixed price type  
7 relief. So I -- and I'm just kind of reacting  
8 to what I've heard. I think Alan has scoped  
9 the solutions envelope pretty well with those  
10 three categories.

11 MR. CHVOTKIN: Let's stay with the  
12 first one, Mr. Chairman. I tend to keep the  
13 procurement methodology separate so whether  
14 they result or don't result in value, a  
15 different question, then the objective, but  
16 the first is a performance based approach by  
17 an agency to meet its need through which a  
18 vendor or vendors offer an integrated set of  
19 products and/or services.

20 CHAIRMAN BRANCH: Let me tell you  
21 why. I drafted it that way for a reason and I  
22 will make my assumption explicit now. So if

1       you could break them apart, you know, as you  
2       might suggest in your alternative to what I  
3       said, "Hey, I understand what that approach is  
4       going to be and I really want you to give me,  
5       you certified smart guys over there to marry  
6       up with the hardware over here to provide that  
7       solution", then I would question why you would  
8       be going at the procurement of a solutions  
9       approach because if I know that I want to buy  
10      you know, 15 widgets over here, and I want to  
11      buy these certified smart guys over here, the  
12      likely possibility that I'm going to get the  
13      5 widgets at a better price inside a solution  
14      is probably less than if I just bought them.

15                So what I was trying to do with  
16      that last phrase and I'm not wed to it, was to  
17      provide a test of when you could call  
18      something a solution against that because I  
19      would argue if I can break them apart then to  
20      package them under a solutions is frankly, an  
21      attempt on the part of the government to not  
22      undergo the administrative burden of issuing

1 more than one order and I don't necessarily  
2 think that's a laudable objective here, if we  
3 can get better advantage by buying the pieces  
4 separately.

5 So that was my -- that was kind of  
6 my thinking on that, what is our test of when  
7 we really determine we have a valid  
8 requirement for a solution as opposed to a  
9 bunch of certified smart guys and a bunch of  
10 piece parts that we want to bundle together  
11 for administrative convenience. But I've got  
12 an open mind on that.

13 MR. CHVOTKIN: My second was just  
14 as you've described it, which is that the  
15 agency determines the performance -- the  
16 elements and solicits offerers to provide  
17 them. It is exactly that bits and pieces  
18 approach. It may still be a solution. It's  
19 just that in one case it is the Agency that is  
20 describing the outcome to be achieved and  
21 behind the elements. In the first instance,  
22 it was the agency was describing the outcome

1 and the vendor was recommending the necessary  
2 piece parts to meet that objective.

3 And then the third again, it's not  
4 a definitional term, but I'll just call it a  
5 pre-packaged activities, and these are  
6 examples of where the solution -- where the  
7 item to be acquired is well understood by  
8 trade or practice such -- and you know, I can  
9 only define it by example, a help desk or  
10 HSPD-12 services or something else.

11 I do believe that there are many  
12 solutions that are well beyond IT as well. I  
13 think there are lots of examples of that,  
14 disaster recovery and elsewhere so lots of  
15 times crossing multiple schedules. Those are  
16 the three that I had in mind. I can work on  
17 them but that's the concept.

18 CHAIRMAN BRANCH: Yeah, and I  
19 agree that those are three good balance, I  
20 guess, and this is philosophical going to the  
21 second one. So if I'm an agency and I've  
22 already defined the elements of the solution,

1           what would ever cause me to bundle those and  
2           put those under the responsibility of a single  
3           contractor? You know, if it's an IT solution,  
4           then wouldn't I always be better off, since  
5           I'm dictating that and taking the risk of  
6           separation anyway of going and buying those  
7           the most -- you know, effectively as possible  
8           without paying the prime's loading?

9                         You know, if I'm -- I guess in a  
10           sense NMCI, and I will use that as an example,  
11           Navy/Marine Corps Internet, you know, we  
12           walked away from telling the vendor how many  
13           computers we want. We said, "We want this  
14           level of service". I'd argue, had we said,  
15           "We want you to buy 50,000 computers and we  
16           want you to bring in these smart guys to  
17           manage that infrastructure, we probably would  
18           have been better off simply going to Dell  
19           ourselves or HP and buying those 50,000  
20           computers. So why would I ever tell a guy,  
21           you know, to buy my solution except for the  
22           fact that, you know, I've decided for my



1 administrative convenience, I only want to  
2 talk to one guy?

3 So I agree with your definition.

4 I think you probably -- you know, I  
5 philosophically have a problem or have a hard  
6 time understanding why you never want to go do  
7 that as a buyer if you've already dictated the  
8 solution.

9 MR. CHVOTKIN: It was just a  
10 suggestion but I think there could be numerous  
11 examples of where the reliance on a contractor  
12 team might actually be more effective than  
13 paying the separate loadings for the piece  
14 parts, but whether that's true or not, we'll  
15 know in the actual order and that's why I  
16 suggested earlier keeping the procurement  
17 method separate from the discussion of  
18 definitions because I think it is too easy to  
19 presume an outcome that we're actually  
20 preferring to rely on the competitive  
21 environment to determine force.

22 CHAIRMAN BRANCH: Okay, fair

1           enough. Fair enough.

2                   MS. SCOTT: We're also assuming  
3           that the solution is the best idea. I  
4           actually have examples where somebody put  
5           together what was a total solution in order to  
6           overcome things like Davis-Bacon or other  
7           areas. So I'll put up that it's not always  
8           the end all and be all sometimes it is used  
9           for.

10                   MR. CHVOTKIN: Mr. Chairman, I  
11           think there is one other characteristic of the  
12           solutions and maybe it helps us a little bit  
13           because it's only in that third example of the  
14           sort of per-packaged solutions do I think we  
15           get to replicability of the purchase. So the  
16           solutions that Tom needs at Treasury or that  
17           Debra needs in Interior in either the first  
18           two examples, may end up being fairly unique  
19           and the reason I mention that lack of  
20           replicability is to get to the end goal.

21                   We talked about the need for a  
22           price reduction clause is kind of meaningless

1 on a one-by-one procurement. Whereas in the  
2 pre-packaged solutions where there is a  
3 possibility of replicability, there might be  
4 a residual reason to have something resembling  
5 a price reduction clause. I don't know what  
6 that would be and I look forward to that  
7 discussion but that's the only place where I  
8 could see a meaningful discussion about  
9 whether the Price Reduction Clause has any  
10 vitality at all.

11 CHAIRMAN BRANCH: Well, actually,  
12 I'll have to differ with you there in that if  
13 essentially, in your second case, I've said  
14 here are the elements of the solution and I  
15 have specified go buy those boxes and we're  
16 treating those boxes strictly as hardware,  
17 then I would like to perhaps see a Price  
18 Reduction Clause applied to those boxes. So  
19 I think probably in both 2 and 3, you know,  
20 you might well have a need for a price  
21 reductions clause as it applies to the  
22 hardware piece, not necessarily the services

1 piece because again, you know, well we've gone  
2 over and over that and probably you know,  
3 perhaps no Price Reduction Clause in that kind  
4 of first one.

5 So let me, you know, in the spirit  
6 of kind of moving the ball forward, I think  
7 you've scoped this right, so could we take out  
8 the word "performance" -- or let's see, take  
9 out "performance based" and put in  
10 "acquisition approach"? And put a period  
11 after services and then put the following line  
12 in the -- "Categories of solutions include:"  
13 and then your three categories, so then I  
14 think we have a definition that's kind of  
15 clear of the original -- you know, of my  
16 original assumptions but then captures that  
17 universe fairly well.

18 So that would be -- yeah, and so  
19 that would be -- that's your number 2. Yeah,  
20 we don't want to get rid of that, just I guess  
21 make that the middle bullet, the piece you  
22 just took out, Pat. So just go to solutions

1 here.

2 MALE PARTICIPANT: Go up to edit  
3 and hit undo. There you go. That's got it  
4 and then just make that the first bullet.

5 CHAIRMAN BRANCH: Yeah, that's  
6 fine. Yeah, and I would just change piece  
7 parts to solution components, so it's products  
8 and services. And I think -- I mean, I can  
9 live with that definition of solutions.  
10 Discussion around that? Can folks kind of  
11 live with that? Think on it until next  
12 session. Yes.

13 MS. THOMPSON: I'd like to look at  
14 some of the information regarding teaming  
15 arrangements because we may have some  
16 information there. I'd like to do that.

17 CHAIRMAN BRANCH: Okay. Okay. So  
18 let me, I guess, ask this question; can we  
19 accept that definition provisionally?

20 MS. SCOTT: Yes.

21 CHAIRMAN BRANCH: All right, I  
22 guess I'd like to raise one more issue while

1 we still have a quorum. So Larry has  
2 suggested that we may not want to address this  
3 piece until we talk about products. So do we  
4 want to revise the order in which we  
5 deliberate and make recommendations? I think  
6 that would -- I mean, I believe that would be  
7 appropriate because based on whatever your  
8 outcome is on products, is going to perhaps  
9 inform your views on what we do with  
10 solutions. So --

11 MR. CHVOTKIN: I would support  
12 that.

13 CHAIRMAN BRANCH: All right, so I  
14 will -- you know, I just note that it's the  
15 consensus of the group that our next meeting  
16 will really address the Price Reduction Clause  
17 relative to products that once we reach  
18 resolution on that, we will come back to this  
19 issue of solutions which should give you know,  
20 out colleagues at GSA time to perfect the  
21 definition as they are using it in operating  
22 practice and to have, I think, a solid

1 discussion around given this is the  
2 assumptions we are making for both products  
3 and services, who do we want to deal with  
4 these finally?

5 Okay, all right, it's 2:53. I  
6 think we have done, again, some good work  
7 today. I want to thank the panel for some  
8 very thoughtful deliberations. I'm going to  
9 ask Pat to do one more thing administratively  
10 and then I think we can get out of here for  
11 the day be we need to start thinking about  
12 November meetings because it's also clear that  
13 we have work to go yet.

14 So Pat, I turn it over to you.

15 MS. BROOKS: We have the October  
16 meeting set. Remember October 6th and October  
17 27th. The 6th -- one of them is back here and  
18 the other one is at Juror's Hotel. We had  
19 already -- we had also decided that those were  
20 going to start at 9:00. So I guess my first  
21 question would be, given the issues that we're  
22 dealing with and the discussions, do we still

1 want to start at 9:00 or do we want to  
2 continue to start at 8:00?

3 I can do my Federal Register  
4 notice for the new dates, I could issue an  
5 amendment to the current time frame and  
6 indicate that those would start at 8:00 also.  
7 So the issues are starting time and the dates  
8 for November and potentially, December  
9 meetings. Remember in November we do have a  
10 couple of holidays. We have the Veterans Day  
11 as well as Thanksgiving.

12 So if we're to get in two meetings  
13 in November are we potentially looking at  
14 trying to get in two before the -- before the  
15 Thanksgiving week, you know, leading up to the  
16 Thanksgiving holiday?

17 MS. THOMPSON: I propose that in  
18 November, if we are to do two meetings, that  
19 we do one back-to-back.

20 CHAIRMAN BRANCH: Other thoughts  
21 on that? I don't so much mind doing them back  
22 to back but I think it might be useful to



1 insert a day between the two, simply because  
2 that gives us some time to process what we've  
3 done and you know, gather additional  
4 information so, and I know that that makes  
5 your week a little bit longer, Jackie, coming  
6 from the West Coast, but I think there's some  
7 value, you know, in maybe doing a Monday and  
8 a Wednesday, so you kind of got Tuesday to  
9 check with some people and do some things if  
10 we have issues that you want a richer  
11 understanding of from your stakeholders.

12 MS. JONES: I would agree with  
13 that. Just an observation of my own, I find  
14 that we're more productive if we do them that  
15 way, too, it seems to me.

16 MS. BROOKS: Okay, so do you want  
17 to throw out some dates?

18 MR. CHVOTKIN: I want to start  
19 with November 4, Monday, November 4.

20 FEMALE PARTICIPANT: Isn't  
21 November 4th a Tuesday.

22 MR. CHVOTKIN: The Redskins play

1 Monday night on the 3rd. That's why, it's not  
2 a Sunday. Oh, bad day to start at 8:00  
3 o'clock in the morning after a Monday night  
4 Redskins game, that will not be good.

5 MS. SCOTT: Well, I would posit  
6 that November 4th is not a date that we want  
7 to have people away from their home voting  
8 districts anyway.

9 MR. CHVOTKIN: I agree with that.  
10 I agree with that.

11 MS. SCOTT: The 12th is a holiday.  
12 Yeah, better.

13 MS. BROOKS: Okay, so in October  
14 it will be the last Monday in October, the  
15 27th, it is, so we've got the 6th and the 27th  
16 of October. So November, if Veterans Day is  
17 the 11th, is the 10th a holiday. We get that  
18 one on the 11th.

19 MS. SONDERMAN: Right, Veterans  
20 Day is a fixed holiday so we could do 10 and  
21 12.

22 MS. BROOKS: What about 12 and 13

1 or 13, 14?

2 MS. SONDERMAN: Elliott had said  
3 he wanted to have a day in between. So he was  
4 suggesting --

5 CHAIRMAN BRANCH: I certainly  
6 suggested that but if it's a consensus of the  
7 group they want to do then absolutely back to  
8 back, I'll live with that.

9 MS. BROOKS: Well, you could do 12  
10 and 14.

11 MS. SONDERMAN: 12 and 14.

12 MS. BROOKS: Which would be  
13 Wednesday and Friday. What about the  
14 following week? You would have still one more  
15 week before the Thanksgiving week which is the  
16 week of the 24th.

17 CHAIRMAN BRANCH: I guess kind of  
18 looking at this, maybe 12 and 13 is the best  
19 we can do. I guess 10th and 12th.

20 MS. SCOTT: We can do the 10th and  
21 12th, Jackie can hang out at my house on the  
22 11th.

1                   CHAIRMAN BRANCH: 10th and the 12th?

2                   Does that work? Okay.

3                   MS. BROOKS: Okay, do we want to  
4                   also look at December because I think we are  
5                   going to need some December dates?

6                   CHAIRMAN BRANCH: No. I'm going  
7                   to exercise the Chair's prerogative and draw  
8                   a line in the sand. You know, it's my hope  
9                   that now we kind of have an operating rhythm  
10                  down that we can disposition products in one  
11                  meeting in October and if not, we can at least  
12                  disposition products and one and a half and  
13                  get started on solutions and really try to  
14                  wrap this up, and I'm going to have to ask the  
15                  commitment of everybody on your respective  
16                  writing teams to support that.

17                  Here is my concern. The closer  
18                  the work that the panel gets to the next  
19                  Administration, the less likely in the grand  
20                  scheme of things, it will get serious  
21                  consideration. I don't know, most of you in  
22                  here have probably lived through transitions

1 in Administrations. I have lived through one  
2 or two at the senior leadership level and my  
3 concern is that this work will get lost.

4 So I believe that we have to  
5 finish this in a timely manner such that when  
6 the briefing books are prepared for the next  
7 Administration, this is a piece of that  
8 briefing book. And I think that if we start  
9 to wander into December, that becomes less and  
10 less likely and I will have chewed up a great  
11 deal of intellectual capital for very little  
12 result. So no, I don't want to consider  
13 December. I want us to commit firmly to a  
14 goal of closing this out by the end of  
15 November so that this work can get serious  
16 consideration.

17 Okay. All right, are there any  
18 other issues we need to discuss? Then again,  
19 I thank the panel for their good work today.  
20 We will see you in October.

21 (Whereupon, at 3:05 p.m. the  
22 above-entitled matter concluded.)

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