

GENERAL SERVICES ADMINISTRATION

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MULTIPLE AWARD SCHEDULE ADVISORY PANEL

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MEETING ON FAIR AND REASONABLE PRICE
DETERMINATIONS

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MONDAY,
AUGUST 18, 2008

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The meeting was held at the American Institute of Architects, 1725 New York Avenue, NW, 2nd Floor board room, Washington, DC, at 9:00 a.m., Elliott Branch, Chairman, presiding.

PRESENT:

ELLIOTT BRANCH	Naval Sea Systems Command
JACQUELINE JONES	U.S. General Services Administration
DEBRA SONDERMAN	Department of Interior
THEDLUS THOMPSON	U.S. General Services Administration
DAVID DRABKIN	U.S. General Services Administration
THOMAS A. SHARPE	Department of the Treasury
LARRY ALLEN	The Coalition for Government Procurement
JUDITH NELSON	U.S. General Services Administration
LESA SCOTT	U.S. General Services Administration

THOMAS ESSIG Department of Homeland
Security

ALAN CHVOTKIN Professional Services
Council

GLENN PERRY U.S. Department of

Education

STAFF PRESENT:

PAT BROOKS Designated Federal
Official

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

2 (9:12 a.m.)

3 MS. BROOKS: Good morning,
4 everybody. I'm Pat Brooks the Designated
5 Federal Official for this panel, and we're
6 going to get started. Thank you for your
7 patience this morning. We just had a little
8 audio visual problem here that we had to get
9 resolved.

10 Before I turn the meeting over to
11 Elliott, just a couple of administrative
12 announcements. Please remember to turn off
13 your cell phones, or put them on vibrate. We
14 do have -- I think most of you have found the
15 refreshments outside the door. They will be
16 there all morning. So please feel free to
17 fill up whenever you need to.

18 The bathrooms are outside the door
19 to your right; both the ladies' and men's
20 bathroom are there. We do have copies of the
21 presentations outside, but if you don't get a
22 copy, all of the presentations including the

1 transcript will be posted on the panel website
2 within the next couple of weeks.

3 I want to remind our panel members
4 to please use the microphone when you're
5 speaking again so the transcriber can pick up
6 your -- whatever statements that you're
7 making. And I remind the other members here
8 that are attending the meeting that if you
9 have questions regarding the panel, or
10 presentations or anything, please see me
11 during the break or during lunchtime.

12 Any questions? Then I'm going to
13 turn it over to Elliott.

14 MR. BRANCH: Thank you, Pat. Good
15 morning, everyone. We are -- I think I've
16 lost my mic. There we go. Okay, good morning
17 everyone. I think we are heading down the
18 home stretch here. The next series of
19 meetings will deal specifically with four
20 things: We are going to start this afternoon
21 deliberating with respect to recommendations
22 that we are going to make the administrator

1 regarding services on the multiple awards
2 schedule, and services will include solutions
3 by us as well, and we'll spend the next couple
4 of meetings on that.

5 And then we're going to move onto
6 recommendations that we will make to the
7 administrator with respect to supplies on the
8 multiple awards schedules.

9 We will come back and we will look
10 at issues that are related to, but not
11 directly pertinent, to the scope of this
12 charter, and we will have a final meeting
13 hopefully sooner than later to kind of try to
14 wrap this into a coherent product.

15 So we will start that series this
16 afternoon by deliberating on services. I just
17 want to put everyone on notice, and Pat will
18 do this in the next public announcement, but
19 as we schedule meetings, the next meeting will
20 be the last meeting at which we take
21 presentations.

22 The panel of course welcomes any

1 sort of written statements people might want
2 to submit for the record, and we'll go so for
3 the term of its deliberations. But we think
4 it's time now for us to do more deliberating
5 and less taking of presentations.

6 So we'll take some today. If
7 anybody is interested in providing us with the
8 presentation, the next meeting will be your
9 last chance. And before we get on with that,
10 I'd like to turn it over to Dave Drabkin, who
11 has asked for a few minutes.

12 MR. DRABKIN: Thank you, Elliott.
13 At our last meeting, the GSAIG made a
14 presentation to us on information that it had
15 gleaned from its work in pre-award surveys.
16 And it actually presented a slide, as some of
17 you may recall, which included in the slide a
18 number of 71 percent.

19 Unfortunately, it appears that
20 many people walked away from that presentation
21 I think misunderstanding it, and I just wanted
22 to make sure we got it clear here before it

1 went any further.

2 What the IG was -- and by the way,
3 we would've had Andy Patchan back today to
4 explain this, except for the fact that Andy
5 Patchan has left GSA, and is now at USAID.
6 But had -- oh, I'm sorry, you're right. He
7 went to federal reserve, not USAID. I think
8 he got an offer, though. We -- we -- he's a
9 very popular fellow.

10 At any rate, wherever he is, he's
11 not in GSA anymore, and he couldn't come back
12 here today. But back to the slide, what the
13 slide said was, as everybody will recall, and
14 if you don't recall it, please go back and
15 read the slide; that when they did their pre-
16 award reviews - this is before the contract
17 was awarded and the price was set - that they
18 found in 71 percent of the time that we didn't
19 get the best price offered to us.

20 That is distinctly different than
21 saying that after we made award of the
22 contract and they had done reviews, they found

1 that 71 percent of the prices were not the
2 best prices. That is not what they said they
3 found.

4 But unfortunately in at least one
5 period, there was a front page story in which
6 it said that 71 percent of GSA's prices were
7 not the best prices. And then there was an
8 editorial taking GSA to task for not getting
9 best prices in 71 percent of the cases, all of
10 which was based upon the presentation made by
11 Andy Patchan, none of which is what Andy
12 Patchan said.

13 So I would like to make sure that
14 we're all clear, and if we're not, I'll be
15 glad to have the material redistributed so
16 that everybody can understand that that is
17 what the IG found in the initial offers that
18 were presented to us for negotiation, 71
19 percent of the time the prices weren't the
20 best they could be.

21 Now, that doesn't mean there's not
22 a problem. We ought to be getting a whole lot

1 better prices in the first offers we get from
2 vendors. But it doesn't mean that we got bad
3 prices after we finished our negotiations and
4 awarded contracts, and that was a terrible,
5 terrible message to take away from that
6 briefing.

7 I don't know what our friends from
8 the VA will say about fair and reasonable
9 pricing on the schedules, but I guess we can
10 ask the questions about what they find. But
11 I just wanted to hammer this home that you
12 need to look at what Andy Patchan actually
13 said, and you need to understand that he did
14 not say that 71 percent of the prices obtained
15 on the GSA schedules were bad.

16 That is not what was said. Thank
17 you, Elliott.

18 MR. BRANCH: All right. Thank you
19 for that clarification, David. Okay, I think
20 we're ready to proceed with our presentations
21 this morning. And first up on the screen, we
22 have Maureen Regan from the VA's Office of

1 Inspector General. Good morning, Maureen.

2 Thank you.

3 MS. REGAN: That one? Okay, now
4 can you hear me? First of all, I'd like to
5 thank the panel for inviting me to speak today
6 on fair and reasonable pricing. And I have
7 one caveat. It's I can only talk about fair
8 and reasonable pricing as it affects the
9 schedules awarded by VA, as we have absolutely
10 no experience in what goes on in GSA with the
11 GSA schedules, or with the types of
12 commodities, services that GSA awards
13 contracts to.

14 What qualifies us to do this is
15 first of all the Office of Contract Review.
16 This is an office within the Office of
17 Inspector General that's a separate entity,
18 and basically we operate under a memorandum of
19 understanding with the Department that we've
20 had since 1993 to conduct pre and post award
21 audits of FSS and contracts and healthcare
22 proposals that are awarded at our VA medical

1 centers.

2 Primarily we do pre and post award
3 audits of the federal supply schedule
4 contracts. For the past five years, we've
5 conducted 277 pre-award audits or reviews and
6 148 post award reviews.

7 Most of our post award reviews are
8 voluntary disclosures, and the pre-award
9 reviews are always at the request of the
10 contracting officer, and they could be
11 modifications or they can be original award or
12 extensions.

13 Pre-awards have identified \$2.1
14 billion in potential cost savings to the
15 government, and post awards have recovered
16 \$81.1 million in overcharges. What the pre
17 and post awards audits or reviews do is they
18 allow us to understand the commercial
19 practices of the industries that we deal with
20 by knowing how they sell to commercial
21 customers, what their commercial practices
22 are, and to identify ways that the government

1 can be more like them in how we buy products.

2 The purpose of a pre-award is to
3 advise the contracting officer the
4 reasonableness of the offer, and we also
5 recommend tracking customers for price
6 reduction purposes.

7 One of the things that we've done
8 at the VA is ensure that the people understand
9 the vendors. If they're going to go through
10 a pre-award, what's the kind of data that we
11 need.

12 This helps expedite the process of
13 getting the pre-award done and to get a
14 contract awarded in a more timely manner. And
15 so that's actually in the solicitation, and it
16 has sped up the process some.

17 Okay, the federal supply schedules
18 are unique to the federal government. They
19 offer customers a simplified method of
20 purchasing commercial supplies and services,
21 satisfies the requirement for full and open
22 competition. Vendors have already been

1 determined to be responsible, and prices
2 determined to be fair and reasonable.

3 So when somebody out there in the
4 field is purchasing, they don't have to make
5 all of those decisions, which expedites the
6 process, and we don't need as large an
7 acquisition workforce in order to compete
8 every purchase for commercial items.

9 The FSS though is not comparable
10 to commercial contracting. In all the work
11 that we've done in our industries, we haven't
12 seen any contracts out there that are like or
13 similar to the FSS.

14 And so I -- we listed here some of
15 the differences that we see in our industries.
16 First of all, it's a non-competitive award.
17 In commercial, competition is usually
18 required. It's a multiple award. Anybody can
19 come in, and if you meet the requirements and
20 offer what's considered a fair and reasonable
21 price, you can get a contract. And many of
22 our commercial customers, it's winner take

1 all. It's competitive.

2 Vendor has the option of offering
3 some or all of their items. It's the vendor's
4 decision on the FSS. On the commercial
5 customers, we see it's more cherry picking;
6 that a lot of them we don't see that many
7 customers that buy all of the product line.
8 They can pick and choose what they want to
9 buy.

10 You can come in and request
11 modifications to add or delete products very
12 frequently on the FSS. You can't do that on
13 commercial contracts. We see some, but we
14 don't see majority of them going that way.
15 You can request price increases under the
16 economic price adjustment clause.

17 Most commercial customers do not
18 have a price adjustment clause in them, or at
19 least not upwards. It's a five-year term with
20 a possibility of one or more five-year
21 extensions. I think VA's only doing one five-
22 year extension. I know GSA is doing more than

1 that.

2 The average length of the
3 contracts that we see in industry are about
4 three years. They range anywhere from one to
5 maybe ten, but the average is about three
6 years.

7 Again, looking -- comparing the
8 government and the commercial sector, there
9 are some advantages just of government
10 contracting that you don't see in the private
11 sector. One is the Competition in Contracting
12 Act. The second is the right to file a
13 protest if you don't get a contract. You can
14 have an independent arbitrator look at what
15 happened.

16 It's much more difficult to
17 terminate a government contract. Small
18 business initiatives are unique to the
19 government, and like I said earlier, there's
20 no economic price adjustment clauses in the
21 contracts that we've seen.

22 There are some similarities

1 between the FSS and commercial healthcare
2 contracts. First, both commercial customers
3 and the government are using their aggregate
4 buying power to obtain better pricing.

5 We have the FSS schedules, and
6 they have group purchasing organizations out
7 there that hospitals and other healthcare
8 entities belong to. The group purchasing
9 organizations do the negotiation, and they buy
10 off them.

11 One of the things we've learned
12 though is that whereas government customers
13 only have one federal supply schedule to go
14 to, group purchasing members on average -- we
15 looked at a survey a few years ago. It's
16 about 3.5 group purchasing groups that they
17 belong to. So they can kind of shop around
18 within the group purchasing organizations.

19 There are best price and most
20 favorite customer clauses in commercial
21 contracts. They may not be worded the same as
22 ours, but there are clauses to say we will get

1 your best price throughout the term of this
2 contract. And price reduction provisions are
3 not -- are not uncommon. How they enforce
4 them, I don't know. But they are not uncommon
5 in the contracts that we've looked at.

6 These are the schedules that are
7 managed by VA. You can see they're all
8 related to healthcare services, or healthcare
9 supplies.

10 The 621, the professional services
11 and the medical laboratory testing are rather
12 new. The others we've had for quite some
13 time. They are in the process of adding two
14 schedules on the 6/21 home infusion therapy
15 services, and tele-radiology.

16 VA schedules do about \$7.5 billion
17 in sales each year, and about 99 percent of
18 that is by DoD and VA. This is why the price
19 reasonableness is very important to VA. As I
20 said, 99 percent of the purchases are by VA
21 and DoD. It's about -- about a 60/40 split
22 with VA being the highest, depends on the

1 commodity.

2 There's two times when you want
3 price reasonableness: at the time of award,
4 which is very important, but also if you're
5 going to have a five-year contract in a market
6 that's volatile with products, you want to
7 make sure that you have price reasonableness
8 the day after award, and after that.

9 One of the things that we've
10 noticed is that in doing our pre-awards, and
11 actually our post awards, there's -- a lot of
12 vendors wait until after award to give
13 discounts to their commercial customers. You
14 can have a week or two right after award, and
15 the price goes down 30 percent.

16 We had one where the price went
17 down within three months from \$15.00 for the
18 item, to \$3.45. The federal government was
19 the only one paying the \$15.00. Every other
20 customer was getting \$3.45, and it was
21 millions of dollars when you looked at the
22 volume that the government purchased.

1 One of the exclusions too, from
2 our price reasonableness discussion today are
3 going to be covered drugs. Public law 102585
4 established a formula for determining the
5 federal ceiling price for covered drugs. And
6 these are innovator drugs that are marketed
7 under a new drug application. And they're
8 generally awarded at the federal ceiling
9 price.

10 You may have occasion where
11 they're awarded at a lower price; there may be
12 a waiver to have them at higher price because
13 the calculation brings it down too low. But
14 generally, they're awarded at FCP. So some of
15 the -- the negotiation objectives that you
16 have with regular commodities don't apply to
17 these pharmaceuticals.

18 One of the reasons that we have
19 this law is that -- or it's important to get
20 these drugs on contract is that the
21 manufacturers of the covered drugs cannot
22 obtain any funds from federal programs,

1 including medicare and medicaid, unless they
2 enter into a master agreement with VA and
3 offer the drugs on the federal supply schedule
4 at a price that is no higher than the FCP.

5 They can always give us a lower
6 price, but it can't be higher than the FCP.
7 And the FCP is -- is only for what we call the
8 big four, which is VA, DoD, Public Health
9 Service, which includes Indian Health
10 Services, and Coast Guard. Again, most of the
11 purchases of these drugs are by VA and DoD.

12 Okay, I have price reasonableness
13 and non-covered drugs, but this is non-covered
14 drugs, but also medical surgical supplies,
15 equipment, and any other item that we have on
16 our contracts. Most favored customer is the
17 objective of negotiation.

18 Contracting officer relies on
19 commercial sales practice disclosures made by
20 the vendor. We conduct pre-award reviews for
21 the accuracy of that data, and also there's a
22 price adjustment clause that if the price was

1 awarded based on misinformation, that the
2 contracting officer can adjust the price. And
3 these all help to keep the price reasonable
4 for the government, the awarded price.

5 One of the myths out there is that
6 the government is legally entitled to most
7 favored customer or best price. And the
8 reason I know it's a myth is we get qui tams
9 everyday, where someone has come in saying,
10 "We were defrauded because we're not getting
11 the best price out there."

12 And so we have to go back and
13 explain we're not entitled to the best price.
14 We're entitled to a fair and reasonable price,
15 which may or may not be the best price that is
16 out there.

17 And so it's a negotiation
18 objective. There's no law that says we're
19 entitled to that. And again, that's in GSR
20 538.270, where it says, "The government
21 recognizes that terms and conditions of
22 commercial sales vary, and may be legitimate

1 reasons why the best price cannot be
2 achieved." So therefore, that's why it's an
3 objective. It's not mandatory.

4 It's not only the objective at the
5 time of award, but it's also the objective
6 when there's modifications to add products or
7 services. One of the things we've seen over
8 the years is that some companies will come in
9 and offer a portion of their product line,
10 sometimes a small portion, and then come back
11 in and want to modify the contract to death to
12 add all the other items.

13 Hopefully this will get them by a
14 pre-award, because the dollar values might be
15 lower, and we've now started doing more pre-
16 awards on modifications to make sure that
17 those items which are likely to be high dollar
18 items are awarded at a fair and reasonable
19 price.

20 There is absolutely no
21 relationship between this and the federal
22 ceiling price, and there's no relationship

1 between the best prices used by Medicare and
2 Medicaid and their statutes.

3 How is it determined? Well, first
4 of all, they compare the offered prices to the
5 commercial customers or the vendor. In this
6 we look at the vendor's disclosures, which are
7 on the CSP disclosures, which is a GSA
8 document in pre-award reviews that we conduct
9 of the accuracy of that information.

10 Comparable customers, commercial
11 customers: it's really only relevant if we're
12 not being offered most favored customer
13 pricing. The vendor says you're getting most
14 favored customer pricing, and they can
15 demonstrate that's their best customer. We
16 don't look at anybody else.

17 Some of the factors that the
18 contracting officer must consider when we're
19 not being offered most favored customer are
20 quantities purchased by commercial customers.
21 Is it a commitment? Are there terms and
22 conditions that distinguish the customer from

1 the government's purchasing practices?

2 However, differing terms and
3 conditions don't always make the commercial
4 customer non-comparable to the government.
5 First of all, because there's nothing else out
6 there similar to the FSS, every contract out
7 there is different from ours. They always
8 have different terms and conditions.

9 So we'll have a vendor come in and
10 say they have different terms and conditions.
11 Well, every contract has that, so let's look
12 at what they are, and how does that compare to
13 what the government is buying?

14 One of the issues we dealt with a
15 number of years ago was quantities, especially
16 quantity commitment, and we would look at the
17 commitment, and the commitment might be for \$1
18 million, and we're buying \$10 million with no
19 commitment. And so we would say, "Well, maybe
20 we're still comparable to that customer."

21 The other thing we found with
22 commitments was they may sign a commitment

1 agreement, but there was no follow up on it.
2 So while they may buy 1 million, if they only
3 bought 500,000, there was no penalty offset
4 for it. So it was just a commitment on paper,
5 not enforceable, or was never enforced.

6 Some of the other terms and
7 conditions have been like tiered pricing. If
8 you buy this level, you'll get this pricing.
9 One of the things we've done over the years is
10 encouraged the VA contracting officers to
11 build in similar types of things in our
12 contracts, and we have, and we've been
13 successful at doing that.

14 We had one several years ago where
15 we were offered on a very large dollar
16 contract a 15 percent discount. When we did
17 the pre-award, we noticed that almost all the
18 customers were getting between a 35 and 40
19 percent discount, which considering the
20 millions that would be -- and this was like
21 one type of item.

22 We went back and looked at it, and

1 they said, "Well, they all commit to it." So
2 we did a little more work, and we found out
3 that it was the type of product that a
4 hospital either buys or doesn't buy. They
5 standardize within the hospital. So everybody
6 who bought this product actually committed to
7 it.

8 And so what we did was we ended up
9 negotiating that in the contract. The VA
10 facilities did the same thing. We went and
11 looked at what VA was doing, and it turns out
12 that the VA customers either bought that
13 product, or bought the competitor's product.
14 But nobody bought both of them, and actually,
15 there were no sales at the price that we were
16 being offered.

17 So we ended up building that into
18 the contract that the VA facilities and DoD
19 facilities, anybody else who was using this
20 product could sign on as a commitment, and
21 they would get the -- I think it ended up a 40
22 percent discount.

1 Okay, commercial sales practice
2 disclosures: this used to be the data, sales
3 and marketing. I forget. Now what a minute.
4 DSMDs we used to call them, and then in the
5 mid '90s, with the Federal Acquisition
6 Streamlining Act, and the Federal Acquisition
7 Reform Act.

8 We changed the commercial sales
9 practices disclosures. And again, that's GSA
10 documents that are in the VA solicitations,
11 and the offerer is required to fill out these
12 -- this information. They have to either use
13 the form, or a form that's somewhat similar,
14 but contains the same data.

15 They have to provide the dollar
16 value of sales to the general public at or
17 based on established catalog or market prices
18 during the 12 months before. Although they
19 have to do 12 years, we find usually pricing
20 changes.

21 We usually look at about six
22 months of data to see where customers are at

1 the time to make it more current to what we're
2 doing, and they have to show the projected
3 annual sales to the government for each of the
4 special item numbers.

5 This is one of the areas where we
6 see vendors underestimate what the sales might
7 be. Either they think it might get them
8 around a pre-award audit, but we see some big
9 discrepancies in this area by some -- some
10 vendors.

11 Okay, then they have to tell us
12 whether or not the concession -- the discounts
13 and concessions being offered the government
14 are equal to or better than the best price,
15 considering discounts and concessions offered
16 to any customer requiring the same items,
17 regardless of any other terms and conditions.

18 This is another area where vendors
19 make a lot of mistakes in that they want to
20 find somebody more like us, more like the
21 government, and that's all the report on.

22 Okay, then they have to fill out

1 the forms with some other information: the
2 best discounts, quantity or volume of sales,
3 indicate whether it's free on board, delivery,
4 identify concessions such as trade-ins,
5 extended warranties, additional services.

6 Bundling is another one that we see a lot of
7 in our industries where if you buy an item
8 that has a lot of accessories, do they get
9 accessories free if they buy the item at a
10 certain price? Disclose any deviations from
11 written policies.

12 And the last one that GSA added
13 that wasn't in the prior ones was one for
14 dealers and resalers who don't have
15 significant sales to the general public.
16 They're required to provide the manufacturers
17 commercial sales practice data, especially if
18 their contract is going to exceed \$500,000.

19 And what this does is because
20 there's no commercial sales, they could set
21 the price at whatever they want it to. So now
22 you know what commercial customers are buying

1 the product at, and so the contracting office
2 can make a determination whether or not we're
3 getting a fair and reasonable price for the
4 items.

5 But one of the problems that we've
6 had with this clause is that the terms dealer
7 and resalers have never been defined. There
8 is no definition of a reseller. In fact,
9 there's none that I could find anywhere except
10 Google it, and that wasn't -- I couldn't even
11 find it in a dictionary. So that's a term
12 that probably needs to be defined.

13 What do our pre-awards do? We
14 determine the accuracy of disclosures. We
15 make recommendations to the contracting
16 officers regarding the price reasonableness.
17 Is the offered price fair and reasonable?

18 We give some suggestions for
19 negotiation strategies; try to get this
20 customer, but if there's a good reason, maybe
21 try this customer. And we also identify
22 tracking customers.

1 We also support the contracting
2 entity during negotiations if requested. We
3 do not negotiate the contracts. We do not
4 negotiate prices. We do not set policy. We
5 don't make non-award decisions. We don't do
6 any of that.

7 I know we've been accused of that,
8 but I haven't seen a single example in all the
9 years I've worked with this where we made any
10 decisions. It's always a decision of the
11 agency.

12 Okay, accuracy of the CSP data.
13 This is one of the reasons that the pre-awards
14 are really necessary. In the past five years,
15 we've shown that approximately 50 percent of
16 the CSPs submitted are not current, accurate
17 or complete.

18 And we kind of broke it out into
19 the different commodities that we deal with.
20 Imaging, 88 percent are inaccurate. Med-surg,
21 68 percent are inaccurate. Medical equipment
22 are 66 percent inaccurate. Pharmaceuticals

1 was the lowest at 38 percent, and that's
2 probably because we have the greatest
3 oversight of pharmaceutical disclosures.

4 But you can see, and I can tell
5 you that the -- the not accurate, current or
6 complete is more in the vendor's favor than it
7 is in the government's favor. We don't
8 usually find where the price should be higher.
9 It's usually where it should be lower.

10 What kind of errors do we see on
11 these? We see a failure to follow directions
12 or complete the forms. Some of them just
13 leave the forms half blank. Failure to
14 include all customers in the analysis: This is
15 where they come in and they say, "Well, I've
16 decided that this GPO is more like you, so
17 that's the only one I'm going to disclose."

18 Even if they're offering us more
19 favored customer, they have to give us the
20 information not for one of the customers to
21 get us that price, but all the customers of
22 theirs to get that price.

1 Failure to include all concessions
2 to commercial customers. They'll leave out
3 things such as the bundling or the trade-ins,
4 and all of those are important. I mean one of
5 the things we find with trade ins as we look
6 at the program is that actually trading in
7 something that can be usable, or is it
8 whatever you have in the storage department,
9 even if it's not the same type of item?

10 And we've actually found where
11 they'll take a trade in on anything, even if
12 it wasn't a related product. They take
13 anything to give another discount to make it
14 look like it wasn't a discount.

15 They also misrepresent commercial
16 business practices. They misrepresent
17 anticipated or past sales. Again, if you go
18 look at those -- we rely heavily in the
19 government when you're buying off the federal
20 supply schedules, nobody know who is buying
21 what.

22 There's no centralized area where

1 you can see that VA purchased this this day.
2 DoD purchased this day. We rely heavily on
3 the vendors to tell us what was purchased, or
4 at least the dollar amounts.

5 One of the other things we've seen
6 is they -- a lot of vendors think that when I
7 come in for a mod to add products, I don't
8 have to fill out the form. So they don't fill
9 out the forms, or don't fill them out
10 completely.

11 And also, there's a number of
12 times where they'll submit their offer, or the
13 proposal, and then some time goes by before
14 we do the pre-award, or before the award, and
15 business practices have changed. And that's
16 not always the vendor's fault, and the pre-
17 award usually tries to take it up to about the
18 time we issue the report to the contracting
19 officer.

20 We actually have some very strict
21 deadlines as to when the report is due back to
22 the contracting officer so as not to waste

1 any more time.

2 There is a remedy, as I said
3 before, to keep -- even if there is a
4 contracting officer relied on data that was
5 inaccurate and the price is not fair and
6 reasonable, they can reduce the price. And
7 this is where the price adjustment for failure
8 to provide accurate information comes into
9 play.

10 They can be liable to the
11 government for any overpayments, plus simple
12 interest. If there's any disagreement, it's
13 resolved by -- as a dispute, and the
14 contracting officer has the option of
15 terminating the contract. And although it's
16 not in the price adjustment clause, if it's a
17 serious enough violation, it could be a
18 potential fraud case, either criminal or
19 civil.

20 More importantly, it's one thing
21 to get a good price the day the contract is
22 awarded, but what happens the next day, and

1 for the next five years or so? And so that's
2 why it's very important to maintain the
3 reasonableness of the price after the contract
4 has been awarded.

5 As I said earlier, we see a lot of
6 times when we're doing our reviews where
7 discounts, they will hold up a contract until
8 after the government awards the FSS, and then
9 start giving discounts to a lot of customers.
10 And that's where the price reduction clause is
11 a very important clause in these contracts.

12 And to implement the price
13 reduction clause at the time of award, the
14 contracting officer and the vendor agree that
15 there's a tracking customer. And this is the
16 customer or customers that will be followed
17 during the term of the contract. If they get
18 a discount that changes the price
19 relationship, then you have to disclose it to
20 the government, and you have to actually offer
21 it to the government, too.

22 The tracking customer is also not

1 only for the price reduction clause, but it's
2 used for the economic price adjustment
3 adjustment clause, which also allows them to
4 raise their prices.

5 It's supposed to be the commercial
6 customer whose prices were the basis of the
7 government's pricing. If we go out and we see
8 there's certain GPO or a group of GPOs is --
9 is -- it should be the tracking customer.
10 They're the ones that will be tracked for all
11 these purposes, especially if we base our
12 pricing on theirs.

13 They get a 20 percent discount.
14 We buy similar to them. We're going to take
15 a 20 percent discount. Or maybe there's a
16 reason, let's say, that they don't have FOB
17 shipping. They pay the shipping. We may
18 adjust the percentage to account for that.

19 It can be one or more individual
20 customers, and one or more group of customers.
21 And this is really important, not just to have
22 one, because it's very difficult on some of

1 these large vendors where there's thousands of
2 items that are on the federal supply schedule
3 contract to find a commercial customer that
4 buys all the products. And it doesn't help us
5 to have a tracking customer who only buys five
6 percent of the items that are on our contract.

7 We recently looked at a
8 modification for 70 some items from a vendor,
9 and it turns out the tracking customer didn't
10 have any of the items on there, or maybe it
11 was only three on the tracking customer's
12 contract.

13 So you don't have any price
14 reduction protection or price protection after
15 award if the vendor doesn't have -- your
16 tracking customer doesn't actually buy those
17 items.

18 And the contracting officer can
19 select tracking customers for each special
20 item number, each item, groups of items, or
21 the entire contract. It just depends. And as
22 I said, it can be one or more. It can be all

1 group purchasing organizations, or it can be
2 a certain class of group purchasing.

3 It can be hospitals, nursing
4 homes, whatever fits best on the pricing, and
5 how the government buys. And again, as I
6 said earlier, it's often identified during a
7 pre-award audit.

8 Okay, they have to report all
9 price reductions to the -- of tracking
10 customers and explain the conditions under
11 which the reductions are made. It's not
12 automatic that the government says, "You
13 absolutely -- I'm going to take this."

14 If there's a reason why we may not
15 be entitled to it, special circumstances, the
16 contracting officer can decide that we're not
17 entitled to the price reduction.

18 Notification has to be no more
19 than 15 calendar days after the effective
20 date. That's probably where they miss out a
21 lot. Some never report it. But others, it's
22 often after 15 days.

1 What triggers the price reduction
2 clause? Well, it can be revisions to the
3 commercial catalog price list, schedule or
4 other document on which the contract award was
5 predicated that result and reduce prices.

6 One of the interesting things in
7 our industry is the fact that there are
8 multiple catalogs. They can have a catalog
9 for nursing homes. They can have a catalog
10 for hospitals. They can have a catalog that
11 they use as their base price for retail
12 pharmacies, or for other retail entities, even
13 Safeway, Giant, whoever it might be. So it
14 has to be the actual catalog that we used
15 that our discounts were based on.

16 If they grant more favorable
17 discounts or terms and conditions to the
18 tracking customers than contained in the
19 catalog, that triggers reporting. They grant
20 special discounts to the tracking customer,
21 which disturbed the price discount
22 relationship of the government.

1 And I can tell you probably we
2 work more with the last one than the other
3 ones, because that's where the real pricing
4 relationship is -- is established.

5 There are some exceptions. One of
6 them is a firm fixed price, definite quantity
7 contract with specific delivery, and access to
8 the maximum order threshold. This is where we
9 see some mistakes made.

10 A firm fixed price definite
11 quantity, if the maximum order threshold is
12 \$100,000, and somebody says, "I want \$200,000
13 of this item delivered on this day," it's an
14 exception. But somebody getting into what
15 would be an indefinite quantity where they can
16 order it over a period of years that might
17 come up to \$200,000 does not qualify, and
18 we've had some vendors make that mistake in
19 interpreting this section of the clause: Sales
20 to federal agencies, sales to state and local
21 government agencies who purchase off the FSS.

22 We see a lot, too, in our industry

1 where state and local governments are actually
2 buying at the FSS price. They think the FSS
3 price is fair and reasonable, so they will buy
4 at the FSS price, plus whatever percentage
5 they may negotiate, upwards or downwards with
6 the vendor.

7 Sometimes it's -- if it's caused
8 by an error or quotation or billing, for
9 example of they make an offer to somebody who
10 -- and it was a mistake, but they have to
11 comply with it, then we probably wouldn't take
12 that one. It doesn't trigger the clause.

13 And one of the changes that was
14 made in the '90s that benefitted industry was
15 to change -- the price reduction clause would
16 be -- used to say that if you gave a price
17 reduction at any time, then it was a price
18 reduction to the government throughout the
19 term of the contract. And that really wasn't
20 fair to industry, so it got changed, and it's
21 for the same time period.

22 So if they give a discount to

1 someone for a three-month time period, or one-
2 year time period, then that's the length of
3 time that it would be offered to the
4 government.

5 Some of the most common violations
6 that we see: failure to report price
7 reductions to tracking customers, because the
8 vendor fails to implement any kind of a
9 system to monitor the tracking customer
10 pricing.

11 We've also seen it where they've
12 had a very nice system in place, but they
13 overrode it in order to give a discount to a
14 certain customer. And again, that type of
15 behavior may rise to the level of a civil
16 fraud case.

17 Failure to report in a timely
18 manner, as I said earlier, that's probably
19 one of the ones we see the most. And failure
20 to report price reductions because they
21 decide unilaterally that the government is
22 not entitled to the discount because of

1 differing terms and conditions.

2 We see this a lot where they'll
3 look at it and say, "Oh, the terms and
4 conditions are different, so we don't have to
5 report that to the government." Again,
6 that's irrelevant with respect to whether or
7 not you have to -- the vendor has to disclose
8 the discount.

9 It may be relevant to whether or
10 not the contracting officer decides that the
11 government will get the discount. But again,
12 it's the same as I believe we went through in
13 the '90s: disclose or negotiate. And that's
14 all the vendors are requested to do.

15 Economic price adjustments is a
16 clause in the contract that protects the
17 vendors. If the pricing goes up on items,
18 and goes up to the commercial customers, they
19 have the opportunity to come in and raise the
20 prices.

21 We've had a number of items where
22 the prices go up because of raw materials,

1 especially in the pharmaceutical area, go up.

2 And so they -- if the items are more
3 expensive, they have to up their prices.

4 So the commercial customers, they
5 come in and ask for a price increase to us,
6 too. But one of the caveats in this clause
7 is that the tracking customer's price must be
8 disclosed with the request for an increase.
9 We do follow the tracking customer there
10 also.

11 And that's -- and that's where I
12 see more that we look more at the tracking
13 customer than -- than what else is going on.
14 But the vendor can come in at any time and
15 ask for a price increase.

16 And one of the other myths that we
17 hear out there is that it doesn't matter what
18 the FSS contract price is. Put it on at list
19 price, and there's competition at the
20 ordering level, and that's where you're going
21 to determine it's fair and reasonable.

22 The FAR doesn't require

1 competition at the ordering level except
2 under certain circumstances, and when you're
3 talking about supplies, you don't always get
4 competition at the local level. In fact,
5 even with services, we're finding out that
6 some people don't compete. They just call
7 someone up and order it despite what the FAR
8 says for the requirements.

9 And so to say there's going to be
10 competition, this is supposed to be a fair
11 and reasonable price. That's what the FAR
12 says. That's what we are telling the
13 commercial customers: that this is a fair and
14 reasonable price. And list price is not a
15 fair and reasonable price.

16 I don't know about other
17 industries, but I can tell you in the
18 healthcare industry, there's a list price out
19 there with whatever they want on it. But you
20 can -- you can look at commercial sales
21 transactions, and you can find that 99.9
22 percent of the sales are below the list

1 price.

2 In some cases, we had one case
3 where 99 percent of the sales were 90 percent
4 below list price. So if the government paid
5 list price, or even 50 percent of list price,
6 you're still paying a lot more than
7 commercial customers were paying for the same
8 item.

9 That's just a baseline. In our
10 healthcare proposals, we have hospitals tell
11 us for healthcare services, "Well, this is
12 the list price of what we charge." But
13 anybody who has health insurance can tell you
14 -- you know, I'll go get an x-ray done, and
15 the bill comes in for \$600, and Blue Cross
16 pays \$80 of it.

17 So what's fair and reasonable?
18 The \$600 or the \$80 that they see? So like I
19 said, everybody has a list price, but the he
20 issue is what do people pay off a list? And
21 how different is that, and how do we buy?

22 The only people who pay the list

1 price for those services are those people who
2 don't have insurance.

3 FAR part 8.405-1 basically says
4 that there's no statement of work, and not
5 ordering services at hourly rates,
6 competition is not required. If it's under
7 the micro-threshold, so \$3,000, which in a
8 lot of these commodity supplies, you're
9 having small orders. They're ordering one
10 box, one case, whatever. A lot of them come
11 in under \$3,000.

12 They can place it with any vendor
13 they want. If it's above the micro-threshold
14 \$3,000 cap, but it's under the maximum order
15 limitation, which varies from contract to
16 contract, then they have to survey at least
17 three vendors, and that's just basically call
18 them up and see what they're going to offer
19 to you at. But you don't have to compete it.

20 And I would say probably a very
21 high percentage of what we see in purchases
22 are at this -- this level, and especially

1 because we have prime vendor. So you don't
2 have to buy in bulk.

3 What are some of the current
4 problems that affect fair and -- the ability
5 to obtain and maintain fair and reasonable
6 pricing? One of them is vendors with no
7 commercial sales.

8 One of the things that happened
9 when the Federal Acquisition Streamlining Act
10 was they repealed divisions of the Walsh-
11 Healy Act that basically restricted
12 government contracts with entities other than
13 manufacturers and regular dealers, both of
14 which were defined in regulations.

15 If you go back in the history, one
16 of the reasons for this was to prevent
17 brokers from coming in, manufacturers to use
18 a middle man, a broker, to come in and
19 negotiate the contract, and thus protect
20 themselves, and maybe not have to offer the
21 government fair and reasonable pricing, and
22 maybe protect themselves from other things

1 such as I -- when you use a broker, how do
2 you go after the manufacturer if the products
3 are not made in this country? And if you
4 have a broker, they've never seen the
5 contract -- they've never seen the items.

6 We started seeing this about 2000.
7 An increasing number of manufacturers were
8 using brokers to obtain FSS contractors on
9 their behalf.

10 We put out a report in 2001.
11 We've been advocates of the FSS because we
12 think the aggregate purchasing power gets you
13 better prices, but we were finding that
14 vendors were walking away from the FSS
15 because competitors were able to sell at the
16 local level, and undercut their price even by
17 a penny.

18 And then so they said, "Well, why
19 get an FSS if I can just go do that?" So we
20 put out a report in 2001 on VA purchasing
21 practices, which ended up in a policy in
22 which there is now a hierarchy of purchasing

1 in VA, in which national winner-take-all
2 contracts are first, and FSS are second. And
3 even blanket purchase agreements are at the
4 level of the national FSS blanket purchase
5 agreement, and then a local purchase
6 agreement.

7 And this has hopefully cut down on
8 purchasing open market items, and we had a
9 lot of vendors come back to the FSS after
10 that.

11 But one of the issues that we also
12 identified in that report was the broker
13 issue. And when you look at these companies,
14 they have insignificant or no commercial
15 sales. And if you look at the agreements
16 they have with the manufacturers, they're not
17 allowed to sell to the manufacturers'
18 commercial customers.

19 The government is the only
20 customer that has to purchase through a
21 middle man. Everybody else is buying direct.
22 And this is -- this is at higher prices

1 because there's a fee that goes to the middle
2 man for getting the contract.

3 They don't buy, sell or stock the
4 products, and they don't market the product
5 on behalf of the vendor. We've actually gone
6 out and looked at this, and we found that the
7 manufacturer is the one who markets the
8 products, negotiates the price if it's
9 different from the FSS price, completes the
10 forms.

11 Manufacturer delivers the product.
12 The manufacturer does any training that might
13 be required. But when the purchase order
14 goes in, it has to go through a middle man
15 who has the contract.

16 There's limited impact of this
17 using a broker when it comes to establishing
18 a reasonable price at the time of award, and
19 that's because of CSP paragraph 5 that I
20 talked about earlier, that dealers/retailers
21 without significant sales to the general
22 public must provide the manufacturer's CSP

1 data for each manufacturer whose sales under
2 the contract are expected to exceed \$500,000.

3 That takes care of it up front.
4 You get that data, assuming that you can get
5 accurate reporting on how much the sales are
6 expected to be if it's over \$500,000.

7 So you can look at what commercial
8 customers are buying at. You can make a fair
9 and -- the contracting officer can make a
10 fair and reasonable pricing determination,
11 and they can go forward with negotiations.
12 But it has a significant impact on whether or
13 not you can maintain price reasonableness
14 after award.

15 The way the contract price
16 reduction clause is written is that the
17 tracking customer should be the customer on
18 which you base you pricing, which pricing was
19 based. That's the manufacturer's customer.

20 The problem is you can't have a
21 tracking customer of a third party. So the
22 broker has no customers. So who do you have

1 for a tracking customer? Nobody.

2 So technically, they can't comply
3 with the price reduction clause. So you're
4 not -- you're not going to get any price
5 reductions during the terms of the contract.
6 And that's what I've talked about in the next
7 slide.

8 We're also subject to unreasonable
9 price increases, because if the price list
10 changes. So the manufacturer just has to up
11 the price. There's no loss to the broker
12 because they're not actually buying the
13 product. There's no risk to them.

14 So the commercial price list that
15 the broker has can go up at any point in
16 time. They can come in and seek a price
17 increase. Doesn't mean that the
18 manufacturer's commercial customers are
19 paying an increased price. They may even be
20 paying a lower price.

21 So again, you have no price
22 protection on either end: price reductions,

1 and you may get price increases that are well
2 above what commercial customers are paying
3 for the items.

4 What are some possible solutions
5 to this? I know the price reduction clause
6 has been at issue, so I'm going to more
7 address that.

8 I think the price reduction clause
9 is necessary in the contracts to assure fair
10 and reasonable pricing throughout the term of
11 the contract. It's a five-year contract at
12 least. So -- and it's a volatile market out
13 there with a lot of these products. And
14 without competition at the ordering level,
15 then you have to have some clause in there
16 that would allow us to get the price
17 adjustments the commercial price customers
18 are getting.

19 I would say that you also need to
20 amend the price reduction clause that if a
21 broker is being used, unless there's a way to
22 prevent brokers, that you have to make the

1 same changes to that that GSA made to the CSP
2 by adding that paragraph 5 protected us on
3 the one end, but didn't protect the
4 government customer after award.

5 So it would be to allow third
6 party tracking if we're using the
7 manufacturer's customers as the basis of
8 award.

9 One of the other things would be
10 to remove the price reduction clause from the
11 contract. But also, remove the economic
12 price adjustment clause: Can't go down, can't
13 go up. Limit the contract to three years or
14 less, or whatever it happens to be for the
15 industry that you're working with.

16 It may be a year in some
17 industries. It may be three years in others,
18 and may be five in others, but make the
19 contracts more -- terms -- length of contract
20 similar to commercial customers. Amend FAR
21 part 8.405 to require competition for all FSS
22 purchases, not just call up and buy in small

1 quantities. And with the \$3,000, you see a
2 lot or order splitting.

3 We actually had one where I think
4 it was every ten minutes, a different
5 purchase order went to a customer. They were
6 breaking it up just below the threshold. So
7 they purchased quite a bit, and they
8 should've done more work. But by order
9 splitting, they got under that.

10 Also, you should consider allowing
11 the awarding agency, whether it's GSA or VA,
12 the flexibility to amend clauses to ensure
13 price reasonableness.

14 No industries are the same.
15 There's different industries, different
16 commercial practices, and there should be
17 some flexibility on the schedules. Right
18 now, they'll all pretty much the same no
19 matter what the industry is. I know some
20 changes were made for IT on the GSA side, but
21 you need to look at the commercial industries
22 that we're dealing with, and make changes to

1 the clauses so that we can maintain price
2 reasonableness the same way that their
3 commercial customers do.

4 And it's not dissimilar to what
5 happened in 1997 with the post award audit
6 clause, where it was allowed that the senior
7 procurement executive of the awarding agency
8 was allowed to determine the risk for the
9 schedule, and either keep the clause or not
10 keep the clause in the contract.

11 And my last -- my last suggestion
12 on this is just terminate the program
13 altogether. If industry wants us to be
14 commercial, let's go commercial. Let's get
15 rid of the FSS program, require full and open
16 competition for all purchases, and also allow
17 agencies to belong to commercial group
18 purchasing organizations in lieu of full and
19 open competition.

20 That would just be kind of a
21 radical solution, but it gets us more
22 commercial if that's the way we want to go.

1 I'm not saying I think that's the
2 best way. I think more flexibility on the
3 schedules; I think the schedules are a great
4 advantage. This would be extremely expensive
5 for the government to build up a workforce
6 that would be able to do this.

7 I just want to touch on services
8 just a little bit. We just started doing
9 more work in services, on our services, and I
10 think there's some real questions about
11 whether or not services belong on the FSS, or
12 at least the same way that we have supplies.

13 Are they really commercial
14 services? And what do we do if they're not?
15 Seems to be a lot of vendors that only sell
16 to the government. They don't have the same
17 services commercially. And one I'll note
18 only because we have a contract is if you
19 take federal HR, human resources, services.

20 There is no other human resource
21 laws, regulations, or whatever that apply to
22 commercial sector that apply to the federal

1 government. Nobody has Title 5. So should
2 there be separate schedules, should there be
3 separate rules when there is no commercial
4 customers out there?

5 And should they be by the type of
6 services that you have? There's a big
7 difference between IT services, HR services,
8 medical services. Again, adjust the services
9 that way.

10 Should certain types of services
11 be excluded from the schedules when a fair
12 and reasonable national price is not
13 attainable or not consistent with commercial
14 practices? And we're seeing where on some of
15 the healthcare ones where the vendors do not
16 have national contracts. Everything is done
17 at the local level at local pricing, because
18 the prices vary from city to city, town to
19 town, specialty to specialty.

20 So is this conducive? Is it a
21 fair and reasonable price if there is no
22 single price you can put on that is fair and

1 reasonable to the people buying out there?

2 I think what they've gotten to is
3 a do not exceed price, but a do not exceed is
4 not a fair and reasonable price. It might be
5 in New York, but it's certainly not going to
6 be in other parts of the country. And when
7 you have vendors who do not have national
8 contracts, that raises the issue also about
9 how -- whether or not these belong on an FSS.

10 And again, issue policy: defining
11 procedures to determine fair and reasonable
12 pricing when vendors do not sell the services
13 commercially. And there are a lot of FSS
14 vendors who do not have commercial customers.
15 They only sell to the government.

16 That's what they were set up for,
17 but if you don't have a commercial customer
18 to compare it to, how do you determine fair
19 and reasonable price? And I think there's a
20 lot of contracting officer who don't know how
21 to go about doing that.

22 And so that's the end of my

1 presentation? Does anybody have any
2 questions?

3 MR. BRANCH: Maureen, thank you
4 very much for I think a very comprehensive
5 overview of how VA does business on the
6 schedules. Does anyone have any questions
7 for -- David?

8 MR. DRABKIN: Quite a few,
9 actually. Let's start with your slides about
10 the CSP data, where you talk about the data
11 coming in, and not being accurate, I believe.

12 MS. REGAN: Yes.

13 MR. DRABKIN: I believe it won the
14 highest level was 68 percent. I think the
15 lowest level you reported was 38 percent on
16 pharmaceuticals.

17 MS. REGAN: Right.

18 MR. DRABKIN: That is the data
19 that was first submitted by the contractor in
20 application for its contract, or in -- in
21 response to it's -- the option exercise. Is
22 that right?

1 MS. REGAN: It can be a contract
2 award, modification, or to exercise the
3 extension option.

4 MR. DRABKIN: And the -- you say
5 you found this data was not accurate. Is
6 that the data that ultimately was used by the
7 contracting officer to award the contract?

8 MS. REGAN: The ones that we did
9 all had pre awards. That's the only ones we
10 see.

11 MR. DRABKIN: Right.

12 MS. REGAN: So there's lots of
13 them out there that we don't see that they
14 rely on. On these, they probably relied on
15 what we gave them as the accurate data.

16 MR. DRABKIN: Right. So -- so
17 then the system worked. A pre-award audit
18 was done, and then the contracting officers
19 negotiated a final price?

20 MS. REGAN: Based upon the ones --

21 MR. DRABKIN: On the ones that you
22 looked at?

1 MS. REGAN: Right, it's only a
2 small percentage.

3 MR. DRABKIN: Right. And do you
4 look at what contracting officers do
5 generally in your program?

6 MS. REGAN: Such as?

7 MR. DRABKIN: I don't know. Do
8 you ever go back and see what they do as a
9 matter of practice? What's their process and
10 policy when they get in an offer, even if you
11 don't do a pre-award audit?

12 MS. REGAN: I guess I'm a little
13 stymied. Maybe Mark or Mike could give me an
14 answer on what they do. We don't know what
15 they get. We don't --

16 MR. DRABKIN: Do you do process
17 review?

18 MS. REGAN: Right.

19 MR. DRABKIN: Not just the
20 contract review, but do you actually do a
21 program process review to determine what a
22 contracting officer does when he or she gets

1 in an offer?

2 MS. REGAN: No. That's not the
3 job of this group is not the general
4 oversight of the IG. We do pre and post
5 award audits of these contracts.

6 MR. DRABKIN: And so the IG and VA
7 does not do process reviews to determine
8 whether or not the processes outlined in the
9 FAR generally or in the FSS programs
10 specifically are followed by your contracting
11 officers? You only look at specific contract
12 offers, is that right?

13 MS. REGAN: We only look at the
14 contract offers, and modification requests.

15 MR. DRABKIN: Right.

16 MS. REGAN: And extensions that
17 were sent to us for review.

18 MR. DRABKIN: So it wouldn't
19 surprise you to learn if contracting
20 officers, as part of their normal orderly
21 course of business, talked to vendors about
22 the prices they submitted?

1 MS. REGAN: They may or may not.

2 I have no idea.

3 MR. DRABKIN: Would it surprise
4 you if they did?

5 MS. REGAN: In some cases, yes.

6 MR. DRABKIN: So you think the
7 contracting officers just accept the price
8 and award it as their contract price?

9 MS. REGAN: I think it depends on
10 the representations that were made. If they
11 make the representation that this is the most
12 favored customer, they may rely on that
13 without asking any further questions.

14 MR. DRABKIN: You don't think
15 they're exercising any discretion or using
16 any judgment? You think they're just
17 accepting the offered prices in making an
18 award?

19 MS. REGAN: Some may be doing
20 that. I haven't done the study on it.

21 MR. DRABKIN: And some may not be
22 doing that?

1 MS. REGAN: And some may not be.

2 MR. DRABKIN: You just don't know,
3 except for the limited number of pre-award
4 audits you did?

5 MS. REGAN: I do know on some
6 cases where if the representation was made,
7 they did rely on it, because we've done some
8 post awards where they did rely on the
9 information, and the information was
10 incorrect.

11 MR. DRABKIN: Okay. Now, onto
12 your slide discussing competition. I'm
13 somewhat confused. You correctly finally
14 referred to FAR 8.4, where it requires for
15 anything over the minimum -- the micro-
16 purchase level that you make at least three
17 calls, and you called that a survey of other
18 vendors. In your mind, that's not
19 competition?

20 MS. REGAN: It's not the same as
21 competition.

22 MR. DRABKIN: What is competition

1 by your definition? Is it a sealed bid?

2 MS. REGAN: No, it's -- I think
3 under the FSS it's an RFP where you send it,
4 and they send in an offer.

5 MR. DRABKIN: And so that's what
6 they do in the private sector, they send out
7 RFPs whenever they're getting ready to buy
8 something, and get competitive prices?

9 MS. REGAN: No. In the private
10 sector, they work through group purchasing
11 organizations, as I said. And most of the
12 hospitals that we see are members of various
13 group purchasing organizations, and they buy
14 through them.

15 MR. DRABKIN: In the private
16 sector, when they get ready to buy something,
17 are you telling me that in every case, they,
18 in order to satisfy this definition of
19 competition that you -- you seem to believe
20 in, that they issue in RFP open to everybody,
21 and wait some period of time for responses?

22 MS. REGAN: I think again, are you

1 talking at the buying level, or are you
2 talking about purchasing?

3 MR. DRABKIN: I'm talking about
4 people who buy things. The people who buy.

5 MS. REGAN: They don't have --

6 MR. DRABKIN: The private sector.

7 MS. REGAN: And what I'm telling
8 you is they don't have to do that. Most of
9 them purchase through group purchasing
10 organizations, in which they have paid a fee
11 and they have negotiated a price. Whether
12 they did it -- most of the times they've done
13 it competitively. They can also belong to
14 more than one group purchasing organization,
15 and look for who might have the best price on
16 like or similar items.

17 MR. DRABKIN: But if you peel it
18 back to when they actually awarded the
19 contract, the group purchasing contract was
20 awarded by somebody. Are you telling me that
21 to award the group purchasing contract that
22 they got competition by issuing an RFP and

1 inviting the world to compete for that group
2 purchasing contract?

3 MS. REGAN: Most of those
4 contracts were competed based on what we've
5 seen.

6 MR. DRABKIN: By issuing an RFP
7 and inviting the world --

8 MS. REGAN: I'm not sure that RFP
9 might not be --

10 MR. DRABKIN: Okay, so there could
11 be other ways to get competition?

12 MS. REGAN: But they get
13 competition, and many times it's winner-take-
14 all, and it's only a limited number of
15 products. It's not always the full product
16 line, and there's not always competitors
17 products being offered by the same GPO.

18 MR. DRABKIN: And checking with
19 three vendors in your mind is not sufficient
20 competition?

21 MS. REGAN: It's not competition
22 in that -- in the standpoint where starting

1 out with the FSS price is fair and reasonable
2 so that you don't have to go out and look at
3 what price are you going to be offering me on
4 this.

5 So you can go to three vendors,
6 and you can get the quotes.

7 MR. DRABKIN: And that's not
8 competition?

9 MS. REGAN: No.

10 MR. DRABKIN: In your mind?

11 MS. REGAN: No.

12 MR. DRABKIN: Okay. And then onto
13 the last point that I want to -- actually,
14 there's so many others, but let's talk a
15 little about your resellers. Now, didn't GSA
16 send you a letter describing clearly what the
17 policy is on resellers in the schedules
18 program?

19 MS. REGAN: When was that?

20 MR. DRABKIN: Would've been sent
21 to your senior procurement, Jan Frye, by
22 Molly Wilkinson, probably in January.

1 MS. REGAN: Well, I don't think it
2 outlined anything specific. It just made a
3 statement. But we have asked them to define,
4 since 2002, what a reseller is, and we were
5 not able to get a definition.

6 Also, the letter from Wilkinson
7 did not have all the letters that had been
8 sent between the VA on the issue that she
9 discussed. There was absolutely no
10 discussion between the individual and any VA
11 official about the facts on which she was
12 basing the letter.

13 MR. DRABKIN: But GSA makes the
14 policy, right, for the schedules program?

15 MS. REGAN: And that's what we've
16 said. GSA has to set the policy.

17 MR. DRABKIN: And GSA has
18 specifically said that resellers are an
19 important part of the schedules program?

20 MS. REGAN: What I said is that
21 resellers is not defined anywhere as to what
22 constitutes a reseller.

1 MR. DRABKIN: And the -- isn't it
2 also true that resellers are mostly composed
3 of small and medium sized companies on the
4 schedules program?

5 MS. REGAN: No.

6 MR. DRABKIN: That is not true?

7 MS. REGAN: No, we have some
8 extremely large resellers.

9 MR. DRABKIN: I said most. I
10 didn't say all.

11 MS. REGAN: Well, I would say it
12 depends on whether you're talking about the
13 number of resellers or you're talking about
14 dollars. Dollars I would say a big portion
15 of your dollars are through your larger
16 resellers.

17 MR. DRABKIN: Okay, but 70 percent
18 actually, factually, 70 percent of resellers,
19 70 percent of all schedule vendors are small
20 businesses aren't they?

21 MS. REGAN: Not all of those are
22 resellers. There's a lot of businesses on

1 the schedule that are not resellers.

2 MR. DRABKIN: Okay, and you say
3 there's no price protection in the reseller
4 policy as you understand it?

5 MS. REGAN: In the -- in your --
6 CSP 5 takes into consideration the
7 manufacturer's data. There is no -- for
8 establishing the price. There is no tracking
9 customer after the contract is awarded. So
10 there's no price protection afterwards.

11 MR. DRABKIN: And you don't do
12 post award audits on resellers and -- you
13 haven't done any post award audits on the
14 resellers?

15 MS. REGAN: I don't believe we've
16 done a post award on a reseller for the
17 purpose of price reduction. We've done some
18 post award when the modification was added
19 without a pre-award, and we were asked to
20 look at it post award to see if it was -- the
21 data was accurate and complete.

22 MR. DRABKIN: Thank you.

1 MS. REGAN: And I will have a
2 caveat to that. We have looked at it to see
3 if there was any compliance with the small
4 price reductions we might get based on their
5 sales to the minimum number of commercial
6 customers, or whether or not they gave us --
7 even sold it to us at the price that was a
8 contract price. So the post award would take
9 that into consideration also.

10 MR. BRANCH: Larry and then
11 Judith.

12 MR. ALLEN: I'm following up on
13 David's point. I think it might be
14 interesting to hear from GSA because I know
15 the GSA awards to a number of resellers, as
16 David alluded to. Obviously GSA contracting
17 officials and GSA IG probably feel that GSA
18 has some mechanism for tracking price
19 reductions.

20 We had Andy Patchan here at our
21 last meeting. That wasn't a major issue that
22 he singled out resellers on, at least so far

1 as I can remember. So maybe some of the GSA
2 panelists can tell us about how GSA ensures
3 price reasonableness when awards are made to
4 resellers.

5 As David pointed out, that's a
6 good portion of the program. So there must
7 be some way to ensure that the government is
8 protected. I suspect GSA probably has the
9 answer for that.

10 MS. REGAN: I would -- one -- one.
11 You keep using the term resellers. There's a
12 lot of resellers out there who actually buy
13 and resell product. We're talking about
14 people who are brokers who are calling
15 themselves reseller.

16 These are people who have no
17 commercial sales, and the commercial sales of
18 the product are done by the manufacturer who
19 is dealing with the government through a
20 third party. That's one of the problems with
21 the fact that the term reseller has never
22 been defined, and that's a term these brokers

1 are calling themselves.

2 So it's a very small group. You
3 keep saying resellers. There's a ton of
4 resellers out there. There's a lot of people
5 who actually distribute and market their
6 wholesalers and their small businesses, and
7 they deal commercially.

8 We're talking about a very small
9 group here of brokers, and we're seeing it
10 get broader right now.

11 MR. ALLEN: And as you pointed
12 out, however, there is currently no
13 prohibition on that type of arrangement in
14 the law?

15 MS. REGAN: That's because the law
16 got changed in '95.

17 MR. ALLEN: Right.

18 MS. REGAN: That allowed them to
19 come in the door. That's right.

20 MR. ALLEN: The other part of the
21 -- so they're actually -- a broker is a
22 broker just taking it as face value; they're

1 actually not breaking any federal law by
2 doing that, right?

3 MS. REGAN: And I basically said
4 that earlier. We're not accusing them of
5 breaking the law. We're saying that there's
6 a problem with fair and reasonable pricing
7 after award. I have no problem if you fix
8 the price reduction clause to allow us to
9 track the same customers that we base the
10 prices on. They can come in through whoever
11 they want.

12 But I think you also have a
13 concern about whether or not you're getting
14 the product and whether you can hold them
15 accountable, for example, under the Trade
16 Agreements Act because there a subcontractor
17 with the recent supreme court case.

18 So if you have a broker who never
19 sees the product, how do they know what's
20 being distributed to the government, and
21 whether or not it meets the other
22 requirements of the statute?

1 MR. ALLEN: My other point on that
2 would be that if you've got companies out
3 there, and I know this is not exclusive to --
4 to VA either. I know that it happens in the
5 GSA world as well. My comment would be if we
6 set up a construct that's so complex where
7 companies feel that they have to set up
8 unique arrangements for distributing to the
9 government, that may be in favor of
10 simplifying the schedule process.

11 MS. NELSON: First of all, thank
12 you very, very much for coming in. I know
13 that you're speaking regarding your
14 experience with the VA FSS. I do, as I sit
15 in the Office of Acquisition Management, have
16 a few questions regarding your experience.

17 First of all, when you're choosing
18 your pre-award audits to perform, or pre-
19 award reviews, I would clarify, to perform,
20 I'm wondering because they're not a
21 statistical portion, so they're very cherry
22 picked, how do you choose which ones to do?

1 MS. REGAN: We don't select them.
2 VA has established dollar limits. And
3 anything at a certain threshold depending on
4 the commodity is required to -- the
5 contracting officer is required under certain
6 circumstances to seek a pre-award.

7 We don't select them at all. Pre-
8 awards are all based on a referral by the
9 contracting officer.

10 MS. NELSON: So these are
11 exclusively pre-awards that are high risk
12 dollar volume that contract, or perhaps are
13 they ones that the contracting officer feels
14 that they could use assistance on?

15 MS. REGAN: It can be any. It's
16 the contracting officer's choice if it's
17 below the threshold.

18 MS. NELSON: Right.

19 MS. REGAN: Yes.

20 MS. NELSON: So these are --
21 because this is also the policy over at FAS,
22 these are ones that the contracting officer -

1 - either they're high risk dollar volume, or
2 they're ones that the contracting officer
3 feels that they could use assistance with
4 because they know that there could be a risk,
5 and they need help with in the pre-award?

6 MS. REGAN: Right, and that's very
7 similar.

8 MS. NELSON: Okay, so I just
9 wanted to clarify. The other thing: when you
10 were talking about CSPs in the accuracy, if I
11 could find it, in the types of errors. And
12 you said that falls within some of our
13 recommendations here. One of the things you
14 said at slide 31 was failure to follow
15 directions or complete the forms.

16 And I'm wondering, and this didn't
17 fall in your recommendations, what is -- do
18 you think that it would help if there were
19 improvements to the forms? Let's say we
20 stayed within CSP 1, and we weren't
21 recommending functional content changes
22 because we moved away from the DSMD a long

1 time ago because of law.

2 MS. REGAN: Right.

3 MS. NELSON: There was a lawsuit
4 that was -- GSA lost, okay? Because of data,
5 okay? So we don't go back to requiring that
6 type of data. But we change the format,
7 improve the type of instructions. And B,
8 anybody who is not familiar with them, they
9 have these -- what I would refer to as
10 ridiculously small boxes, and often not clear
11 what needs to go in what boxes. Do you think
12 that would A, improve in how they might fill
13 them out, and better data?

14 MS. REGAN: I'm not sure that we
15 have -- that I have enough information - I
16 don't know if Mark or Mike might have
17 something to add to it - whether that would
18 make a difference. I mean you're -- you have
19 some companies that just aren't going to fill
20 it out right.

21 They expect us to do it in the
22 pre-award. And our position is that's not

1 our job to fill out your forms. They should
2 be all completed by the time they come to us.

3 MS. NELSON: But I mean you've
4 told us you're not looking at a statistical
5 amount, and they're only the high risk. So
6 what about -- I mean if they're not coming in
7 accurate?

8 MS. REGAN: I don't know why
9 they're not accurate to say whether or not
10 the form is the problem, or whether or not
11 it's the vendor. It just figures out I'm
12 going to have a pre-award. Why fill it out
13 accurately?

14 So you have a combination, and I
15 don't think we've studied it, unless Mark
16 might have an answer.

17 MR. MYERS: My personal opinion is
18 it just -- from discussions with the
19 contractor at the contractor facility, is
20 they just have not carefully followed the
21 directions. Again, it's just my personal
22 opinion.

1 As far as the boxes being small,
2 I'd say the overwhelming majority, 98 percent
3 or better, are putting it into a spreadsheet
4 anyways.

5 And so the size of the boxes, I
6 don't think, are a big significant bearing on
7 it, because they -- they're doing it. And I
8 think if I -- if I'm correct, the
9 pharmaceutical section is already issuing a
10 spreadsheet where they can just input a lot
11 of information already. So that's my opinion
12 from my experience.

13 MS. REGAN: A lot of the vendors
14 we look at have been through the process
15 before, so it's not something new to them.
16 There's new people coming in, but the ones I
17 know we see are usually vendors who have been
18 in on several contracts over the years.

19 MS. NELSON: I have another
20 question going back to the competition stuff.
21 I'm not aware of any requirement. You were
22 talking about orders that were coming in

1 below the micro-purchase threshold. You
2 know, they continuously come in at \$2,998,
3 \$2.995 repetitively.

4 First of all, I'm just not aware
5 of any requirement to compete those. And I'm
6 not aware of any way for anyone to track
7 those because I'm not aware of any
8 requirement to track anything below \$25,000.
9 So you, as an auditor, may have the capacity
10 when you go into the records to see those,
11 but I'm not sure that any contracting officer
12 could see them.

13 MS. REGAN: There's no way.
14 There's absolutely no way.

15 MS. NELSON: That's a problem for
16 us.

17 MS. REGAN: Yes. Well, I think
18 that's just a problem in general is that the
19 awarding entity, especially in GSA since you
20 buy such a small percentage over what's sold
21 in your schedule, GSA's schedules. So you
22 don't know what every other agency is out

1 there doing, because there's no central
2 price.

3 Even in VA, we can't track what
4 people buy. For example, a lot of it is done
5 on the credit card, and that's in one
6 database. And even if you go look at credit
7 card data, you don't get down to line item
8 until you get back to the facility and the
9 purchase order.

10 If you look at FAS orders and
11 things that go into what we call our IFCAF
12 System, you still don't get all the data on
13 it. There's no centralized place right now
14 that you can track what VA buys, or what the
15 government buys off of our schedules, except
16 going to the vendor.

17 We always just go to the vendor
18 and ask for the sales transaction data, and
19 that's where you see how people buy. If we
20 go to the credit card company -- and these
21 are on other work other than the Office of
22 Contract Review.

1 I mean one of the things I just
2 looked at is -- I think you might've
3 remembered the articles about the misuse of
4 the credit card where they were going to
5 casinos and things like that. So we had an
6 audit team who was looking behind that. And
7 happy to say, all the purchases were
8 legitimate.

9 But when we looked at what was
10 being purchased, it was all small items, a
11 lot of it through the prime vendor. But
12 there were not -- most of the orders were
13 very, very small. They were under \$3,000.

14 So I've worked on a couple things
15 where I've had to track that because of other
16 IG work. So that's where I get my
17 information from. But VA contracting
18 officers have no idea what's purchased.

19 MS. NELSON: I don't think that
20 the customer agencies do, either, because
21 nothing is reported under 25K.

22 MS. REGAN: Right.

1 MS. NELSON: So even a contracting
2 entity wouldn't know what -- what the --
3 somebody with a credit card is buying because
4 they don't report it.

5 I have one last question. In your
6 post award audits, or even in your pre-award
7 audits when you're working with a contracting
8 officer and helping them, or in your post
9 awards when you've looked at what's happened,
10 have you found -- had any experience where
11 you've found that in determining fair and
12 reasonable, that there's been -- the
13 industrial funding fee on the VA is not 0.75.
14 It has a different --

15 MS. REGAN: Right.

16 MS. NELSON: -- percentage. But
17 it's still is industrially funded. Have you
18 found that the contracting officers have --
19 that's been an issue for them that they have
20 negotiated differently because they're
21 industrially funded, or that the issues have
22 been more around the disclosures of the

1 vendors?

2 MS. REGAN: More the disclosures.
3 The industrial funding fee is embedded in the
4 final price.

5 MS. NELSON: But the contracting
6 officers aren't using industrial funding as a
7 -- as saying, "Well, we're industrially
8 funded so I'm not going to negotiate the
9 best."

10 MS. REGAN: Oh, no. No, I haven't
11 seen that at all.

12 MS. NELSON: Okay, thank you.

13 MR. BRANCH: Are there any other
14 questions? Debra?

15 MS. SONDERMAN: One of your
16 recommendations is to move to three-year
17 instead of five-year contracts. Are you all
18 in the process of implementing that at VA?

19 MS. REGAN: No, no, no. That
20 would only be if you get rid of the clauses.
21 If you keep the contracts so that we can get
22 fair and reasonable pricing, not just at the

1 time of award, but all through the term. In
2 other words keep the price reduction clause.
3 We don't care how long the contract is.

4 But if you're going to get rid of
5 the price reduction clause, one of the
6 suggestions was to get rid of the economic
7 price adjustment clause, go to shorter
8 contracts more with industry, and do more so
9 that you can maintain price reasonableness
10 for the long term.

11 MS. SONDERMAN: Have you done any
12 analysis of what the workforce impact would
13 be? How many -- how many more contracting
14 officers would you need to be able to --

15 MS. REGAN: I think -- I think
16 anything other than our first suggestion or
17 second would -- especially with competition
18 would be -- have to increase the workforce
19 tremendously, and that would be a tremendous
20 impact. Whether it would balance out what
21 you save, I haven't done any kind of savings
22 on that, but I would say we still would

1 probably save money.

2 MS. SONDERMAN: Thank you.

3 MR. BRANCH: Alan?

4 MR. CHVOTKIN: Thank you, Mr.

5 Chairman. Three hopefully simple questions.

6 On page 10 on the split on the amount of
7 purchases, do you know, or can you provide
8 how much is split between product services
9 and pharmaceuticals? Page 10.

10 MS. REGAN: I think it's -- I
11 don't know about services what the split is.
12 But I know it's pretty much the same over
13 pharmaceuticals and supplies, med-surg
14 supplies and equipment. We haven't seen much
15 of a difference. It's always about a 50-50,
16 60-40 split.

17 You may see individual items that
18 DoD purchases more of. For example, if it's
19 a pediatric drug, you're going to see all the
20 dollars on the DoD side, and not on the VA
21 side since we don't have pediatrics.

22 So line item by line item, you may

1 see a difference, but overall that's about
2 the split. And it's -- it's pretty
3 consistent.

4 MR. CHVOTKIN: Thank you. I'll be
5 interested a little bit more, and am going to
6 talk later about that. On the terms and
7 conditions on page 6, the difference in the
8 commercial side. In your experience, have
9 you looked at the difference of commercial
10 versus government in some of the mandatory
11 clauses that exist in the government's side
12 that may not exist in the commercial, or even
13 the FAR part 12 clauses that would exist
14 uniquely in the government other than the
15 business terms and conditions, and the
16 relative impact that those have on the
17 differences between government and commercial
18 purchasing in this area?

19 MS. REGAN: Well, I think almost
20 all the government clauses are not -- are not
21 similar to what we see in the way they're
22 written, but you've probably have to give me

1 an -- there's so many of them. You don't see
2 anything -- each industry, they either have
3 their own contract that they will use, or
4 you'll have certain GPOs that develop their
5 contract.

6 They're -- they're all different,
7 but there's no standard clauses that you see
8 there in their contracts that I would say are
9 comparable to what we have.

10 MR. CHVOTKIN: Have you done any
11 work to measure the impact of those
12 government unique clauses then on pricing?
13 Have you seen any work in that area other
14 than what you've done yourself, or --

15 MS. REGAN: No, I haven't seen
16 anything that would impact the pricing. I
17 mean usually the issues that come up on
18 pricing are not the clauses on the contract
19 or complying with the clauses. It usually
20 comes into how much we buy, whether or not we
21 commit to buying, those kinds of issues. But
22 I haven't seen anybody that says the clauses

1 themselves and the contract will cost us
2 administratively, therefore we have to charge
3 you more. I haven't -- I haven't encountered
4 that argument at all.

5 MR. CHVOTKIN: Thank you. And
6 finally, on page 2 in the review you said
7 that most of the post award reviews were
8 based on voluntary disclosures.

9 MS. REGAN: Right.

10 MR. CHVOTKIN: Can you tell me a
11 little bit more about what that is, what kind
12 of voluntary disclosures you're getting and
13 what's triggering those?

14 MS. REGAN: Well, one of the
15 things that triggers them is we've kept the
16 post award audit activity, and ever since
17 1993, we've had vendors increasingly come
18 into us saying, "I might have overcharged
19 you, or I didn't give you a price reduction."
20 It's a very informal program. We're not part
21 of the -- like DoD has it with DoJ. We have
22 them come to us. They do an audit. We

1 review it. We either accept the amount,
2 issue a bill of collection.

3 If it's really egregious, we're
4 required to send it to Justice. A lot of it
5 is the pharmaceuticals, and our statute, the
6 public law, requires the Secretary or allows
7 the Secretary to have an audit process to
8 look at it.

9 We have a lot of the companies --
10 a lot of the money lately has been from the
11 drug companies who we calculate their federal
12 ceiling prices periodically to see if they
13 owe us back money that was recalculated. It
14 just -- it's just increased significantly. I
15 think we had our first one in 1993, and it's
16 just consumed our resources over the years.

17 MR. CHVOTKIN: So the -- in the
18 past five years, though, the 148 post award
19 reviews, do you have a sense of what portion
20 of those were based on voluntary disclosure?

21 MS. REGAN: Eighty. Mark do you
22 know? It's like 80.

1 MR. MYERS: It's probably up
2 around that number. We don't have that on
3 top of our --

4 MS. REGAN: It's somewhere between
5 80 and 90 of them.

6 MR. CHVOTKIN: Ball park.
7 Direction is what I was interested in.

8 MS. REGAN: Yes.

9 MR. CHVOTKIN: Thank you very much.

10 MR. BRANCH: Mr. Drabkin?

11 MR. DRABKIN: Yes, I just need to
12 follow up on one other issue with the
13 resellers. Are you familiar with the fact
14 that many manufacturers -- some manufacturers
15 refuse to sell directly to the government for
16 any number of reasons?

17 MS. REGAN: I have never asked the
18 manufacturers why they have chosen to sell
19 through a broker.

20 MR. DRABKIN: That wasn't my
21 question. My question is are you familiar
22 with the fact that there are at least a

1 number of manufacturers who refuse to enter
2 into direct contractual relationships with
3 the government?

4 MS. REGAN: And there probably are
5 some who do that. The reasons vary as to why
6 they don't want to enter into a contract with
7 the government.

8 MR. DRABKIN: So the answer is
9 yes, you are aware that there are
10 manufacturers who do not chose to deal
11 directly with the government through a
12 contract?

13 MS. REGAN: Right, but there are
14 the manufacturers who want the government's
15 money without entering into a contract in
16 complying with terms and conditions are
17 offering fair and reasonable prices.

18 MR. DRABKIN: Okay, but you're
19 familiar that that is in fact a commercial
20 practice? Are you familiar that in the
21 commercial marketplace that there are
22 manufacturers who choose to deal through

1 brokers or resellers only and do not choose
2 to deal directly with the end customer of
3 their product or service.

4 MS. REGAN: I have not seen any of
5 the manufacturers that we know of who are
6 dealing through brokers who deal with their
7 commercial customers in the same manner.

8 There are manufacturers who do
9 deal through resellers, where the reseller
10 actually buys and stocks and sells the
11 product for them. I do not see commercially
12 where the broker situation is being used the
13 same way, and not with the ones that we've
14 looked at.

15 When we look at it, we find out
16 that none of their customers -- we are the
17 only customer buying through a broker. That
18 raises the issue. If the broker has -- is
19 doing that commercially, and that's where
20 their sales are going, that's fine. But
21 that's -- they would have commercial sales at
22 that point.

1 But we're talking about a very
2 small group who don't buy/sell stock.
3 They're only for the government. They're set
4 up for them, and again, it gets in the fair
5 and reasonable pricing.

6 MR. DRABKIN: So then again I
7 think if we boil your answer down, then you
8 are in fact aware that there are
9 manufacturers in the private sector who
10 choose to deal with their customers through
11 brokers or resellers?

12 MS. REGAN: I don't know of
13 anybody who deals through a broker with their
14 -- I have not seen that. With legitimate
15 resellers that buy and sell, yes, there are a
16 lot of them. They may sell commercially.
17 They may hire resellers to sell commercially
18 for them, but those people will have
19 commercial sales. Not brokers. I have not
20 seen brokers. I've only seen that in our
21 contracts.

22 MR. DRABKIN: Thank you, Mr.

1 Chairman.

2 MR. BRANCH: I'll reserve the
3 prerogative to ask the last few questions, so
4 we'll get you out of here.

5 MS. REGAN: Okay.

6 MR. BRANCH: I'm just curious with
7 respect to the scope of VA's schedules. How
8 many sick codes, how many contracts? Do you
9 have any idea overall?

10 MS. REGAN: I don't know the
11 number, but --

12 MR. BRANCH: NAICS codes I should
13 say.

14 MS. REGAN: Greg or Carol, do you
15 know? We have some people from our national
16 acquisition center that actually do the
17 award.

18 MS. O'BRIEN: There's about 36
19 NAICS, and 1,600 or so vendors on contract.

20 MR. BRANCH: Okay, so I -- you
21 know, and I've enjoyed -- I've enjoyed your
22 remarks. I think you did a very

1 comprehensive job, and I think your
2 recommendations will generate a lot of -- a
3 lot of discussion amongst the panel.

4 But I guess what I'd like to hear
5 is kind of your view of how we would extend
6 some of this into the broader Federal Supply
7 Schedule, which has I think significantly
8 more contracts, significantly more NAICS
9 codes, and in an environment where the
10 predominant ordering activities do not belong
11 to either DoD or VA, but indeed cover the 14
12 cabinet departments and various independent
13 agencies, how much of what you've said to us
14 today do you believe is directly translatable
15 to what GSA is doing?

16 MS. REGAN: You mean some of the
17 findings that we've had? I haven't seen what
18 GSA has done since the mid-'90s when I think
19 we began -- really upped our pre-awards.

20 Based on the legislative changes
21 in the mid-'90s, we began doing more pre-
22 awards. We began doing more post awards. I

1 think there was a GAO report a couple years
2 ago that talked about the numbers that we did
3 versus GSA.

4 I don't have any insight into
5 GSA's vendors, the type of products and
6 commodities. But the one recommendation I
7 would say is that I think the schedule needs
8 to be flexible depending on what's being
9 bought or sold. And I think that industry --
10 if we want to be -- get good prices and keep
11 good prices, we need to see what industry is
12 doing in those commodities and have some
13 flexibility in the clauses to be able to
14 adjust them for that purpose.

15 If you remember way back when, VA
16 -- the government couldn't even put like
17 tiered pricing in the contract. So we would
18 lose out on the better pricing. Now, we've
19 changed. We've put tiered pricing in there.
20 We issue national BPAs.

21 We do a lot of different things.
22 We'll put clauses in that you can now get

1 trade-ins, or you can do bundling. Whatever
2 it happens to be, we're not as strict as we
3 used to be in the schedules, and that is an
4 industry related issue.

5 So one of the things I think is
6 that you need to study the industries, not
7 put one big FSS, but because of the different
8 types of commodities and services that are
9 being provided, maybe the schedules need to
10 be more flexible depending on them.

11 But I don't know, and I don't
12 think GSA has done as many pre-awards as we
13 have over the time period to get the -- to
14 know if they have the same type of problems
15 in the disclosures that we see. But I know
16 the two areas that I think we have in common
17 are whether it's services or commodities when
18 there's no commercial sales what to do.
19 Because you get into the whole cost or
20 pricing issue, which is how do you do it when
21 it's not competitive? Those are issues that
22 I see overlapping.

1 But I really can't comment on
2 whether or not GSAs total package is the same
3 as ours, or whether their industry practices
4 are the same as ours. I can only really
5 comment on what we see with ours. But I do
6 think the flexibility in the different types
7 of services and commodities being purchased
8 might make a difference in the schedules,
9 maybe by your codes.

10 MR. BRANCH: All right, thank you
11 very much. Thank you for your presentation
12 today.

13 MS. REGAN: Thank you.

14 MR. BRANCH: You know, we're a bit
15 behind schedule, but I think this was -- I
16 think this was worth the extended time and
17 the discussion. And it's about -- well, I
18 have 10:37 by my watch. So why don't we take
19 a break until ten minutes to 11:00, and then
20 we'll hear from the next speaker.

21 (Whereupon, the above-entitled
22 matter went off the record at 10:39 a.m., and

1 resumed at 10:55 a.m.)

2 MR. BRANCH: We have a
3 presentation from Herman Caldwell, junior, on
4 multiple award schedule price reasonableness.
5 Mr. Junior isn't here in his private
6 capacity, although as I understand it, he
7 does work for the GSA.

8 Before we get started, though,
9 let's talk a little bit about the previous
10 presentation. As I understand it, there are
11 some questions for that presenter, so I would
12 just suggest to the panel that if they have
13 questions and want to probe more deeply, we
14 will ask Ms. Regan to provide written
15 responses for the record.

16 So for her and any other speaker,
17 if you have follow up questions, please get
18 those to Pat in writing, and we will ask for
19 written responses with the exception, of
20 course, of Mr. Drabkin, who I think has
21 probed all witnesses probably adequately.
22 Just kidding, Dave.

1 MR. DRABKIN: I have no further
2 questions for Ms. Regan. Her testimony will
3 be given the credibility it's deserved. Can
4 we ask questions of her that would really be
5 directed to VA in the bigger sense?

6 MR. BRANCH: I think that would be
7 appropriate.

8 MR. DRABKIN: Okay.

9 MR. BRANCH: I think that would be
10 appropriate. So with that, Mr. Caldwell, the
11 floor is yours. Welcome this morning.

12 MR. CALDWELL: Good morning.
13 There we go. Good morning. Looking around,
14 I would guess that everyone in this room
15 shares one characteristic. I bet we all pay
16 taxes: sales taxes, gasoline taxes, income
17 taxes, perhaps property taxes, capital gains
18 taxes.

19 So I'd like to share a taxpayer's
20 view with you, if you would humor me. And
21 everybody put on their taxpayer's hat, and
22 think with me about the reasonableness of MAS

1 pricing.

2 The 2007 annual report from GSA on
3 page 67 says one of our customers, whom I
4 think you're going to hear from later this
5 afternoon, was able to achieve 90 percent off
6 of MAS pricing. But the FAR says that GSA
7 has determined those prices to be fair and
8 reasonable.

9 How can that be? In GSA advantage
10 over five years ago, a negotiator found three
11 different prices for the same item: \$583,
12 \$1,000, \$6,000. We can see that probably the
13 \$6,000 price is not reasonable, but can you
14 really say that either of the other two are?
15 How can that be?

16 With apologies to Letterman, I
17 would like to offer the top ten reasons. COs
18 are slow-witted country folk from North
19 Carolina, like myself, and they don't cut a
20 good deal. COs fell off a turnip truck on
21 their heads. Workload, workload, workload.
22 Emphasis on cycle times of award. Cycle

1 time to award performance incentives.

2 Organizational turbulence, industrial
3 funding.

4 And I would like to offer a
5 specific comment to a question for the last
6 presenter regarding industrial funding. I
7 think it's a fair reading of the trade press
8 coverage. The postal IG report on Sun
9 Microsystems, as well as the redacted
10 version, as Senator Grassley's report that
11 yes, in fact the emphasis on sales revenue
12 and industrial funding did play a role there.

13 If you're industrially funded, you
14 need to either build revenue or reduce
15 operating costs. One of the ways you drive
16 operating costs down is by churning
17 workforce, with junior people replacing
18 senior people. And of course, increased
19 sales.

20 And the number one reason? The
21 Congress made us do it thought the industrial
22 funding system. But there is good news. The

1 Congress has recently voted to bail out
2 Fannie Mae and Freddie Mac, two private
3 corporations.

4 They are corporations that are
5 able to share in the profits, but the public
6 will bail out losses. That's quite a --
7 quite a deal. You may want to call your
8 broker later on this morning and invest.

9 If the Congress will bail out
10 these private corporations, would GSA or FAS
11 be permitted to perish from an industrial
12 funding shortfall? We seem to operate like
13 we would, but I would submit that we need to
14 negotiate better pricing.

15 Again, this is presented as a
16 taxpayer, something that I think we all
17 share. If there are no questions -- are
18 there any questions? If there are no
19 questions, this concludes my presentation.

20 MR. BRANCH: Are there any
21 questions for this presenter?

22 MR. CALDWELL: Thank you, very

1 much.

2 MR. BRANCH: Thank you, Mr.
3 Caldwell.

4 MR. DEL-COLLE: Good morning to
5 all of you, and thank you for allowing the
6 Coalition for Government Procurement to have
7 the opportunity to present some thoughts.
8 We're going to share in a particular way.

9 I'm Mike Del-Colle. I'm head of
10 the IT committee the Coalition has. James
11 Connal is going to be speaking on products.
12 I'll be focusing more on services. I also
13 need to admit, personally, this is an awkward
14 situation. I usually sit where you are and
15 get to ask the questions. So I'm not sure
16 how prepared I am for what you may do to me.

17 I'd first like to put something in
18 perspective. I distinguish the car from the
19 driver. I think we need to appreciate and
20 understand that the GSA schedules are the
21 car. There are a variety of criticisms that
22 can be offered on the ability of the drivers,

1 but that doesn't make the car bad.

2 It may need improvement, but
3 there's clearly a difference. Later today,
4 you're going to hear from one of the drivers.
5 I think it's Mr. Gross for the DoD Enterprise
6 Software Initiative, who I think from our
7 perspective might be a very good driver. The
8 same could be said for the Army Material
9 Command down in Huntsville; another good
10 driver. That's different than maybe other
11 stories that you've heard today, or at other
12 times.

13 One of the things I first would
14 like to cover is to appreciate the scope of
15 the schedules, and I think some of the
16 comments today have touched that. And I
17 think your comments at the last meeting, Mr.
18 Chairman, properly reflect the fact that
19 maybe by virtue of the growth of the
20 schedules, consideration needs to be given to
21 the differences between products and
22 services.

1 I'm not advocating it as a to-do,
2 but I'm suggesting that your observation has
3 a lot of merit, and ought to be considered.

4 What we're here to talk about is
5 fair and reasonable pricing. What we need to
6 consider is the need for the clients to have
7 a better understanding of what that means.
8 That client being GSA, that client being the
9 drivers, the individual ordering agencies who
10 are permitted to use the schedules to place
11 their product needs.

12 As I make these comments, you have
13 the testimony of the Coalition, and I'm
14 building upon those, and adding to them in a
15 bit as I reflect that some of the
16 presentations that preceded me.

17 First, let's put something in
18 perspective. Everybody argues and discusses
19 most favored customer. It appears if I go
20 back to the IG's presentation, that it has
21 its roots in 1982. I was far younger then,
22 and government contracting was different

1 then.

2 Back in those days, as I remember
3 it, because I'm a career federal employee,
4 there was a certain mandatory use of the
5 schedules. There was a certain presumption
6 that it dealt more with product.

7 The GSAM, the General Services
8 Guidance on price evaluation talked about
9 evaluation and looked at the issue and
10 mentioned most favored customer as a
11 negotiation technique, not as a condition or
12 requirement of a clause.

13 It was an encouragement to the
14 contracting officer to be aggressive, to
15 exercise the delegated authority they had to
16 pursue the best interests of the government.
17 And that guidance recognized that when the
18 government was looking for "the most favored
19 customer," it was presuming something.

20 It was presuming that there were a
21 set of terms and conditions that could be
22 drawn as a parallel to what happened in the

1 commercial marketplace, but that guidance
2 also recognized that there were any number of
3 circumstances that might create a different
4 environment in which a fair and reasonable
5 price was still expected, but not that it
6 necessarily had to be, "the most favored
7 customer."

8 Keep in mind that when we talk
9 about the CSP, the commercial sales practice
10 sheet, and we ask vendors to talk about their
11 most favored customer, that frequently in
12 previous testimony, the answer is no. For a
13 variety of reasons, everything from the false
14 presumption that every commercial contractor
15 has a complex, sophisticated, detailed price
16 inventory control system of some sort, which
17 they don't have, or that they are so highly
18 centralized that they're able to aggregate
19 and collect that information.

20 And the fact of the matter is is
21 that frequently, they may not even know who
22 their most favored customer is at a

1 particular point.

2 Keep in mind that if you go back
3 to 1982 and you talked about most favored
4 customer, it was reflective of a different
5 form of contract, a requirements contract; a
6 requirements contract in which the terms and
7 conditions basically said, "Only you and I
8 will dance."

9 That's not what the schedules are.
10 The schedules are an ID/IQ environment. They
11 provide for variety, flexibility, and a
12 certain kind of responsiveness that was not
13 originally imagined in requirements
14 contracts.

15 What the ID/IQ arrangement of the
16 schedules does provide is a ceiling
17 protection. It says that once we've
18 determined that our price, be it for product
19 or service, is fair and reasonable, that
20 we're willing, whether it's for services or
21 product, to compete on individual task orders
22 and offer even more. Because the question is

1 is the price fair and reasonable?

2 And I say price because it's
3 important to realize that we're talking about
4 pricing and not cost. We're talking about
5 price analysis, not cost analysis. We're
6 talking about contract price analysts,
7 whether they be done by the government or
8 done by the IG.

9 And let's understand that we've
10 created an ambiguity of roles.
11 Appropriately, government contracting
12 officers are depending on the IG, but they're
13 depending on the IG to do price analysis. We
14 use the word audit I think far too loosely to
15 suggest something of greater merit than it
16 is. It's a price analysis.

17 One of the things that needs to be
18 kept in mind at the same time is that the
19 pricing is built on particular cost elements
20 that are appropriate to the circumstances of
21 that buy.

22 The government would like to this

1 it is Wal-Mart, but the last time I looked at
2 govspending.org, I believe I identified over
3 -- what appeared to be over 13,000 different
4 ordering activities. Wal-Mart does not have
5 13,000 ordering activities.

6 It's something that has to be
7 considered, because when you ask for that
8 kind of favored pricing, you're presuming
9 that a whole set of circumstances exist,
10 which may not be there.

11 As Mr. Drabkin rightfully pointed
12 out at the beginning, the IG's previous
13 suggestion that 71 percent of the initial
14 offers weren't at the most favored
15 manufacturer is immaterial. It is the
16 contract that governs.

17 There is a negotiation process,
18 and it has been pointed out those
19 negotiations frequently have been very
20 successful, and to the government's benefit
21 in determining a fair and reasonable price,
22 not necessarily the best price.

1 That best price is frequently
2 offered on the competition for task orders,
3 and what is known as spot pricing. And in
4 fact, the SARA panel, the 1423 panel,
5 recognized that in part when they made a
6 recommendation that on the IT schedule,
7 possibly pricing shouldn't even be used
8 because it is such a transitory value
9 affected by the marketplace and by the
10 variety of things that can impact it, be it
11 geography, be it demand, be it complexity, or
12 any one of those things.

13 I ask you to keep in mind, because
14 Jim's going to speak next, and he and I will
15 answer questions, that the schedules provide
16 flexibility. They provide a responsiveness
17 to simple and complex needs. They provide
18 for best value. They provide for
19 competition.

20 If there are criticisms, they may
21 be of the driver, but they don't need to be
22 of the car. There are improvements

1 undoubtedly that can be made, and this panel
2 will find. But many of those criticisms are
3 unjustified relative to the basic vehicle
4 that is available.

5 Stop to think about it, as GSA and
6 schedules have evolved, they have continued
7 to be responsive to a variety of needs. Are
8 they subject to a lot of criticism? Yes.
9 Some of it obviously earned and justified.
10 In other cases, it's like anything else.
11 We're learning how to drive the car, and
12 occasionally, we tend to drift off the road.
13 Thank you.

14 MR. BRANCH: Jim?

15 MR. CONNALL: Good morning. By way
16 of introduction, just so you know, I'm with
17 Red River Computer Company. We are a
18 reseller of IT products to the federal
19 government. More than 98 percent of our
20 business is with the federal government. We
21 do hold the GSA schedule that has been quite
22 successful for us.

1 So I've been asked to talk about
2 products as it pertains to the GSA schedule,
3 and you have the information that's been
4 presented to you.

5 When it comes to fair and
6 reasonable prices, there's many, many
7 variables that come into this equation, and
8 we deal with that everyday, just as the
9 government buyers deal with it everyday.

10 There's volume, there's
11 components, there's market pressures, all
12 sorts of things that go into determining a
13 price for any given sale. But the key factor
14 is competition, especially in today's world.

15 The cost of doing business with
16 the government is higher a factor that cannot
17 be ignored, and a fair and reasonable price
18 does not necessarily mean that it's the
19 lowest price. It may be, but it is not
20 necessarily the lowest price.

21 Big question that needs to be
22 asked is how are prices arrived at? And that

1 varies by the seller. Everybody uses a
2 different scheme to determine their prices,
3 and then there's the negotiation by the
4 contracting officer, a very key element that
5 seems to serve the government very well in
6 today's world.

7 Most favored customer needs to
8 take into account the phrase similar size and
9 scope. Size is not the only thing. Scope is
10 very key to that. There's also the factor
11 about customer commitment. Something that
12 Michael touched on in his mention of Wal-
13 Mart: the government really doesn't make good
14 commitments when it comes to buying products
15 particularly, as compared to large corporate
16 organizations that will make a commitment to
17 a brand, to a time frame, and to a dollar
18 amount. And that time frame frequently is a
19 year or more, some the government agencies
20 just don't do.

21 And in that timing, the markets
22 move fast, especially when it comes to

1 information technology products. What was a
2 good deal six months ago may not be such a
3 good deal today. And today's deal may pale
4 in comparison by the deal that gets offered
5 in September by a company that happens to be
6 coming to the end of its fiscal year to
7 coincide with the government's fiscal year.

8 So both the buyer and the seller
9 have an extra incentive to make that sale, so
10 that sale in September may make today's sale
11 look not so good.

12 It's time to change. If the
13 government, via GSA and the GSA scheduled
14 program, desires to gain the advantage of the
15 commercial marketplace, the government needs
16 to act more like the commercial marketplace.
17 Competition is the key. It happens everyday.
18 Allow the market to drive the benefits to the
19 customer.

20 That's all I have. I guess we're
21 ready for questions.

22 MR. BRANCH: Okay, do we have

1 questions for either Mike or Jim? We'll
2 start with Debra, then go to David, and then
3 I think Alan, do you have some questions?

4 MS. SONDERMAN: Thank you for your
5 presentation. You say that competition is
6 the key. What is your suggestion for
7 changing the competition dynamic within the
8 schedules program?

9 MR. CONNALL: I think the primary
10 benefit would be one of timing, to broaden
11 the competition closer to the actual sale, as
12 opposed to the competition -- so much of the
13 competition being part of the initial
14 negotiation.

15 The initial negotiation for a GSA
16 schedule may have been years ago, and things
17 have changed, especially in the IT world.
18 But the closer you can get that competition
19 to the actual sale, then the stronger the
20 competition will be. Most products are
21 available from more than one place.

22 MS. SONDERMAN: So are you -- can

1 you elaborate a little bit? Does that -- as
2 far as practical advice for this panel and
3 for procuring agencies, does that mean that
4 you are advocating shorter terms on schedules
5 so that they are -- or competition to get on
6 the schedules, rather than open marketplace
7 as we tend to have today, or are you making a
8 specific recommendation about more stringent
9 competition at the task order level?

10 MR. CONNAL: Definitely at the
11 task order level. That's then the buy is
12 being made. The length of the schedules is
13 fine. It's a legitimatizer to the commercial
14 entity wishing to sell to the government. So
15 bringing the competition down to the point
16 when the purchase is being made will favor
17 the government tremendously, rather than some
18 discussion that happened a year or more ago.

19 MR. DEL-COLLE: One thing to keep
20 in mind that goes with that as well is the
21 Department of Defense legislatively, and I
22 think it's the 206 DoD Authorization Act, and

1 that requires any order over \$100,000 has to
2 be posed on e-Buy.

3 That's another requirement of
4 civilian agencies. It's obviously something
5 the panel could look at in terms of a general
6 requirement, but let's also keep something in
7 mind, and there were some criticisms earlier
8 by some of the presenters.

9 Some of the techniques that are
10 used on schedules for competition are no
11 different than what they are for the open
12 market. \$3,000 is \$3,000. You know, \$25,000
13 is \$25,000, and \$100,000 is \$100,000. The
14 premise of -- one of the premises of the
15 schedules is that you are able to frame a
16 spectrum of fair and reasonable, much like it
17 is in the marketplace right now, much as it
18 is if you do an open market buy, and you are
19 then able to fashion and to compress that --
20 that competition into a more effective
21 community.

22 You can only have to give three

1 quotes on open markets as well. So let's be
2 careful that we don't -- as we look at
3 competition to make sure we get what we need
4 that we're not adding additional requirements
5 on schedules that are not otherwise existent
6 in the open market.

7 MR. DRABKIN: Thank you. I'm a
8 little concerned about a couple things you
9 said in your initial statement. First, from
10 this perspective: the schedules, if they are
11 to remain useful as a tool for the
12 government, have got to be a place where
13 buyers can go and be assured that the terms
14 and conditions that the government requires
15 have been negotiated, and that they're
16 operating in an environment where price is at
17 least -- at least a fair price has already
18 been established, and now what they actually
19 pay should be the result of competition.

20 So keeping that in mind, you
21 indicated in your initial statement that
22 companies don't centrally manage their

1 pricing data. Well, maybe we ought not to
2 let them on the schedule unless they do in
3 fact have systems that track their pricing
4 data. What do you think? What's your
5 response to that?

6 MR. DEL-COLLE: A poor choice of
7 words on my part. When I said that, what I'm
8 assuming is that everybody -- it's not that
9 at some point you don't know what the prices
10 are, but there is a presumption of
11 instantaneous knowledge, number one, which
12 isn't there.

13 Second of all, let's distinguish
14 contractors. And it's been hinted at those
15 who are commercial who have government
16 practices, and those that are government
17 contractors; there are some different
18 creatures in that environment.

19 Third, I think we need to consider
20 the fact that when I made that comment, under
21 the CSP, one of the things that the
22 contracting officer or the assistant they get

1 through the contract price endless support is
2 to validate that the contractor has an
3 accounting system that will give them the
4 capacity to capture the information to
5 support, and to be able to monitor the basis
6 of award.

7 That may or may not include
8 capturing all of the pricing data. It
9 obviously has to capture the basis of the
10 award. So when I made that comment, I was
11 looking at the broad spectrum of what could
12 be -- what could be priced out there, and
13 what's relevant to the contract on that basis
14 of award.

15 MR. DRABKIN: But taking that just
16 a little bit further, because it's a matter
17 that concerns me greatly. If the -- if the -
18 - if the benefit of the schedules to the
19 government buyer, wherever they happen to be,
20 is the fact that we've already done the
21 homework for them, and that they can rely on
22 a head-to-head competition at the time

1 they're actually going to make a buy, if
2 that's the premise of the work we do, then
3 how can a company be responsible enough to
4 get a schedule contract if they cannot tell
5 us what they're pricing has been so that when
6 we question whether or not we've gotten the
7 price that we've negotiated, which is more
8 than just based upon the benchmark customer,
9 because the benchmark customer could change,
10 or the benchmark customer maybe ought to
11 change because of a change in practices by
12 either the government or the company.

13 Why would we consider, or why
14 should we consider a company sufficiently
15 responsible for receipt of a scheduled
16 contract if they cannot tell us what their
17 pricing practices are with the -- with the
18 degree of discretion that would allow us to
19 make a good decision on prices?

20 MR. DEL-COLLE: I think that's --
21 I think that's a fair question, and I have to
22 think about it a bit more, David.

1 MR. DRABKIN: That's fair.

2 Secondly, then in the same area of pricing,
3 it seems to me that what's really important
4 to the government isn't whether we're getting
5 your best price, it's whether or not the
6 price we're getting for the goods or services
7 we're buying is the best price given what
8 we're -- how we buy for that good or service
9 in the marketplace.

10 So I mean if IBM is selling me a
11 computer, I guess I shouldn't much care
12 whether IBM is giving me the best price IBM
13 has for a computer. The question is am I
14 paying the price for the computer with the
15 capabilities that the IBM computer has, that
16 is a good price based upon how we buy in the
17 whole marketplace.

18 Why do I care if it's IBM's best
19 price if HP has the same thing that does the
20 same thing, that meets all the other
21 requirements and is \$100 cheaper? Shouldn't
22 I be more focused on the price I pay for the

1 good I buy, as opposed to whether it's your
2 best price or not?

3 MR. CONNALL: You're absolutely
4 right, because my best price may not be the
5 best price that you're offered today. It
6 might be from somebody else. Again, that's
7 the marketplace, the competition driving it.

8 To use your examples, IBM and HP,
9 and then throw a third in there with Dell,
10 and you may find that today's price on Dell
11 might be the best. Tomorrow, might be HP.
12 The next day might be IBM.

13 But also, to draw the distinction
14 in the negotiation with GSA schedules, we're
15 talking about the sell price, as opposed to
16 the negotiation regarding cost because just
17 as your concern is not what is any individual
18 schedule holder's the best price, just what
19 is the best price offered today to the
20 government, the cost should not be a concern
21 either.

22 MR. DRABKIN: Okay, and then last

1 question I have, and also of somewhat -- I
2 did not say that the 71 percent figure was
3 immaterial. What I said was people took away
4 from it the wrong impression.

5 In fact, I think it's very
6 material that contractors given the
7 understanding that they should have when they
8 submit an offer to us, 71 percent of the time
9 when our IG checked, weren't starting out
10 with a price that was consistent with our
11 pricing guidelines.

12 I'm concerned about that either
13 because they're playing a game with us, or
14 because our rules aren't sufficiently clear
15 to instruct them on how to prepare a pricing
16 proposal when they submit it to us
17 originally.

18 But I wouldn't want you to walk
19 away that I think it's immaterial. Quite the
20 contrary, it's very material. It bespeaks a
21 problem; not the problem that some people
22 walked away thinking it spoke, but it

1 bespeaks a problem that needs to be fixed,
2 precisely what I think the purpose of this
3 panel is.

4 If people can't submit us a price
5 that's consistent with our pricing policies
6 71 percent of the time when we checked,
7 that's a problem.

8 MR. DEL-COLLE: And I would agree
9 with you that -- that you've identified what
10 the real issue is, and not the
11 characterization of an interpretation of that
12 issue. I absolutely agree with you.

13 MR. DRABKIN: Thank you, Mr.
14 Chairman.

15 MR. BRANCH: Alan and then Judith.

16 MR. CHVOTKIN: Thank you, Mr.
17 Chairman. Gentlemen, you split the
18 presentation between products and services,
19 and I wonder if you have a different view
20 than between the issues of most favored
21 customer, and price reasonableness or fair
22 and reasonable pricing. I should say fair

1 and reasonable pricing between products and
2 services, and how the schedules program ought
3 to treat them.

4 Are they the same whether you're
5 dealing with products and services, or are
6 they different?

7 MR. CONNALL: From the product
8 point of view, they're really very different.
9 And I think the biggest difference is the
10 actual services being provided by a person, a
11 trained, skilled person, versus the purchase
12 of an object.

13 They're very different, and the
14 pricing data, the pricing schemes that
15 produce the end user's price, whether it's
16 through a commercial entity or to the
17 government, vary tremendously.

18 The competition in selling
19 products is very different than the
20 competition in services. And to -- to try to
21 make one area like the other area is just
22 fraught with problems that will never go away

1 in my opinion.

2 MR. DEL-COLLE: And I would agree
3 with that. In fact, I would use that -- I
4 would take the observation and the correction
5 of data provided to my own use of words to
6 further support the idea that for example in
7 a lot of procurement, we have found that we
8 have taken product oriented perspectives, and
9 we've tried to adapt them into the service.

10 And given the fact that services
11 are now such a large part of everything that
12 we buy, is there a need to rethink whether
13 it's a CSP in terms of its language and
14 clarity of instruction, or whatever it may
15 be, to appreciate what those differences be,
16 they both -- be they major or subtle in terms
17 of what's taking place, and what is
18 appropriate for those two kind of different
19 major growing areas.

20 And an example that I recently
21 experienced was the use of weighted
22 guidelines, which are a product-oriented

1 manufacturer into a service kind of
2 procurement that we were dealing with, where
3 it was very difficult for both the CO and for
4 ourselves to be able to reconcile those
5 criteria in a service environment.

6 Can it be done? With a lot of
7 interpretation. And it speaks to one of the
8 issues. I think that obviously is here when
9 I talk about drivers. That's the training of
10 the workforce with developments of its
11 competencies and capabilities, and the fact
12 that we all recognize, either through our
13 advancement and wisdom and age, or the fact
14 that -- that training dollars tend to get
15 restricted.

16 We're not necessarily providing
17 the full skill set that people need to deal
18 with those growing differences particularly.

19 MR. CONNALL: And if I may,
20 fundamental difference between the price and
21 the cost of products and services is that
22 over a significant period of time, typically

1 in the IT field, prices go down for products,
2 but cost to the reseller is going up for
3 services.

4 Those people that are becoming
5 better skilled, better trained, better
6 experienced cost more five years from now
7 than they do today, but the products they're
8 using will cost less.

9 MR. CHVOTKIN: I may have some
10 follow up on that point. Do either of you
11 have any experience with price differences on
12 the schedules, products and services, and a
13 unique government terms and conditions,
14 versus what those prices might be in the
15 commercial marketplace?

16 I probed on this question with Ms.
17 Regan, and she was not aware of any analysis
18 where the government terms and conditions had
19 significant impact on price. Do you have any
20 sense of the -- whether the government unique
21 terms and conditions have any impact on price
22 on the schedules, either for products or

1 services?

2 MR. CONNAL: Frequently for
3 products, they have a significant impact.

4 MR. CHVOTKIN: What would that be?

5 MR. CONNAL: Trade Act Agreement
6 compatible products. They cost more, and a
7 commercial entity typically has no preference
8 on those. There can be a significant
9 difference in the cost of that.

10 The -- the cost of money in the
11 period of time that the government sometimes
12 takes to pay can be a significant difference.
13 The willingness of the customer to pay in a
14 very short period of time can dramatically
15 impact a manufacturer in their purchase of
16 component products to build finished systems.
17 So if a commercial entity is saying they'll
18 pay in three days is dramatically more
19 attractive than having experience with a
20 government agency that pays in longer than
21 three days.

22 MR. DEL-COLLE: And I would add to

1 that. As you asked that question, it
2 occurred to me that that's not just a
3 schedules issue; that the cost of doing
4 government business generally in terms of
5 whether you look at Trade Agreements Act,
6 okay, whether you look at Service Contract
7 Act, whether you look at the accounting and
8 the various forms of documentation and
9 recordation that need to take place to
10 support and document not just for an
11 immediate need, but for an anticipated
12 possibility.

13 Are all costs in different --
14 different systems at least that I've observed
15 that vendors have to put in place, either
16 through a major systems change and/or through
17 some form of subsidiary bolt on applications?
18 A perfect example on the GSA schedules
19 currently is disaster recovery.

20 A large percentage of vendors have
21 accepted the modification that adds disaster
22 recovery. There is a fair number that have

1 not. A number of those who have not is
2 because one of the unsolved issues is the
3 level of data that will have to be provided.
4 It's called L3 data, Level 3 data.

5 If it gets finite enough, it will
6 require every -- particularly for the large
7 firms, be they product and/or services, that
8 will require a significant change to their
9 system to record and capture the data.

10 Because as occasionally happens, the
11 government is expected to be able to get data
12 from the vendor, on, for example, what kind
13 of services are being procured in the case of
14 an emergency, by what state, by what
15 congressional district, by what product, by
16 what business size, all of which is
17 information that is not currently captured.

18 MR. CHVOTKIN: Finally, Mr.
19 Connal, you said you're a reseller in the IT.
20 Do you sell both off the GSA schedule --
21 obviously you have the GSA schedule. Do you
22 also sell as a reseller directly to federal

1 agencies, and not off the schedules using FAR
2 part 15 procedures?

3 MR. CONNAL: We do. We have a
4 number of contracts, GWAC's, with the
5 government, so.

6 MR. CHVOTKIN: Congratulations.

7 MR. CONNAL: Thank you.

8 MR. CHVOTKIN: So are there
9 differences then as a reseller between the
10 procedures in FAR part 8, and the procedures
11 in FAR part 15 as a reseller that you -- that
12 you're familiar with? And it's not a pop
13 quiz. I'd welcome the information back if
14 it's a -- if it's helpful, because I'm
15 interested in what information you have
16 available, and any differences between the
17 schedules, the treatment under the schedules,
18 and the treatment under FAR part 15.

19 MR. CONNAL: What do you mean
20 specifically? Maybe I don't understand the
21 question.

22 MR. CHVOTKIN: Access to

1 information, FAR Part 15, cost of pricing
2 data other than certified cost of pricing
3 data required under FAR part 15, the
4 comparable data that may be required under
5 FAR part 8.

6 MR. CONNAL: We typically don't
7 run into those kind of requirements other
8 than GSA schedule. That's the only time,
9 which is a significant item.

10 MR. CHVOTKIN: Thank you.

11 MR. DEL-COLLE: Alan, if I could
12 just touch one point there? The fact that
13 something is under -- under part 12 or 13 and
14 15 doesn't mean that it's not commercial. I
15 mean you can still -- the negotiation process
16 is the negotiation process, and I wanted to
17 be careful that we don't presume that can't
18 be done if it's a schedule based buy or
19 anything else.

20 MR. CHVOTKIN: I fully understand
21 that. That wasn't my question. Thank you.

22 MR. DEL-COLLE: Thanks.

1 MR. BRANCH: Judith and then
2 Glenn.

3 MS. NELSON: Good morning,
4 gentlemen. I have a couple of questions.

5 MR. DEL-COLLE: For him, Judith?
6 For him?

7 MS. NELSON: Sorry, Michael, for
8 both of you, sort of on and off. The first
9 question, and -- what the heck is your name
10 there?

11 PARTICIPANT: Larry.

12 MS. NELSON: And I know Larry sits
13 on the panel, but you guys are representing
14 the Coalition. So just for the record,
15 what's the -- approximately what's the
16 membership of the coalition?

17 MR. CONNAL: There's over 330
18 companies that are members of the Coalition,
19 and they represent both large and small
20 businesses, and more than 70 percent of GSA
21 schedule business is done by the 330-plus
22 member companies.

1 MS. NELSON: Okay. And so first
2 of all, what would the day be if I didn't, or
3 David didn't take exception to one of the
4 things that one or the other of us said? And
5 in regard to negotiations or what companies -
6 - what customers are looking for for
7 products, and you actually agreed with him,
8 and I would take exception.

9 So in our negotiation strategies,
10 or what customers are looking for, you were
11 talking about like items. So let's say an HP
12 desktop or a Dell desktop, or an IBM desktop,
13 and we're talking about with similar
14 capacities, and we're talking about if
15 they're the same price.

16 And you said, "Well, yes, that
17 would be the same thing." And I -- the
18 question that I have is really is that the
19 same thing, or would we have a contracting
20 officer -- because we're talking about GSAM
21 says, "Well, we could go for other things.
22 We could look at best value." Right?

1 So, as a contracting officer,
2 might I look both at the bast contract level,
3 and say, "Well, they aren't the same thing?"
4 You know, maybe they have dissimilar terms
5 and conditions. Maybe the warranties are
6 different. Maybe the terms and conditions of
7 sale are different, and again, at the task
8 order level, or the PO level.

9 So are we really negotiating for
10 the same thing, just because they may
11 functionally have the same capacities? They
12 both can do word processing.

13 MR. CONNAL: Typically, the
14 specifications are not for the use of the
15 equipment. Specifications typically are to
16 the actual equipment, the processor size,
17 speed, size of memory, that sort of thing.

18 So rare is the specification for
19 the use when you say, "They all do word
20 processing." But the variance: you mentioned
21 three manufacturers in your question. They
22 vary, and how each one of those three

1 manufacturers price their goods varies, and
2 can vary with time, depending on the end of
3 their quarter, the end of their fiscal year,
4 depending on their inventory, depending on
5 the deal they got on some of the components.

6 Because the items that you're
7 talking about literally have hundreds of
8 components and sub-assemblies, so one of
9 those three may have gotten a great deal on
10 some components, and thus, today's price
11 might be more favorable for one of the three.

12 You're also talking about an area
13 that yes, they are very similar. But it's a
14 very competitive marketplace, and they all
15 want your business. One of them will have
16 the best price today.

17 MS. NELSON: But you -- you are a
18 reseller?

19 MR. CONNALL: Yes.

20 MS. NELSON: So let's say I'm a
21 manufacturer. If I'm the -- If I am the
22 ordering activity, and so I won't use any

1 names so I don't get smacked by our IT
2 customers -- IT vendors who are in the room.
3 I, as in ordering activity, may have a
4 wonderful experience with one type of laptop,
5 and not good experience with another type of
6 laptop, or the customer service that I
7 receive from one company or another.

8 MR. CONNAL: Yes.

9 MS. NELSON: Then they're
10 dissimilar products, right? Even though they
11 have the same functionality.

12 MR. CONNAL: And I would submit
13 that that may be a list of factors that all
14 go into your best value equation.

15 MS. NELSON: Correct. And even at
16 the base contract level, right? If one has
17 great past performance and the other doesn't,
18 we're not actually negotiating for the same
19 thing?

20 MR. DEL-COLLE: But that's also
21 the flexibility of the schedules. They can
22 take David's circumstance, which is

1 specification based, and say that it's
2 ultimate use, if you will, is not as
3 important as the operating capability, versus
4 yours in which you look at other issues via
5 the basic schedule or the task order level,
6 and embrace other value benefits that you're
7 willing to consider in terms of making a
8 determination.

9 That's the benefit the CO has, and
10 that's the benefit of the schedules offer in
11 terms of the ability to adjust and to adapt
12 to that need.

13 MS. NELSON: Right. So I guess
14 the point that I'm trying to ask and at the
15 same time make is past performance plays a
16 role both in the base contract level, and the
17 ordering activity contract level, whether
18 that be services or products.

19 Given your experience and
20 opinions, and this is something that we've
21 been talking about, so I'd like your input:
22 Do you think the terminology "most favored

1 customer," is a good term to remain in the --
2 what are we, GSAM or GSAR at that point? I
3 don't even know, given the rewrites that are
4 going on, I can't figure out what's grey and
5 what's white at this point. But what do you
6 think about that?

7 MR. CONNAL: Personal opinion?

8 MS. NELSON: Well, you got another
9 one?

10 MR. CONNAL: It was a good -- it
11 was a good concept at one time. And in
12 today's world, no, not really. The companies
13 that choose to sell to the federal government
14 want your business, and will do what they
15 need to do to get that business.

16 To impose an arbitrary standard
17 that only applies to the federal government,
18 ignores the benefits that those companies
19 have built up: the three manufacturers you
20 brought up in your earlier question. It
21 ignores the benefits that they've built up in
22 the marketplace.

1 The government is interested in
2 buying those three manufacturers, because
3 they're leading manufacturers. And you get
4 the benefit and the equity that they've built
5 up over the years, which is the warranty, the
6 customer service, the past performance that
7 is demonstrable right now and today with
8 government customers.

9 So to impose an arbitrary most
10 favored customer, it ignores all of those
11 benefits that you derive from the commercial
12 marketplace. Keep in mind that even those
13 largest manufacturers and the resellers
14 typically, the federal business is about ten
15 percent of the business. It's a small part.
16 The big part is somewhere else, and there's
17 huge benefits to be gained from that.

18 MS. NELSON: And I have a last
19 question. Are you -- and you may not, and
20 then I won't ask the question. As
21 representatives of the Coalition, does the
22 Coalition membership, because it's large and

1 small so maybe not, have representation of
2 companies that face pre-award reviews and
3 post award audits?

4 MR. CONNALL: That have faced them?

5 MS. NELSON: That do go through
6 them.

7 MR. CONNALL: Yes, yes, absolutely.

8 MS. NELSON: And are you aware of
9 issues and the experiences of those
10 companies, or as a member you don't actually
11 have any knowledge of how those go?

12 MR. CONNALL: As a person I'm aware
13 of them. And anecdotally and what I read in
14 the newspapers as far as discussion at
15 Coalition meetings, typically companies don't
16 discuss that level of detail regarding --

17 MS. NELSON: Okay, so I'm not
18 going to go into --

19 MR. CONNALL: I mean I can't help
20 you there.

21 MR. DEL-COLLE: I would -- I would
22 -- I would add though that there have been

1 issues. And again, I want to go back to
2 awarding. One, it's price analysis versus
3 audit, okay? That's one issue.

4 Second of all, I talked about the
5 ambiguity of roles. Historically,
6 contracting officers are supported by a
7 contract price analyst. By virtue of a
8 number of changing circumstances, they're now
9 being -- frequently getting their price and
10 cost analysis done by the IG.

11 I'm not complaining about that,
12 but please understand the IG operates under a
13 different statutory authority. It means that
14 quite frequently, you have an ambiguity of
15 roles because the IG in providing their
16 advice provides it in the context of their
17 statutory authority.

18 When that happens, and there have
19 been complaints that I've heard in public
20 meetings, that frequently there have been
21 negotiations in which IG representatives have
22 been in attendance and one gets at least a

1 conflicted view of who is in charge and who
2 is making the decisions relative to pricing
3 issues.

4 Because they're rightfully - they
5 being the IG - providing their input, but
6 historically, you've had the perception that
7 a CO is the one making that call. And
8 there's just been ambiguity.

9 MS. NELSON: Let me just ask a
10 question around the IG's presentation from
11 last meeting, and the 71 percent number. And
12 I tried to ask Mr. Patchan, and unfortunately
13 he's not available this time, and Mr. Drabkin
14 discussed it regarding -- and Ms. Regan made
15 the comment about the presentation and the
16 disclosures of most favored customer.

17 And I'm trying to get an
18 understanding of most favored customer,
19 because most favored customer seems to be
20 such a major issue that the panel is facing,
21 and the program is facing.

22 And the question that I'm asking

1 is whether or not vendors experience that the
2 IG is defining most favored customer
3 differently than the contracting officers are
4 defining most favored customer; whether or
5 not you find that the IG will look at, say, a
6 most favored -- a customer -- a product that
7 cannot be offered to the government, say that
8 is not in compliance with government
9 regulations, whether or not manufactured in a
10 non-trade agreement country, or whether or
11 not that is not environmentally compliant
12 with what an agency is required to buy, or
13 something like that?

14 MR. DEL-COLLE: I think two
15 different issues. One is the application of
16 the concept of most favored -- as one
17 interprets most favored customer being
18 different from what the basis of award was,
19 okay?

20 The basis of award may or may not
21 have been what somebody perceived at that
22 time to be the most favored customer, but the

1 fact is it's the basis of award that drives
2 the original award. And I believe frequently
3 there may be reviews done that take an
4 interpretation that that presumes most
5 favored customer.

6 They then - I agree with you - may
7 go back and look at buys, be they commercial,
8 that may not have the same kind of criteria
9 or requirements with them that the government
10 has, and make a presumption that, "Oh, that
11 was what Jim mentioned," for example.

12 I mean let's be honest about it.
13 One of the difficult issues is that under
14 that -- under the Buy American Act, under the
15 Trade Agreements Act, there are things that
16 you can go to Best Buy and buy that you can't
17 buy in the federal government relative to the
18 manufacturing point.

19 But to go back and to look at Best
20 Buy, and then say, "Well, I didn't get the
21 same deal," would be -- and I'm not a product
22 person, okay So I'm sharing what I've

1 anecdotally heard. Creates a sense of, "I
2 can't do anything here, guys. I can't give
3 you the Best Buy price because where it's
4 made and what it's composed of, and a lot of
5 other issues aren't applicable to what you
6 need."

7 It speaks to Alan's question
8 earlier: is there a price for all of those
9 various things that are conditions of dealing
10 with the government? And as Jim explained,
11 obviously both manufacturers and service
12 people want to work for the government.

13 They want to, but there are
14 conditions. And if we're going to talk about
15 commercial acquisition, we have to figure out
16 where the balance line is. Where's the
17 overlay where we can both operate together
18 without interfering with the other in a way
19 that's counterproductive in price, product or
20 quality?

21 MR. BRANCH: And let's -- sorry.

22 MR. CONNALL: Just to expand a

1 little bit on the TAA stuff, the cost of
2 doing business with the government is larger.
3 Everybody says that. It's really tough to
4 bring that down to numbers.

5 When you're buying TAA numbers,
6 that becomes a significant exercise for the
7 reseller, and it becomes an exercise for the
8 distributor. It becomes an exercise for the
9 manufacturer so that the difference in cost
10 between a product that meets the government's
11 specifications, a simple specification, and
12 one that doesn't can become significant
13 because of all the layers involved in that.
14 And the -- the request of the government to
15 drive those prices down can only go so far.

16 In the case of LCD monitors, just
17 to use an example, there's one major
18 manufacturer that can't tell you where they
19 were manufactured. They make them in nine
20 different countries. They can't tell us
21 where they made them. They can't tell you.
22 So we don't tell them to the government.

1 It's just not worth the risk.

2 But there are other manufacturers
3 that can. Typically, they have at least two
4 different part number systems. The
5 manufacturing plants are different; the --
6 the cost involved there. And so you get a
7 product that Michael mentioned you can see at
8 Best Buy for \$199, and the government wonders
9 why they're paying \$375.

10 MR. BRANCH: We'll go to Glenn,
11 and then to Jacqueline, and then in the
12 interest of time, I'll reserve the right to
13 ask the last question.

14 MR. PERRY: Thank you, gentlemen.
15 I guess I'm sitting here trying to hear what
16 you're saying, and your primary customer is
17 industry here. It is 2008. It's not 1982.
18 I somewhat disagree with the -- I guess I'm
19 not with you on the -- that you only
20 represent ten percent of the commercial space
21 that government is consuming.

22 I have a different viewpoint.

1 We've got several hundred million people that
2 we serve, and I think that's just as
3 important, more important. And I think they
4 have some expectation that across the country
5 that we have some consistency in what we are
6 buying in order to serve them is -- does have
7 some, to them, understanding from their
8 perspective that it's reasonable.

9 And what I hear from you are
10 reasons why you don't have to go -- why we
11 got 29 different variations in that from what
12 you've said. And I'm curious what would --
13 and I think thinks like most favored customer
14 and some of these other provisions were an
15 attempt to try to get us to the point where
16 we can -- taxpayers feel like wherever we
17 might be encountering the commercial section
18 in order to get a mission, that they would
19 feel like we were paying something that would
20 be the best price or reasonable,

21 And again, I realize I'm taking
22 some latitude with the definition of those

1 terms. But what would you -- like, and you
2 make the comment earlier that, "Well,
3 companies can't be expected to -- that we're
4 causing you extra money because you have to
5 know how many -- something we're selling here
6 or there."

7 Yet, everyday I listed to --
8 either on the way to work, or on the way
9 home, or in the paper that if the stock
10 prices go down, they know exactly how much
11 fuel they've been buying, and how many of
12 this, and how much of this is going into
13 that. And all those things you got to -- you
14 can't tell me that you've -- that industry
15 doesn't know or can't tell us what's going on
16 as far as transactional and volumes and those
17 sorts of things.

18 So knowing all -- so let's -- in
19 that -- in that perspective, what would
20 industry be willing to come to the table with
21 to the government to start that discussion on
22 fair and reasonable?

1 Sort of getting to some of the
2 other points the panel has made, we do have a
3 significant number of findings that -- that
4 that's not happening. What would you be
5 willing to bring to the table for the
6 taxpayer to start off with, with the -- where
7 would be start that conversation to get to
8 that understanding?

9 MR. DEL-COLLE: I would offer two
10 thoughts as I tried to listen to what you
11 were saying. One is if we can accept that
12 the FAR is the basis for characterizing what
13 is expected of fair and reasonable, I would
14 then say I can't give you an answer. But
15 what I would suggest is that you consider
16 going, for example, or coming back to us as
17 well as some other associations, maybes ones
18 that concentrate on services, for example, to
19 look at what are ways to better benchmark and
20 establish that the prices being offered are
21 within that boundary of expectation of fair
22 and reasonable.

1 Fair and reasonable doesn't
2 necessarily mean the same. It doesn't
3 necessarily mean that it's always the lowest,
4 but that it establishes, again, what I call
5 the span of what is obviously a reasonable
6 price to pay for a product or a particular
7 service.

8 I'm not prepared, and I know I
9 can't on behalf of the Coalition, to give you
10 an immediate answer that says this is how I'd
11 frame it. But I do believe each one of the -
12 - and again other organizations like PSC,
13 ITA, maybe some others, would be willing to
14 help frame that issue. Maybe part of a
15 dialogue.

16 MR. CONNALL: By way of an answer,
17 we have a number of BPAs that are based on
18 GSA schedule. And what we find from the
19 customers is variation in what their needs
20 are. Some of the BPAs are based on a better
21 price. Some of the BPAs are based on much
22 faster delivery. They vary as to what the

1 customer need is.

2 As far as from our point of view
3 in selling products, and selling a range of
4 products, bringing to the table -- Michael
5 uses the phrase framework, a framework that
6 things fit within, and then as the purchase
7 is made, that's the time for the true
8 competition when it comes down to price.

9 The framework gets you the
10 stability of the seller. The framework gives
11 you the knowledge that the seller understands
12 the marketplace and the rules and the
13 regulations so that then the many contracting
14 officers across the country can make an
15 informed purchase from an already qualified
16 seller, as opposed to somebody that just
17 happened to pop up.

18 So by way of the answer, that's
19 what we see in the marketplace is what the
20 customers are looking for.

21 MR. BRANCH: Thank you.

22 Geochelone?

1 MS. JONES: Okay, this is for the
2 gentleman representing the IT company. When
3 you submitted your offer to get a schedule
4 award, did you have commercial sales within
5 your company?

6 MR. CONNAL: We did not.

7 MS. JONES: You had no commercial
8 sales?

9 MR. CONNAL: No.

10 MS. JONES: So -- so you came in --
11 -- go ahead.

12 MR. CONNAL: Essentially zero.
13 Way less than 1 percent of our sales.

14 MS. JONES: Okay, so you came into
15 the schedule program with no commerciality,
16 no commercial sales?

17 MR. CONNAL: No.

18 MS. JONES: Okay. And you formed
19 your price, and you submitted your schedule
20 offer, and received an award, obviously.
21 What percentage of your business -- well, you
22 said that primarily your business is

1 government sales.

2 MR. CONNAL: Yes.

3 MS. JONES: So what percentage of
4 that is schedule sales would you say?

5 MR. CONNAL: Last fiscal year
6 approximately 9 percent were GSA schedule
7 sales.

8 MS. JONES: GSA schedule sales?

9 MR. CONNAL: Yes.

10 MS. JONES: So what does that
11 represent in terms of dollars?

12 MR. CONNAL: Eight million
13 dollars.

14 MS. JONES: So you're doing \$8
15 million per year?

16 MR. CONNAL: Last year, that was
17 gross from the year before. This year, it
18 looks like GSA schedule sales will finish in
19 the range of \$13 or \$14 million.

20 MS. JONES: Thirteen or 14
21 million?

22 MR. CONNAL: Yes.

1 MS. JONES: So are you a small or
2 a large business?

3 MR. CONNAL: We're a small
4 business.

5 MS. JONES: And small business and
6 doing \$13 is schedule sales per year?

7 MR. CONNAL: Approximately this
8 year that's what it's trending for, yes.

9 MS. JONES: Okay, so would you say
10 then that in order to receive the orders that
11 you are receiving at \$13 million a year, do
12 your prices have to be competitive at the
13 schedule level?

14 MR. CONNAL: Yes.

15 MS. JONES: Yes?

16 MR. CONNAL: Everyday, ma'am.

17 MS. JONES: Okay.

18 MR. CONNAL: Every single day,
19 every single order. The number of orders
20 that we receive that just show up if you want
21 to buy something is the subject of office
22 humor because it just doesn't happen.

1 Everything is competed. It needs
2 to be said that there's a lot of contracting
3 officers out there that are doing a very good
4 job, and we see that everyday.

5 MS. JONES: Right. So would you
6 say if your prices weren't competitive at the
7 schedule level, do you think you would be
8 solicited as much as you are?

9 MR. CONNALL: No, because there's
10 almost no discussion about the GSA schedule
11 price, the price that's on the books.
12 Because when somebody is buying multiple
13 systems, they ask.

14 MS. JONES: Okay, so then you are
15 not -- you're not receiving RFQs, say, like
16 through e-Buy, or are you receiving calls
17 from agencies? I mean how -- how do you
18 respond to the requirements that are out
19 there?

20 MR. CONNALL: We receive calls. We
21 receive emails primarily. Some through the
22 automated systems, and we respond. More than

1 80 percent of our business is with existing
2 customers, is with repeat customers.

3 MS. JONES: Repeat customers?

4 MR. CONNAL: Yes.

5 MS. JONES: Okay. So with the
6 thousands of IT vendors that are out there on
7 schedule, would you say that your prices at
8 the schedule level have to be competitive in
9 order to do the business volume that you do?

10 MR. CONNAL: Are you referring to
11 the everyday quantity 1 price?

12 MS. JONES: Right.

13 MR. CONNAL: Not really.

14 MS. JONES: Not really?

15 MR. CONNAL: No.

16 MS. JONES: So agencies are buying
17 from you at, say, much higher prices than
18 your competitors?

19 MR. CONNAL: Sometimes the prices
20 are higher.

21 MS. JONES: The schedule level
22 price?

1 MR. CONNAL: At the negotiated
2 price.

3 MS. JONES: No, I'm strictly
4 talking about the schedule level pricing.

5 MR. CONNAL: Okay.

6 MS. JONES: The pricing that you
7 currently have on your schedule contract.

8 MR. CONNAL: We make almost no
9 sales at those prices. The GSA schedule
10 sales we make are competed price. They're
11 lower than that.

12 MS. JONES: Are much lower than
13 that?

14 MR. CONNAL: Yes, and I -- and I
15 would --

16 MS. JONES: Is that based on what?
17 A quantity of --

18 MR. CONNAL: More than one.

19 MS. JONES: So if you have a
20 quantity of -- ordering agency, let's say,
21 ordering five, you're still lowering your
22 schedule price for that?

1 MR. CONNAL: You have to. If you
2 don't, you don't get the business. It's a
3 competitive marketplace. And if somebody
4 wants to buy 761, the price is lower.

5 MS. JONES: Okay, so you're saying
6 then that the customers have no regard for
7 your schedule level pricing, and that all of
8 the business that you do is at a different
9 price than you have on your schedule
10 contract?

11 MR. CONNAL: The bulk of it, yes,
12 it's lower.

13 MS. JONES: Okay, so why don't you
14 lower your schedule contract price if you
15 have that capability?

16 MR. CONNAL: You need to start
17 some place.

18 MS. JONES: Okay.

19 MR. CONNAL: Just as the
20 manufacturer has -- everybody has a list
21 price, or a standard price of some sort, a
22 catalog price. You have to start some place.

1 MS. JONES: Okay, thank you.

2 MR. DEL-COLLE: But if I could add
3 one thing though real quickly on that. Go
4 back to basis of award. One of the general
5 presumptions in the product area is that most
6 pricing is based on a unit of one. I'm not
7 saying that's correct. I'm saying that
8 that's a presumption.

9 One of the things that we
10 recommend in our comments is that somehow
11 there needs to be a better record of a basis
12 of award. If it is a unit of 1, let's make
13 that understood. If it is a unit of 10, or
14 if it's a unit of 100, let's make that
15 understood in the record however we do that,
16 okay, so that everybody understands, and that
17 a contracting officer from an ordering
18 activity understands that I'm -- that that
19 price is presumed on 1, presumed on 10. It's
20 presumed on something, and that they are then
21 able to evaluate are they different.

22 Is what they're asking for

1 different from that, and should they have a
2 different expectation?

3 MS. JONES: Right, but what he's
4 saying is that even at the quantity of 1,
5 he never sells at that schedule price. It's
6 always lower, and that's the -- that's the
7 point that I just wanted to -- to make.
8 Because you had no commerciality. So you're
9 only selling to the government.

10 MR. CONNAL: Virtually.

11 MS. JONES: Okay, thank you.

12 MR. CONNAL: If I may, the sales
13 we -- when we do make a sale at the regular
14 GSA price, it's typically a small item. It's
15 not anything large. The buyers are too savvy
16 in today's marketplace.

17 MR. BRANCH: I just have one
18 question to kind of wrap up the presentation,
19 and I'll go to -- to a remark Jim made, which
20 is we need to bring the competition closer to
21 the actual sale.

22 So if I look at this as an

1 economist, and I believe that prices in the
2 marketplace convey a certain amount of
3 information to both buyer and seller, and if
4 I bring the pricing closer to the actual sale
5 at competition, then can you help me
6 understand in your view what the value of the
7 schedule price really is? What -- what
8 informational value does a price listed on
9 the GSA schedule have?

10 MR. CONNALL: I'd say primarily
11 informational; that it establishes a range.
12 It's a starting point. And the prices on the
13 GSA schedule, at least in our experience,
14 rarely have a lot of markup in them. We just
15 don't; the nature of it. So it is a starting
16 point.

17 I don't want to -- I wouldn't want
18 anyone to think that the difference is
19 astounding. It's not. We're talking about
20 single-digit percentage points here, so it's
21 a starting point.

22 That's where the process begins,

1 and the -- the benefit to the reseller is
2 that the government buyers have an
3 understanding and a knowledge that it is
4 started at some point, as opposed to where
5 the seller chooses to start.

6 MR. BRANCH: Okay, so -- so in a
7 sense, it's the Wikipedia of pricing. It's
8 the place where I should start, and not where
9 I should end up?

10 MR. CONNAL: Well sure.

11 MR. BRANCH: Ever?

12 MR. CONNAL: Sure, we know that.

13 MR. BRANCH: Okay.

14 MR. CONNAL: And your buyers know
15 that, too.

16 MR. BRANCH: All right, thank you.

17 MR. DEL-COLLE: And there's an
18 additional benefit. The work that GSA does
19 is in part a responsibility determination as
20 well.

21 So if I am a CO, I can work and
22 take advantage of the work that GSA has

1 already done. I'm presuming that they're a
2 responsible, capable offeror, and that it may
3 be that you want to view it as the Wikipedia
4 of pricing, but it establishes part of what
5 the FAR would otherwise require of me as a CO
6 in terms of those kind of activities.

7 MR. BRANCH: Okay, all right.
8 Gentlemen, thank you very much for your
9 presentation.

10 MR. CONNAL: Thank you.

11 MR. BRANCH: In the interest of
12 time, I think we only have one presentation
13 remaining. So I'm going to ask Floyd Groce
14 from Navy CIO to -- to do that. And then we
15 will talk a little scheduling, and break for
16 lunch.

17 MR. GROCE: I apologize. I was
18 handed the thumb drive this morning and was
19 told it's on there, and I didn't do a QA, so
20 I apologize. You'll have to follow along
21 with the hard copy.

22 I'm Floyd Groce. I work for the

1 Department of Navy CIO, and I co-chair the
2 DoD Enterprise Software Initiative Working
3 Group, along with Jim Clausen, who is with
4 the DoD CIO, who is sitting here to my right.

5 I wanted to just very briefly tell
6 you about the DoD Enterprise Software
7 Initiative, and essentially the reason that
8 we're here is we are a major customer of the
9 schedules program.

10 Of our 74 enterprise software
11 agreements, only one is an ID/IQ open market.
12 Actually it's with a native Alaska company
13 for a software product. But everything else
14 has been done through the schedules program.

15 The DoD ESI was created in 1998
16 with our mission of software asset
17 management. That has now evolved into
18 information technology asset management.

19 We are one of the strategic
20 sourcing initiatives within the DoD, and are
21 the only strategic sourcing initiative
22 supporting the DoD CIO.

1 We use software project managers
2 from five different organizations within the
3 Department of Defense to negotiate and manage
4 our enterprise software agreements: Air
5 Force, Army, Navy, DISA - Defense Information
6 Systems Agency, and Defense Logistics Agency.

7 The software product managers
8 engage the contracting organizations that
9 normally support their internal licensing
10 efforts to also negotiate and do the --
11 provide the contracting officer for our
12 enterprise software agreements.

13 We also have been working very
14 closely with the intelligence community, the
15 director of National Intelligence CIO, as
16 well as the Smart Buy program office on
17 software licensing. Next slide.

18 As I'd said enterprise software
19 agreements are contracts or blanket purchase
20 agreements. In our case, only one contract
21 that is not a blanket purchase agreement for
22 software, software maintenance and selected

1 services, and we -- we negotiate improved
2 pricing and terms and conditions.

3 These are all managed by our
4 enterprise -- our ESI software project
5 managers and contracting officers. As I'd
6 mentioned, we have 74. We're continually
7 putting more in place, and we -- we want to
8 engage the channel under the GSA schedules
9 that the software publishers are utilizing.

10 So a lot of companies do fulfill
11 through resellers, so we have a lot of
12 resellers under ESI, as well as some directly
13 with the software publishers. Next slide.

14 We are in policy and in
15 regulation. We have the DoD CIO Guidance and
16 Policy Memo. And then in 2002, the roles and
17 responsibilities and the requirements from
18 the guidance and policy memo were put into
19 our DFARs. We also are in the DoD 5000
20 series instructions so that program managers
21 are a large -- DoD programs are required to
22 engage the DoD Enterprise Software Initiative

1 when they're going to be acquiring commercial
2 software as part of their program.

3 We also have a joint DEPAP CIO
4 policy memo for Smart Buy, indicating our
5 support for the Smart Buy Program, which does
6 require the use of Smart Buy when -- if that
7 particular product is available on a Smart
8 Buy agreement.

9 We also, for the data at rest
10 products last year in working closely with
11 the Smart Buy program office, have awarded 11
12 agreements for data at rest, and these also
13 were the first agreements that were also made
14 available to state and local governments
15 through the schedules program.

16 And also, again, we're working
17 with the Director of National Intelligence on
18 enterprise software licensing as well. Next
19 slide.

20 IT Asset Management: essentially,
21 we are trying to capture the procurement
22 information, as well as their financial

1 information, and the terms and conditions,
2 and tie it to each of our software or IT
3 assets.

4 It's quite an undertaking, but we
5 think it's -- over the long term, it will
6 provide significant savings and really help
7 us to address the life cycle costs of our
8 assets.

9 Again, we have an IT asset
10 management program manager that supports our
11 working group, and a heads up across
12 component IPT. We are going to be standing
13 up a general officer SES steering group to
14 provide governance to the -- our ITAM
15 efforts, and we're going to be starting a
16 pilot, also.

17 It's actually going to be sooner
18 than 18 months, but it's a significant change
19 management effort. So it is going to take
20 time. Next slide.

21 We are also, like I say, working
22 closely with the smart buy program office to

1 extend enterprise software licensing
2 opportunities across the federal government.
3 GSA is the Smart Buy executive agent, and
4 they are using the schedules program for the
5 enterprise software agreements that have been
6 put in place.

7 And we, in ESI, are doing what we
8 call co-branding, which is ESI is -- in
9 working with Smart Buy is providing the
10 software product manager and contracting
11 support for several of the Smart Buy
12 agreements.

13 And then lastly, we, in 2004, used
14 e-Buy, and competed for COTS systems
15 integration with the focus on ERP because the
16 program managers who are implementing ERPs
17 within DoD wanted to solicit the support or
18 help of the Enterprise Software Initiative.

19 We have software agreements with
20 the ERP software vendors, and this is an
21 extension of the strategies for how -- for
22 best practices for implementing ERPs and COTS

1 within DoD.

2 We have the five systems
3 integrators, and we did a FAR part 8
4 competition using the e-Buy, and provide
5 fixed price time and material labor hour type
6 pricing opportunities.

7 So we're -- we have about four
8 years under our belt and personnel. We're
9 going to be looking at what's our approach
10 going forward. So thank you.

11 MR. BRANCH: Yes, Tom?

12 MR. ESSIG: Let me begin by saying
13 I think this is a terrific initiative, and I
14 applaud you for standing it out. I have only
15 one question, possibly a follow on depending
16 upon your answer.

17 At this point in the life of your
18 initiative, why do you continue to use GSA
19 schedules?

20 MR. GROCE: They still continue to
21 be -- to provide us with the -- the
22 foundation for us to establish a very focused

1 enterprise software agreement. We spend a
2 lot of time working with software publishers
3 trying to understand their licensing models
4 and their pricing.

5 And having the underlying contract
6 already established allows us the ability to
7 focus on those special things that we need as
8 far as value added transferability to
9 facilitate our asset management, and so on,
10 so that the best value that we provide to end
11 customers brings the improved terms and
12 conditions, as well as one of our
13 expectations of our software product managers
14 is that they really do understand the
15 licensing models and the business practices
16 of the software companies.

17 MR. BRANCH: Other questions for
18 this presenter? Yes, Jacqueline?

19 MS. JONES: Can you tell us how
20 using the FAR part 8 competition procedures
21 saves your -- your agency time in terms of
22 competing your requirements?

1 MR. GROCE: Well, again, because
2 the contracts already exist, we were able to
3 do an RFQ, and tailor the evaluation to the
4 specific requirements that we were trying to
5 satisfy. We did engage the expertise of some
6 of the programs within DoD, but we were able
7 to -- to do the competition.

8 And actually there was a one-week
9 evaluation, and so it did cut down
10 significantly in the amount of time versus an
11 open market.

12 MR. DRABKIN: Do you have a figure
13 as to the amount of money that the government
14 has saved as result of this particular
15 initiative over the -- I think you said four
16 years of the program?

17 MR. GROCE: Well, ESI has been at
18 it for ten years now. But we did our first
19 agreement in 1999. We are saying over \$3
20 billion in cost avoidance, and that's looking
21 forward. So it's not just the immediate
22 savings and license costs, but it's getting

1 the reduced maintenance and support costs
2 based on those lower licensing costs.

3 One of the things that we -- that
4 helps with that is our ability to use working
5 capital funds to invest in software licenses,
6 and then over a two or three year period,
7 customers can repay the working capital fund,
8 as they pull licenses out of inventory or
9 deploy licenses.

10 So we're able to take advantage of
11 opportunities that present themselves that
12 will really get us super reductions in price.

13 MR. BRANCH: Okay, Judith and then
14 Alan.

15 MS. NELSON: Thank you, Floyd very
16 much, and I'm sorry I missed the beginning of
17 your presentation. You have this BPA in
18 place. You are doing this yourself. This is
19 not through an assisted acquisition, is that
20 correct?

21 MR. GROCE: Well, we call it an
22 initiative. It's really a --

1 MS. NELSON: Yes, the initiative.

2 MR. GROCE: -- virtual team that
3 is managed by the Enterprise Software
4 Initiative Working Group. That's a CIO
5 focused working group. And we have software
6 product managers that are in the acquisition
7 community that negotiate and -- and manage
8 and provide the contracting expertise to
9 actually support the working group with the
10 purchasing and the management of these
11 agreements.

12 The buying is still done very
13 decentralized, but we do get reports of what
14 is purchased through the Enterprise Software
15 Initiative so that we can start capturing
16 metrics in terms of what's being bought, who
17 is buying, and make sure that we're tracking
18 the pricing as -- as we go through the life
19 cycle of a particular enterprise software
20 agreement.

21 MS. NELSON: But the buying is not
22 being done by GSA for you?

1 MR. GROCE: No. It -- we're --
2 yes.

3 MS. NELSON: Okay.

4 MR. GROCE: Yes.

5 MS. NELSON: So I have a question.

6 In the process of this, does -- though it's
7 not being done by GSA, does GSA as you have
8 questions or needs or looking for solutions,
9 does GSA offer you support either through --
10 in their offices to help facilitate your
11 work?

12 MR. GROCE: Yes. We do at times
13 ask for meetings with GSA, and part of it is
14 to get a better understanding of kind of what
15 -- what is in particular GSA schedule
16 contracts. Maybe an end user license
17 agreement; make sure that we're not
18 duplicating or providing any kind of
19 ambiguity by doing something and duplicating
20 what might already be in the underlying
21 contract.

22 A lot of times, we -- if we know

1 that a technical refresh is being submitted
2 or going to be submitted, we might reach out
3 to GSA and offer our thoughts on -- so
4 there's an understanding of the impacts that
5 certain actions, if they're -- when they're
6 approved, and possibly even timing of
7 renewals or option extensions and the impact
8 on some of our agreements.

9 MS. NELSON: I have one more
10 question. Let me just find this spot. I see
11 here that you -- it says that you have five
12 system integrators awarded, the BPA, and I
13 see them listed. Under GSA's BPA processes
14 and policies, we have what are called on-
15 ramps and off-ramps so that if you have
16 either a single award BPA, or a multiple
17 award BPA, one of the things that can be
18 done, and I'm not sure if people are aware of
19 this, but in the length of a BPA, you can
20 off-ramp BPA holder or a sub in there, or you
21 can bring it.

22 And have you had the opportunity,

1 or do you use that to bring in other
2 providers during the process of these BPAs?

3 MR. GROCE: We have not done it
4 for BPA holders. There is teaming. There is
5 -- is done I think extensively on each -- on
6 the BPAs. We have spent quite a bit of time
7 meeting trying to get lessons learned as
8 we've gone through the processes over the
9 last four years.

10 So we spent -- set aside a day or
11 two just to talk individually with each of
12 the BPA holders to understand what issues
13 they're having with customers and pricing,
14 maybe some recommendations on things that
15 they would do differently, or that we should
16 consider as part of the agreements.

17 And some of the other things: of
18 course competing on the e-Buy met section 803
19 requirements for us. And there is the fair
20 opportunities competition for each of the
21 requirements that -- that use the agreements.

22 But we also have been able to work

1 with what's called the Joint Information
2 Technology Team. That's a -- the cost
3 analysts from Army, Navy and Air Force that
4 actually do the costing baselines for these
5 programs to -- because these BPAs actually
6 laid out a lot of pricing methodologies for
7 these rather complex implementations that
8 we've been able to establish a very good
9 working relationship with that group because
10 they're the ones that are trying to do the
11 independent baselining of costs and prices
12 for -- for these ERP programs.

13 And so that's also been another
14 positive thing that has come out of these
15 BPAs.

16 MR. BRANCH: Alan?

17 MR. CHVOTKIN: Just a follow up
18 because you touched on the question of your
19 visibility into the purchasing activities.
20 Buying is done decentralized. You get
21 reports on who is buying and what's being
22 used.

1 Do you have a good visibility into
2 who is buying, and at what price, and for
3 what period of time? Is that information
4 available? I'm not asking for the
5 information, but you have that transparency?

6 MR. GROCE: We do. And partly
7 because at the very beginning of the
8 Enterprise Software Initiative, asset
9 management was what our CIO said we really
10 have to get to, and we knew that we would
11 have to kind of understand what goes into the
12 inventory, what comes into the inventory,
13 through these purchase transactions, and
14 whether it's being maintained, whether we've
15 purchased support that goes along with the
16 software so that we don't have to re-buy
17 later on.

18 So we do have -- have that level
19 of detail, and it -- it's -- we also just --
20 we share that information so it's -- if it's
21 an Army customer within -- but it's a Navy
22 managed vehicle, that information is shared

1 with the Army so it doesn't just stay within
2 the managing organization.

3 We get our software product
4 managers and contracting officers together
5 regularly, I think probably nine times a
6 year. Just get them together where we -- we
7 talk about lessons learned, share issues,
8 share kind of experiences, and so hopefully
9 we have a good, healthy exchange of
10 information among our -- our product
11 managers.

12 MR. CHVOTKIN: And so is all of
13 that information accessible on a real time
14 basis to the various buying activities who
15 were considering that, or do they only share
16 information --

17 MR. GROCE: Well, what is
18 available is all of our agreements are with -
19 - the pricing and the terms and conditions
20 are available through our ESI website. Those
21 are again the starting points, or the ceiling
22 prices that any customer would buy, would

1 pay. And depending on the size of the
2 transaction, the spot pricing, the price
3 reductions, would come into play.

4 So the -- the details of what's
5 been bought and by who is not -- that's not
6 available publically.

7 MR. CHVOTKIN: But it's available
8 within the --

9 MR. GROCE: Within the group, yes.

10 MR. BRANCH: Yes, Glen?

11 MR. PERRY: Yes, thank you. Can I
12 ask your -- your function office? Is it
13 based on fees that you receive from the
14 buying entities in DoD?

15 MR. GROCE: Yes.

16 MR. PERRY: Okay.

17 MR. GROCE: The ESI does have a
18 fee structure. We have -- because the
19 organizations that we use are in fact fee for
20 service. And so the -- there are fees that
21 are kept, and then depending on the size of
22 the transaction and their -- there can be a

1 reduction that's specific to each
2 circumstance.

3 MR. PERRY: Okay, the only reason
4 I asked is because of the next question. I
5 want to make sure it's all out, it's there
6 that you have some interest in the amount of
7 business that goes through this initiative.

8 So throw that to the side
9 particularly in the Smart Buy situation,
10 because you -- your office, your group, was
11 good enough in a situation to stand and stand
12 up and do the work that's necessary in order
13 to negotiate those government-wide deals
14 based on -- with some other factors involved,
15 OMB and some other folks.

16 As we look at the schedules, is --
17 is the work that you are doing -- is it
18 something that we should be expecting GSA to
19 do, or do you believe in the long run it
20 still should be done at the agency level?

21 MR. GROCE: Well, I think that for
22 ESI, it really makes sense for us to do a lot

1 of the work because we are very focused in
2 the technologies we are going after, and we
3 are trying to establish a strategic
4 relationship with the software publisher,
5 which is something again that I'm not saying
6 that GSA couldn't or shouldn't do that also.
7 But we need to be doing that to be able to
8 have the best service, provide the best
9 support and value to our DoD customers.

10 MR. PERRY: Well, actually, you're
11 doing it for the whole federal government for
12 the Smart Buy items.

13 MR. GROCE: Well, but Smart Buy,
14 they do a lot of the interface with the
15 civilian agencies under Smart Buy, even if
16 it's DoD managed. So I would -- I would say
17 -- because they have software product
18 managers and contracting officers similar to
19 what we have.

20 MR. PERRY: So you're saying GSA
21 is doing that work, or?

22 MR. GROCE: GSA, but not the

1 schedules contracting officer. It's a
2 different group within the Federal
3 Acquisition Service.

4 MR. PERRY: Okay, then -- sorry, I
5 lost my train of thought on that one. I was
6 -- I'm going to pass.

7 MR. BRANCH: Lesa?

8 MS. SCOTT: I was just going to
9 say the Smart Buy and the ESI are parallel
10 and they work together very collaboratively,
11 and they're quite often visiting me.

12 MR. BRANCH: Glenn?

13 MR. PERRY: Just to go back.

14 MR. BRANCH: Okay.

15 MR. PERRY: I know a fair amount
16 of what happened in those situations, and so
17 I'm trying to get at what -- Floyd's kind of
18 doing -- the issues we're going to have is it
19 really is about what the buying agency is
20 dependent upon versus what GSA would bring to
21 the table.

22 In this particular case, the

1 government did depend upon a lot on the ESI
2 folks to do -- to know the market, to do the
3 homework, to know what the -- what the price
4 points were, and did that based on volumes.
5 They brought things like funding to the
6 table, some other things on our behalf.

7 Is there -- and so the issues is
8 where do -- where do the schedules sort of
9 set you up for? Where do they put you versus
10 what you have to do after that? But because
11 they acted in this case on behalf of all of
12 us, I'm just asking a question. That was
13 kind of put together because of circumstances
14 at -- over the last two or three years. Is
15 there a different model, or what would be the
16 ideal model based on the work that you have
17 done?

18 Working with GSA, is there some
19 kind of ideal model now if we're going to try
20 to leverage government-wide spend in the
21 future as we go forward, and how much will we
22 -- should we be relying on a GSA structure

1 for the schedules versus what we do either
2 afterwards or separate from that?

3 MR. GROCE: Well, I know some of
4 the discussions we're having right now. I'm
5 not sure I have an answer for you.

6 But Smart Buy, when they are
7 actually taking the lead to negotiate or
8 solicit and negotiate Smart Buy agreements,
9 and we will be kind of in the support role to
10 the federal-wide effort, what are the roles
11 and responsibilities of Smart Buy program
12 office with DoD Enterprise Software
13 Initiative to make sure that we provide --
14 we're available to customers as they need
15 support that we are working together to
16 anticipate and solve problems? Because they
17 really do span the whole federal government.

18 So I think the -- the script is
19 still being written on what's the right
20 combination of Smart Buy or GSA to DoD
21 support.

22 MR. BRANCH: David?

1 MR. DRABKIN: If I can, Glenn, the
2 Smart Buy office is separate from the
3 schedules program. It was run out of the
4 former FTS before the combination of FTS and
5 FAS. It's a separate program office.

6 Actually, the first Smart Buy
7 initiatives, which came after the ESI
8 initiatives, but were ultimately joined
9 together through Karen Evans, one of Karen
10 Evan's e-Gov initiatives, was I think for
11 geospatial software, were actually
12 agriculture.

13 MS. SONDERMAN: Wrong, Department
14 of Interior.

15 MR. DRABKIN: Agriculture and
16 Department of the Interior. I think actually
17 we wound up getting the better price from
18 DOI, but the bulk was being bought at
19 Agriculture. You had the low price,
20 agriculture had the bulk. Interesting
21 circumstance. And DoD had nothing -- DoD
22 wasn't a big player? I don't know.

1 But my point is it was a great
2 price, but the Smart Buy office then brought
3 together the requirements from all the other
4 federal agencies, including DoD's requirement
5 for geospatial, and negotiated agreement
6 ultimately with the provider to get a reduced
7 license fee per license, which actually wound
8 up being a little bit lower I think when we
9 finished than what Interior -- not much
10 lower, because Interior was actually getting,
11 as Debra so correctly pointed out on that
12 particular item, even though Agriculture is
13 buying more of the stuff.

14 So anyway, the point is the
15 schedules themselves were only the foundation
16 because there was an existing contract with
17 schedules, and they chose to use the
18 schedules as the basis for the subsequent
19 negotiation. They didn't want to start from
20 the beginning, negotiate new terms and
21 conditions.

22 And that is, I think, true for

1 every single Smart -- except one, the one you
2 described where you've done your own IQ, has
3 been the basis for all of the other Smart Buy
4 initiatives. And they're still looking for
5 other opportunities. It's all under the
6 Federal Strategic Sourcing Initiative,
7 although Tom, I don't think you're managing
8 that in your group. It's being managed
9 separately.

10 So the schedules were -- saved
11 time and effort, as Floyd described, because
12 you didn't have to begin from the beginning
13 to negotiate D's and C's. They existed, and
14 we were able to aggregate government
15 requirements.

16 And actually, DoD's, I think,
17 circumstance in a number of cases where they
18 actually bought licenses is different from
19 some of the other Smart Buy activities where
20 we still haven't made an aggregated purchase.
21 We've just negotiated a lower price, or we've
22 negotiated to the lowest price some other

1 government agency got, and agreed that
2 everybody else who buys it gets it.

3 I don't know if that answers your
4 question, but the schedule contracting office
5 is not involved in this at all. This other
6 program office, kind of like one of the other
7 e-Gov initiatives and Smart Buy is the one
8 that kind of manages that program.

9 MR. PERRY: I apologize. I wasn't
10 very good at asking the question. I was only
11 trying to get him to talk about what the
12 differences were between them. And then
13 based on his experience on the ones that they
14 did do, is there anything we should be
15 considering here as to that, the
16 juxtaposition of what went on there with the
17 schedules?

18 Because during for example the
19 Smart Buy, we've had the conversation about
20 is this a schedule thing? Is it not? Do we
21 do -- how do we -- do we incorporate the
22 pricing on the schedule? Is this sort of the

1 pre-work to get it back on the schedule? Do
2 they manage it under the schedules versus
3 having a separate office, which at GSA is not
4 a fully funded -- is a limited staff and
5 those sort of things?

6 There's a lot of work involved,
7 whether it was done in Interior, or whether
8 it was done with the ESI folks. And what can
9 we expect would be done? Is there a
10 different world? And is there a different
11 structure for some of these things? Or, do
12 we try to work within the schedules and then
13 is there a different structure there as far
14 as what we do? That's what I was trying to -
15 - thank you.

16 MR. BRANCH: All right, I'm going
17 to ask one more question and then get us out
18 of here for a well-deserved lunch.

19 So I want to take this back to
20 pricing. And what I've heard is GSA laid a
21 foundation of real value added in terms of
22 making sure the terms and conditions were in

1 place. As we heard from our associates and
2 counsel and government procurement, make sure
3 that we complied with trade agreements acts
4 and so forth.

5 But again, I -- and then you folks
6 took that down a level, and said, "We'll use
7 that structure to put competitive BPAs in
8 place." And even within those BPAs, an
9 agency looks to that signal pricing as just a
10 signal.

11 Depending on the circumstances of
12 the buy, they might negotiate lower prices,
13 buy prices. So can you help us understand
14 how your teams looked at that initial GSA
15 pricing, and what value they found in that
16 pricing?

17 MR. GROCE: Well, we do try to
18 understand what was the foundation for that
19 pricing, and then it's the impact to the
20 pricing that we're trying to negotiate.

21 I can say that the team that --
22 the teams that negotiate the BPAs really do

1 spend -- in some cases it's months trying to
2 work through some pricing for our particular
3 agreements, whether it be tiered pricing.

4 So we establish a price for a
5 particular transaction depending on the
6 dollar value, or accumulative pricing so that
7 the more we buy, it triggers additional
8 discounts. So then even smaller buys
9 downstream would get the benefit of the
10 cumulative buying volumes.

11 So it's really multiple pricing
12 strategies, seeing what additional things we
13 can do based on what's in the GSA schedules
14 that will improve pricing with the additional
15 terms and conditions for our end customers.

16 We do, like I say, try to
17 negotiate transferability rights and some
18 other things that will facilitate our asset
19 management going forward. So that sometimes
20 is used as kind of a negotiating lever from
21 the vendor's side, saying, "Look, you're
22 asking for more benefit from us, and so

1 you're also asking for a lower price." So we
2 get into a back and forth there.

3 So it's trying to improve pricing,
4 understand the basis for the GSA schedule
5 price, and also then how our customer buying
6 behaviors are, and how we can make sure that
7 we can take advantage of the lower prices
8 going forward for DoD.

9 MR. BRANCH: Thank you, Floyd.

10 Thank you for your presentation. Good to
11 hear from one of the users. And I can attest
12 that having an NNCI desktop on my desk really
13 does work, even though we still can't afford
14 to pay the bill. So thank you for your
15 efforts as well as your presentation.

16 MR. GROCE: Thank you.

17 MR. BRANCH: It is now about
18 quarter to 1:00. So why don't we break until
19 2:00 for lunch? And then the first thing I
20 want to put on the agenda is scheduling from
21 here on out. And then let's start to probe
22 some of these issues.

1 (Whereupon, the above-entitled
2 matter went off the record at 12:44 p.m., and
3 resumed at 2:05 p.m.)

4 MR. BRANCH: So does Monday the 8th
5 work for people for our next meeting?

6 MS. BROOKS: As I mentioned in my
7 message, the 8th won't work because of the
8 notice that we have to put in the Federal
9 Register. So the first one that we could
10 have is September 15th.

11 MR. BRANCH: My bad. Let's see
12 here. Okay, does the 15th work for people?
13 That week is not good for Jacqueline. Got an
14 up check from Alan?

15 MR. CHVOTKIN: Yes, sir, 15th and
16 22nd I can move things around.

17 MR. BRANCH: Okay.

18 MR. DRABKIN: Also for me.

19 MS. NELSON: Either day is fine.

20 MR. BRANCH: All right, the 15th
21 does not work for Jacqueline. Does anybody
22 have a sense of whether we want to have it

1 anyway? Do we want to go anyway on the 15th?

2 Okay. Well, let's say the next one is going

3 to be the 15th of September. Okay.

4 Does the 29th of September work for

5 folks, or are we just getting close to New

6 Year's Eve? Yes.

7 MR. CHVOTKIN: The 22nd?

8 MR. BRANCH: Okay, do we want to

9 schedule one on the 22nd? My goal is to move

10 this to closure. All right the 22nd sounds

11 like that's a good -- okay. All right, what

12 does October look like for folks? I guess

13 that first Monday would be the 6th.

14 Let's see, so it would be -- what

15 I would anticipate, depending on how far we

16 get today, is we would start our discussion

17 on services this afternoon, continue that on

18 the 15th with the goal of wrapping that up if

19 we could. Or, do we just want to talk rules

20 of engagement today and start on services on

21 the 15th, and work services on the 15th and the

22 22nd? Thoughts on that? If people could, use

1 their microphones for the recorder, please.

2 MS. NELSON: I don't know that we
3 need a whole hour on rules of engagement. I
4 mean a whole afternoon of rules of
5 engagement.

6 MR. BRANCH: I would agree. So
7 what that would mean is we would probably get
8 some of our afternoon this afternoon back,
9 and we would start fresh on the 15th,
10 identifying the areas attended to services,
11 with the 22nd looking at recommendations.
12 Folks happy with that approach?

13 So what does October look like for
14 folks? Do you want to go to the second week
15 in October just to give us a little bit of a
16 break in the process?

17 MR. CHVOTKIN: That's Columbus
18 Day.

19 MR. BRANCH: Oh, that's a holiday.
20 Okay.

21 MS. SONDERMAN: We could do 6 and
22 20, or 20 and 27.

1 MR. BRANCH: Mics, please.

2 MS. NELSON: For me, 6 works, not
3 20.

4 MS. SONDERMAN: I'm just the
5 opposite of her.

6 MS. NELSON: Nothing new.

7 MR. DRABKIN: Why don't we lock in
8 the 6th and the 20th, because there are other
9 holidays in October, and November gets really
10 crowded between Election Day, Veteran's Day
11 and Thanksgiving.

12 MR. BRANCH: All right, so
13 understanding that people have some
14 scheduling issues, can we reach an agreement
15 that the 6th and the 20th would be appropriate?
16 So by the -- by the end of October, we should
17 have concluded our discussion on both goods
18 and services?

19 MS. NELSON: Pat, you're writing
20 November, but we mean October.

21 MS. BROOKS: Oh, sorry.

22 MS. NELSON: Any way I could get

1 you to change it from the 20th of October to
2 the 27th of October?

3 MR. BRANCH: Panel?

4 MR. CHVOTKIN: That change is
5 preferable for me, but may miss one meeting.

6 MS. NELSON: It's preferable for
7 me, too.

8 MR. DRABKIN: Twenty-seventh will
9 work for me.

10 MR. BRANCH: All right, well, then
11 why don't we make that the 27th, the 6th and
12 27th? Okay, so now we're getting into
13 November, and as we discussed at our previous
14 meeting, those should be the wrap up
15 meetings. So that should give us one meeting
16 to talk about things that we believe are
17 related to -- indirectly related to the scope
18 of the charter that we might want to offer
19 the administrator as areas for further
20 inquiry. And then the last meeting would be
21 to do wrap up on our deliverable.

22 MS. BROOKS: At one of the

1 discussions, we -- you also talked about
2 solutions. So we're looking to treat
3 solutions separately, or solutions would be
4 you would combine it. Either one of those.

5 MR. BRANCH: Solutions? I think
6 we came to an agreement solutions would be a
7 part of the services discussion.

8 MS. BROOKS: That's the 15th.

9 MR. BRANCH: The 15th, or -- right.

10 MR. DRABKIN: Based on my
11 experience on the 1423 panel, after we have
12 all these discussions, somebody's going to
13 have to write stuff up. It's going to have
14 to be circulated. It's going to have to be
15 reviewed. There's probably going to be a
16 need to spend time actually going over the
17 text.

18 If you don't do it through a
19 meeting process, it gets really difficult to
20 collect comments back and forth through
21 email. So as you're planning for November I
22 think we're going to need certainly a day,

1 and maybe longer, to actually review whatever
2 we decide to reduce to writing.

3 MR. BRANCH: Okay. So are you
4 suggesting that we need either a two-day
5 meeting, or a three meetings in November,
6 David?

7 MR. DRABKIN: I would think that
8 if we're going to use November to come out
9 with a product that we ought to do it back to
10 back, not split it up. As tough as that may
11 be for our schedules, it'll actually save us
12 some time.

13 MS. SONDERMAN: How about 3, 4?

14 MR. BRANCH: Fourth is Election
15 Day, so that is probably not a good day.

16 MS. SONDERMAN: That makes it a
17 great day.

18 MR. BRANCH: Well, you will be
19 without your chairman.

20 MS. NELSON: David, do we need
21 some time between the October meeting and
22 then November meeting to start the rating, or

1 do we do the writing after the November
2 meeting?

3 MR. DRABKIN: I mean we can do it
4 any way we want. It seems to me that when we
5 finish our discussion on services that we
6 ought to have someone or some ones
7 responsible for reducing that to writing, and
8 starting the circulation process. And same
9 thing as after we finish products. Someone
10 or ones should reduce that to writing.

11 But we're going to need, I'm sure
12 -- I hope I'm wrong, but I think we're going
13 to need like full days to talk about each --
14 I mean we all have opinions give our
15 discussion so far. I'm not sure that we're
16 going to achieve unanimity on day one. In
17 fact, I'm pretty sure we're not.

18 MR. BRANCH: Why don't we come
19 back to the -- to the November meetings since
20 we're talking about those as kind of our
21 final meetings, and talk about rules of
22 engagement. So I'll let Pat finish writing,

1 and then it might be useful to have another -
2 - another piece of paper so we can kind of
3 write them down.

4 And I want this to kind of go as a
5 brainstorming session with respect to rules
6 of engagement. And I guess I've thought of a
7 couple, so I'll start off when Pat has a
8 clean sheet of paper.

9 MS. JONES: Excuse me, Elliott.
10 Before you start that, in September since
11 we're going to be discussing services and
12 that's a -- that's a primary area of
13 contracting in our center, or within my realm
14 of expertise, I would like to propose
15 September 9th instead of 15th to the panel, so
16 that I could -- so that I could make the
17 meeting.

18 Is it 20 -- is it 15 calendar
19 days, or is it 15 working days? Because if
20 it's calendar days, that should mean --

21 MS. BROOKS: Well, it is calendar
22 days, but you still have to have time -- I

1 can't get it to the Federal Register today,
2 and they publish it tomorrow. So they have
3 the schedule also, so that's why I looked at
4 the calendar based upon what has to be done,
5 and figured that the closest meeting would --
6 if you still wanted to have it on a Monday,
7 it would have to be the 15th.

8 MS. JONES: Okay, then I'll see
9 what I can work around.

10 MS. NELSON: Can we try and alter
11 it from a Monday? I mean we're not tied to
12 Monday as a -- it's not a FAR regulation
13 here.

14 MR. BRANCH: And I'm certainly
15 open to --

16 MR. DRABKIN: It is now.

17 MR. BRANCH: It's certainly open
18 to other dates. I think Monday was the one
19 we took because it tended to work for
20 everyone's calendar. What date other than a
21 Monday, Jackie, would best accommodate your
22 needs to be here?

1 MS. JONES: Actually, Wednesdays.
2 Wednesdays would be good.

3 MR. BRANCH: All right, I think I
4 may have a problem that Wednesday.

5 MS. JONES: Or Tuesday.

6 MR. BRANCH: Yes, see I have a
7 problem from the 16th through the 18th.

8 MS. JONES: Okay, okay. That's --
9 that's fine. I just thought that maybe I
10 would propose something.

11 MR. DRABKIN: Is Friday the 19th
12 out?

13 MR. BRANCH: Hold on.

14 MR. DRABKIN: It'll put us with
15 back-to-back meetings, but actually that
16 might actually save Jackie air fare.

17 MS. JONES: Oh, I could just stay?

18 MR. DRABKIN: Right.

19 MS. SONDERMAN: So you're
20 proposing 19 and 22?

21 MR. DRABKIN: Right.

22 MS. SONDERMAN: I could do that.

1 I mean I have to juggle some things, but.

2 MS. NELSON: Works for me.

3 MR. BRANCH: Yes, I can juggle
4 some things. The 19th works. So do we want
5 to say September 19th instead of 15th? Okay.
6 Let's talk about how we -- we're going to
7 come back, I think, to November after. Let's
8 talk about how we I guess conduct these
9 deliberations and get to a final product.

10 What I'd like to do is I'll just
11 start and go around the arc here, and collect
12 folks' thoughts on how we might proceed. So
13 I'll start us off. And I guess I think three
14 things are probably in order.

15 One is that we need to stick to
16 the scope on meeting days. And what that
17 means from my perspective is if we set time
18 aside on the 19th and the 22nd to talk about
19 services, which include solutions, let's make
20 sure that that's what we're here to talk
21 about, not goods; that people are prepared to
22 come in and discuss services.

1 Now, depending on the richness of
2 the discussion, we may have to revise our
3 schedule depending on how much time it takes,
4 but I think it's important to stick
5 specifically to the scope of the meetings
6 that we've set.

7 MR. CHVOTKIN: Mr. Chairman?

8 MR. BRANCH: Yes?

9 MR. CHVOTKIN: Just a -- I fully
10 agree, but I want to come back to a point
11 that you made earlier, or maybe Ms. Brooks
12 did, that the next meeting may be the last
13 meeting for public statements. So somewhere
14 along that line, if the notice for -- now
15 been moved from the 15th to the 19th for if any
16 member of the public chooses to respond, that
17 will cut into time.

18 So maybe we start earlier on that
19 day, and hope that we've gotten all we can --
20 all we need.

21 MR. BRANCH: Anybody have an
22 objection to, say, starting at 8:00 on the

1 19th? That'll give us an extra hour. I'll
2 bring the -- well.

3 MR. PERRY: Elliott, on the
4 solutions and the services, I'd still try to
5 structure the day so that you don't --
6 solutions is going to drag us into product, a
7 product conversation. I wouldn't want to get
8 lost and not cover at least the service, the
9 straight services part.

10 MR. BRANCH: Okay, so we tackle
11 services first, and then move to solutions,
12 which actually might be a good transition to
13 our product discussion.

14 Okay, I believe if we're to do the
15 administrator a service that we need to
16 operate on a consensus basis. However, I
17 think at the risk of stifling some fairly
18 strongly held opinions in the room, and not
19 giving the administrator the full benefit of
20 our counsel, I'd like to propose that
21 consensus is defined as at least two-thirds
22 of us; that minority opinion could be

1 entertained, and they have to be documented
2 in writing and attached to whatever the
3 deliverable back to the administrator is.

4 So those are the I guess two major
5 things that I would suggest. I guess the
6 last thing is I think we need to divide. I
7 think we need to divide the work up, and I
8 think we probably need to do that on a
9 voluntary basis. So I'd like to see us -- I
10 said I think we need to divide the work up.
11 We need to do that on a voluntary basis,
12 although I am not above drafting people if
13 necessary.

14 And I think we probably want to
15 split -- and I'll just throw this out. I
16 would suggest that we want to split into
17 three teams, three subcommittees; one dealing
18 with services and solutions, one dealing with
19 goods, and a third team to edit the product
20 so it looks like a cohesive -- a coherent
21 product from a single body.

22 So those are just kind of the

1 three or four brainstorms I had off the top
2 of my head. So I'll just pass the mic to
3 Jacqueline. Really just want to hear from
4 you any rules of engagement that you believe
5 are necessary to effectively bring this
6 project to closure.

7 MS. JONES: Well, for me, I think
8 sticking to the information that we have,
9 factual information, as opposed to opinions
10 of the schedules program; sticking to the
11 charter, just sticking to the charter of what
12 we were called here to do, and being focused
13 on the responsibility that we have to address
14 the issues that we were given.

15 MR. BRANCH: Okay, so what I'm
16 hearing you say is no deviations outside the
17 scope of the charter.

18 MS. SONDERMAN: I'm not sure
19 that's possible, given that what we've heard
20 from a lot of presenters is that you have to
21 look at issues of competition if you're going
22 to look at the value of price reduction

1 clause. So it depends on --

2 MS. JONES: Right and --

3 MR. BRANCH: So this is what I'd
4 like to do. There are ten of us here, and
5 that means that there are at least 92 way
6 interfaces.

7 So why don't we just kind of go
8 around the arc, capture these all on a
9 whiteboard, and then let's talk about which
10 ones we agree with on consensus? Is
11 everybody okay with that? Because I don't
12 want to get bogged down before we get to poor
13 Glenn over there.

14 MS. JONES: Okay, I just want to
15 clarify what I meant, Debra. Of course we're
16 going to have to talk about pricing. Of
17 course we're going to have to talk about
18 competition. Of course we're going to have
19 to discuss all of the issues that surround
20 visiting the price reduction clause and
21 whether or not we find it to be an effective
22 tool in terms of pricing under the schedules

1 program.

2 And to further clarify what I
3 meant is that candidly, I've seen a lot of
4 different issues arise to the point of
5 revamping the whole schedules program. And
6 so I'm just saying that in my opinion, we
7 would accomplish a lot more and use our time
8 most effectively by sticking to our charter.
9 That's what I meant.

10 MR. BRANCH: Any other rules of
11 engagement, Jackie, for us?

12 MS. JONES: No, that's all I have.

13 MR. BRANCH: Okay, Debra?

14 MS. SONDERMAN: I think it would
15 be worthwhile for us to use the four
16 questions that you had framed in our -- in
17 two meetings ago to look at each of these
18 areas. And that gives us a construct
19 potentially for the document that helps it
20 all.

21 Where does competition take place?
22 If it's at the task order level, what does

1 fair and reasonable pricing mean? Those
2 things.

3 MS. THOMPSON: For me, what I
4 would like is that we sort of start with what
5 we can agree upon. I think there's a lot of
6 differing opinions here, as Jackie has
7 mentioned that I think it's always good to
8 start with the foundation of the issues that
9 we can agree on and go from there.

10 MR. DRABKIN: I agree with the
11 suggestion on -- on consensus and the number
12 you offer, although I think it has to be the
13 number of -- the percentage has to be the
14 folks present, assuming we have a quorum.
15 Because I don't know that we'll ever get a
16 day where all of us will be present all of
17 the time, and it doesn't make sense for us to
18 hold off.

19 So the limitation I would propose
20 is based upon people present, and assuming
21 that we have a quorum.

22 Second thing is I think we're

1 going to have a lot of discussions on scope.
2 I think the administrator when she wrote the
3 scope of this intended it to be broad. While
4 clearly she was interested in the issue
5 affecting the price reduction clause, and the
6 most favored customer issues, she did not
7 draft the document creating this board
8 narrowly. She did not limit your -- our
9 discussions.

10 And so I would hope that if there
11 are things which we've observed that would
12 lead to an improvement both for our own
13 internal agency customers, and for external
14 agency customers that we're not going to
15 spend our time arguing about what the scope
16 is; we're going to spend our time on
17 addressing what will improve the program,
18 improve the return to taxpayers, and improve
19 its use among our internal agency customers,
20 which you're a GSA internal licensing
21 customer, or an interior customer.

22 And last but not least, in

1 addition to coffee, Pat, can we get Diet
2 Coke?

3 MR. BRANCH: All right, Tom?

4 MR. SHARPE: Elliott, I agree with
5 the way you framed it, and David stole my
6 thunder on the scope of the charter.

7 MR. BRANCH: Okay, Judith?

8 MS. NELSON: I'm going to leave
9 it. I think as GSA I'm going to let our
10 fellow panel members determine how best to
11 move forward as far as rules of engagement.

12 MR. BRANCH: Okay, Lesa?

13 MS. SCOTT: I just have one to
14 add. I like Debra's idea of the four
15 questions. And the only thing I would add to
16 that is I'd like to see that we start with
17 some basic definitions to make sure we're
18 using the same word the same way.

19 MR. BRANCH: Okay, Tom?

20 MR. ESSIG: We're in an interest
21 to try to streamline this, since we all have
22 a tendency to comment a lot. I think for

1 each category, kind of identify what the key
2 issues are, vote on each. If we're in
3 agreement or have consensus in any of those,
4 just put them to the side and not talk about
5 them anymore; focus on those where we're not
6 in agreement.

7 And really within that, if we have
8 not -- if we have areas where we're not in
9 agreement, I'd also like to categorize those.
10 Those are things, which are really mandatory
11 for us to reach an opinion on, and those are
12 things that would be nice, too, but we don't
13 have them.

14 MR. BRANCH: Alan?

15 MR. CHVOTKIN: The only thing I
16 would add to agree with Tom and David's
17 characterization: separate out those things
18 that we believe are GSA's responsibility,
19 those things that are in the customer or the
20 ordering responsibility. And there's some
21 things that are in the vendor responsibility.

22 I think if we keep those kinds of

1 functionalities in mind as we're going
2 through the discussion, it may also help.
3 But I agree we need to have clear definitions
4 at the front end of the terms we're going to
5 use, and move forward. I think we'll get
6 there.

7 MR. BRANCH: Thank you. Glenn?

8 MR. PERRY: Thing about being at
9 the end is I don't have to say much of
10 anything. Everybody's covered everything.
11 But picking on your point, I would want to
12 make sure we make sure on all -- on the
13 items, the categories that Elliott laid out.
14 Let's make sure we pick up GSA customer and
15 vendor issues.

16 MR. BRANCH: Okay, very good. So
17 what I'm going to do now is I'm going to ask
18 Pat to kind of walk back through our list. I
19 want to go through the items one by one.
20 These are kind of our rules of the road that
21 we've laid out collectively. And I'd like to
22 get consensus on whether these are the rules

1 we can live with.

2 So now is the time if you have
3 clarification. Now is the time, if you
4 disagree whether mildly or violently, to
5 start that discussion so we can reach
6 consensus around these rules.

7 So the warning is speak now or
8 forever hold your peace. These are the
9 rules. I will throw the yellow flag if we
10 violate them in deliberation.

11 MR. BRANCH: First of all, we need
12 to stick with the -- we need to stick with
13 the scope per meeting date. That means
14 whatever scope that we've decided for that
15 date that that's all that's going to be
16 discussed and the issues surrounding that.

17 In the Federal Register notice
18 that goes out, we are saying that September
19 19th meeting is the last meeting that we will
20 -- I have public comments.

21 We started discussion about a
22 different starting time on September 19th, but

1 I didn't get that we had agreed that we would
2 start earlier. If we are, I need to put that
3 in the Federal Register notice. Is it just
4 the 19th meeting or that's starting at 8:00,
5 or all future meetings will be starting at
6 8:00?

7 Okay, we'll come back to that one
8 when we get a decision.

9 MR. CHVOTKIN: Mr. Chairman, I
10 recommend that we start the 19th meeting and
11 the 22nd at 8:00 a.m.

12 MR. PERRY: Second it.

13 MR. BRANCH: Can we reach
14 consensus on those start times.

15 MS. NELSON: Fine. Does that mean
16 we're ending at 2:00.

17 MR. BRANCH: It means we're ending
18 when we're done.

19 MS. BROOKS: Okay, so the
20 September 19th and 22nd meetings will start at
21 8:00. The October meetings will start at
22 9:00, our regular time.

1 Okay, we will tackle services
2 first, and then move to solutions. And so
3 that means on the 19th, we will start with
4 services. If we finish the services on the
5 19th, we will follow that flow right into
6 solutions or one day each, it just depends
7 upon how the discussion goes.

8 MS. NELSON: Did we discuss when
9 we were laying out what -- I know we talked
10 about services and turnkey solutions. Are we
11 also Services Contract Act solutions, since
12 they fall under schedules? Are we laying
13 that out as the separate item, or are we just
14 following that in professional services? Are
15 we putting that as a separate?

16 MR. BRANCH: Well, my assumption
17 was we were going to cover all services, but
18 that raises a very good point. Do we need to
19 lay that out separately?

20 MS. JONES: The only difference in
21 schedules contracting that surrounds the
22 Service Contract Act -- Contracts, is that we

1 incorporate the wage determination. So other
2 than that, the process is the same. It's
3 visiting the pricing that may be a little bit
4 different.

5 MR. BRANCH: Okay, so I'll ask a
6 question of clarification. Because my agency
7 doesn't buy a lot of service contracts.
8 Well, the Navy does buy a lot of service
9 contract services on GSA schedule. Do they
10 require a statement of work like professional
11 services do?

12 MS. JONES: Yes.

13 MR. BRANCH: Then my personal
14 opinion is I don't see any reason to separate
15 them.

16 MS. BROOKS: Okay, the next rule
17 of engagement was that the recommendations to
18 the administrator is they're based upon the
19 consensus, which is two-thirds of the
20 members. And if there are any dissenting
21 opinions, that those would be reduced in
22 writing also.

1 MS. SONDERMAN: I think the term
2 was minority opinions, not necessarily
3 dissenting.

4 MS. BROOKS: Minority opinions,
5 okay.

6 MR. DRABKIN: They may well be
7 dissenting.

8 MS. SONDERMAN: And I thought it
9 was two-thirds of quorum.

10 MR. BRANCH: I think that was
11 David's modification, and I want to speak to
12 -- to that a little bit, because I'll make a
13 friendly, and then to his friendly, and then
14 --

15 MS. BROOKS: Okay. The next rule
16 was that --

17 MR. DRABKIN: Well, wait a minute.
18 Before you go, shouldn't we resolve it before
19 we go on?

20 MR. BRANCH: Well, we can, and I
21 tend to agree with you that it ought to be
22 two-thirds of a quorum. But let me tell you

1 what my concern is..

2 I could see us getting to a number
3 fairly quickly. As a matter of fact, if
4 there are only ten of us here, two-thirds of
5 ten, round that up. That's seven. That's a
6 minority of the panel. So my concern would
7 be that what we produce not being -- not
8 potentially be a minority representation of
9 the whole panel.

10 So what I'd like to suggest is as
11 we hold these working sessions that that's a
12 good operating rule. However, for the final
13 report, it will require the consent of two-
14 thirds of the entire panel. So if people's
15 schedules can't accommodate a meeting, but
16 they have mild or violent objection to that
17 which the rest of us decided that they have a
18 final opportunity to voice a differing
19 opinion.

20 MR. DRABKIN: And that's
21 incredible reasonable, and how could I
22 possibly oppose it? But I do, none the less,

1 only from this perspective. It's that we
2 already know that many of us will be missing
3 some of these meetings. And we have no idea
4 what will come up between now and the time
5 that our actual calendars portray.

6 I'd really hate for us to get
7 through all of the effort we're projecting,
8 and now we've gotten to the final report, and
9 now we -- even though we had all along what
10 we thought was consensus, now we discover we
11 don't. It's not a problem, but then we got
12 to all get back together again, and work it
13 out.

14 And again, I'm prepared to do
15 that, but we all need to be aware that we
16 could find ourselves in that position. And
17 if that's the case, okay.

18 MR. BRANCH: Thoughts on that,
19 folks?

20 MS. NELSON: My opinion there is
21 that to go and say that at the end of this,
22 somebody who has not attended a meeting and

1 at the end has an issue with the findings of
2 the panel, then they've come to those
3 decisions based on personal opinion without
4 the deliberations.

5 And what I'd like to see is that
6 the findings be the act of the panel's
7 deliberations, and the interplay of the
8 discussions. So I am more inclined to say
9 that it needs to be two-thirds of the quorum
10 present, as well as the final deliberations,
11 the final report.

12 Because otherwise, what you're
13 coming to is decisions made by individuals
14 not privy to the discussions and what comes
15 out of those discussions.

16 MR. BRANCH: Any other views on
17 this?

18 MR. ESSIG: Just a question.

19 MR. BRANCH: Yes.

20 MR. ESSIG: We want to categorize
21 what we're talking about as consensus, rather
22 than majority. Because they're not the same

1 thing. You could have -- the one-third could
2 have violently opposing viewpoints, and that
3 would not be a consensus.

4 MR. DRABKIN: Well, actually I
5 don't mean -- well, I do. Of course I do. I
6 believe the dictionary definition of
7 consensus doesn't actually have in it a
8 percentage. A majority vote would be 51
9 percent.

10 What -- what Elliott has offered
11 is a super majority. Consensus represents an
12 agreement among the group. You can have an
13 agreement among the group and still have
14 dissenting opinions. So I'd rather not get
15 stuck in the semantics. I think we ought to
16 focus on where you feel comfortable. Because
17 I know, Tom, that you and I both have very
18 strong opinions, and I'm sure we want to make
19 sure they're reflected.

20 MR. ESSIG: Yes. My concerns is
21 only that words have meanings, and when this
22 gets published, it's going to mean certain

1 things to people. I think it's important in
2 the definitions that we identify very clearly
3 what we meant by consensus.

4 MR. BRANCH: Okay, so -- so if we
5 -- if we add a ground rule, or I guess if we
6 go to one of the ground rules that was
7 offered, and we can agree by consensus or
8 majority vote that define our terms, then I
9 think that I hear you saying, Tom, is when we
10 define those terms, we need to make sure that
11 it is very clear as to what this panel means
12 as to reaching consensus. And I'm certainly
13 okay with that.

14 MR. PERRY: I actually like
15 Elliott's suggestion for the end, because I
16 think it really is important to make sure
17 that what we come out with is a relatively
18 fair representation of all the communities
19 represented on the panel, and the two-thirds
20 should ensure that everybody has -- probably
21 has had a good say.

22 I think the panel's been pretty

1 good about coming. We've had pretty good
2 representation with only maybe one -- one
3 exception I think that -- I'm just thinking
4 of who is on the panel.

5 So I'm not too worried about this
6 individual session being held up by that or
7 whatever, or having any surprises at the end
8 if we all continue to do what we've been
9 doing so far.

10 MR. DRABKIN: And again, I'm not
11 exactly terribly worried about it, but I just
12 hate for the number to be off, and for us to
13 have to meet again. But beyond that, the
14 fact that we've agreed, I think we've agreed,
15 as part of our ground rules that if someone
16 really feels one way strongly the opposite
17 way, they can provide a minority written
18 position on that to be presented to the
19 administrator, which by the way, I think
20 would do a great service to the administrator
21 to be able to view, if there is a different
22 opinion, what that other opinion is.

1 It's just the overall -- it's just
2 the way numbers work, and at the last day,
3 and after you go through all the work, we may
4 not be finished. And we just need to be
5 aware of that.

6 So I think based on the
7 discussion, I'm willing. I can live with
8 David's proposed ground rule that consensus,
9 as we will define it in the report, will
10 consist of a two-thirds of the quorum
11 present.

12 MR. DRABKIN: Until the final
13 report, which is where I think you and Glenn,
14 and I think even Tom, and -- and I can live
15 with it.

16 MR. BRANCH: Okay.

17 MR. DRABKIN: I just want to make
18 sure that we understand we may have another
19 meeting. It's mathematically possible.

20 MR. BRANCH: Okay. So until the
21 final report; can folks live with that?

22 MS. NELSON: So what we're saying

1 is that the final report will be two-thirds
2 of the panel?

3 MR. BRANCH: Yes.

4 MS. BROOKS: Okay, so we reached
5 agreement on what consensus means, and the
6 number of people present. And I'll go over
7 that when we get to that.

8 We had -- your agreement was to
9 divide work on an -- I'm assuming to divide
10 work on writing the report on a voluntary
11 basis, but if there were no volunteers, he
12 was -- the chairman was going to draft some
13 folks.

14 MS. THOMAS: I have one comment to
15 make. When we're talking about consensus for
16 our deliberations, whether it's two-thirds
17 members, we're making that recognizing that
18 there are certain members who are absent
19 currently. We don't know what their schedule
20 is in terms of our future meetings.

21 So I just wanted to bring that up
22 that we don't foreclose the opportunity of

1 participating, especially in light of two-
2 thirds.

3 MR. DRABKIN: Actually, I think,
4 Thedlus, that we're denying them the right to
5 participate in obtaining this consensus.
6 They're not here.

7 MS. THOMAS: I think so. That's
8 the point.

9 MR. DRABKIN: Yes, I think that's
10 precisely right.

11 MR. BRANCH: But I will observe
12 that we do have two-thirds of the entire
13 panel here today, so I would argue we have
14 the right to do that.

15 MS. THOMAS: I just wanted to make
16 the point. Okay.

17 MR. BRANCH: Yes, we have 15
18 people. April I guess is missing. Jan is
19 missing. Larry had to leave early. Don
20 Ericson is not here.

21 MS. BROOKS: Okay, we propose
22 three teams: a services team, a goods team,

1 and then another team that would review the
2 written products from those two teams.

3 MR. BRANCH: Well, an editing team
4 to try and give the report some sense of
5 unity.

6 MS. BROOKS: For the rules of
7 engagement, you said you were going to stick
8 to the charter.

9 MR. BRANCH: Okay, before we leave
10 that, I see thumbs up. But for the record,
11 do we have consensus on that one? Okay, so
12 let it be shown we have consensus for the
13 record.

14 MS. BROOKS: (Off mic) the teams?

15 MR. BRANCH: Yes.

16 MS. BROOKS: Do you want to do the
17 members of the teams now, or do you want to -

18 -

19 MR. BRANCH: I think let's get
20 through our rules first. Let's build an
21 architecture here.

22 MS. BROOKS: Okay. We're going to

1 stick to the charter, just from the
2 standpoint of the issues that you need to
3 cover regardless of what they are, and the
4 context of the issues that you have to
5 discuss with the charter. You will use the
6 four questions that --

7 MR. BRANCH: I think we've come to
8 some robust discussion on scope and issues
9 here. So I'll start with Judith, and then I
10 think Tom, did you want to say anything, or?

11 MR. ESSIG: No, we discussed this
12 one previously, the issue of limiting
13 ourselves to what's in the charter I don't
14 agree with.

15 MR. BRANCH: Okay. Judith?

16 MS. NELSON: I think we
17 specifically -- a couple of meetings ago
18 whenever it was. We were at the hotel. We -
19 - when we were prioritizing, even
20 specifically, there were some issues that we
21 came up with and determined that they were
22 kind of parking lot issues that were -- we

1 kind of said were outside of the charter.

2 We came up with some that would be
3 guiding principles for us, and then some
4 parking lot issues that we determined were
5 critical, but not specifically within the
6 administrator's charter, but we thought
7 should be addressed. And we did take note
8 that there were things we thought we should
9 include within our final report, and note
10 were outside the charter.

11 So I don't -- I think that as you
12 said from day to day we should, but we -- we
13 talked about having a specific day to
14 address, or at least portion of a day, to
15 address things that were not specifically
16 within the charter, but had sort of come up
17 as parking lot items.

18 MR. BRANCH: Yes, I mean I had
19 proposed that that be our fifth meeting for
20 us to address all of those things that were
21 pertinent to our deliberations, but not
22 directly related with respect to inside the

1 scope of the charter.

2 You know, I guess my view of this
3 is this is a system. And optimizing two
4 particular components of this system being
5 either most favored customer, or basis of
6 award. However you want to determine it.
7 And the price reduction clause would not do
8 the administrator a service if there are
9 significant issues that impinge upon those,
10 even though they were not specifically
11 mentioned in the charter.

12 So I mean that's -- that's just my
13 kind of personal view. I think we've got to
14 have a section that addresses those.

15 MR. DRABKIN: And if I may, as I
16 said earlier, one, I don't think the charter
17 should be read. It clearly doesn't say, "You
18 are limited to these two issues." If someone
19 wants to read it into the record again, I
20 mean that'd be great, but it doesn't say
21 that.

22 And second, I would presume that

1 the administrator is going to use discretion
2 when they read the report. If they think the
3 information we provide them is outside the
4 scope, they'll ignore it. And if they think
5 it's outside the scope, but they want to pay
6 attention to it, they'll pay attention to it.

7 We've taken the time to discuss
8 it. There's a lot of intellectual capital
9 gathered in this room and have been gathered.
10 Let's not waste our time arguing about what's
11 in and out of the charter. Let's just move
12 through the three issues that you've laid out
13 in terms of -- I'm sorry, the two issues
14 you've laid out in terms of services and
15 goods. Let's -- and let's go from there.

16 If we get wrapped around an axle
17 and we all agree it's not relevant, then
18 we'll stop talking about it.

19 MS. SONDERMAN: Mr. Chairman, I
20 happened, by some -- well, I brought the
21 notes from the June 17th meeting, which I did
22 not attend, but I have the parking lot issues

1 if people would be interested right now in
2 hearing about this.

3 MR. BRANCH: I think that might be
4 useful.

5 MS. SONDERMAN: There were three
6 that are in the notes. One: remove all non-
7 statutory, non-commercial schedules terms to
8 enhance growth, encourage competition, and
9 maximize schedule offerings.

10 Second, we need a strategy.
11 Standards, IT skill descriptions, leverage
12 pricing geographically. And third, define
13 resellers. Should the government be required
14 to purchase through a distributor when the
15 manufacturers sell directly to commercial
16 customers? So that's what's in the notes.

17 MR. BRANCH: Okay, so thoughts on
18 this, this particular rule of engagement?
19 Take it out, leave it in?

20 MR. DRABKIN: I think you should -
21 - we're talking about stick to the charter?

22 MR. BRANCH: Yes.

1 MR. DRABKIN: I'd say take it out.

2 MS. SONDERMAN: I agree.

3 MS. THOMAS: I have a slightly
4 different -- I don't think we should take it
5 out. That's our governing body. That's out
6 authority. You can't take it out per se. I
7 mean I think it should be there to be
8 referred to as needed. But taking it out? I
9 think it reminds us of what we're here for.

10 MS. JONES: And I would have to
11 agree with that.

12 MS. NELSON: I think we are a
13 panel that was chartered. So I'm not sure
14 that we should take it out. I just think
15 that we should remind ourselves that the
16 charter is, as David said, broad, and we
17 shouldn't limit ourselves.

18 MR. BRANCH: Okay.

19 MR. DRABKIN: I just don't want
20 this rule to become the focus of the
21 discussion we're having right now. Each day
22 we'll spend our time arguing about whether or

1 not this is within the charter.

2 The charter is incredibly broad.

3 If it has to do with the schedules program,

4 it seems to me it's within it. Let's deal

5 with it and move on. But I do understand

6 what my learned colleague from -- Thedy had

7 to add, and maybe taking it out is too

8 strong, but okay, be mindful of the charter

9 as opposed to --

10 MR. BRANCH: So -- so let me

11 suggest an alternate wording for this rule of

12 engagement. Let me suggest that the panel

13 will agree to stay faithful to the intent,

14 the spirit of the charter. Okay?

15 MS. BROOKS: The panel will stay

16 faithful to the spirit and intent of the

17 charter. You will use again the four

18 questions that Elliott previously proposed.

19 That's the context for starting the

20 discussions.

21 You will try to start with the

22 items that you agree on. We talked about the

1 consensus on --

2 MR. BRANCH: I think we're moving
3 a little fast. Four questions: are people
4 okay with that as the starting framework for
5 the discussion?

6 MS. THOMAS: What are the four
7 questions? I wasn't here last time.

8 MS. SONDERMAN: First, given that
9 the competition -- the first question. Given
10 that the competition primarily takes place at
11 the task order level, does a fair and
12 reasonable price at the contract level really
13 matter?

14 Second, if the consensus is that
15 the competition is at the task order level,
16 are the methods that GSA uses to determine
17 fair and reasonable price, and maintain the
18 pricing relationship with the basis of award
19 customers adequate?

20 Third, if the current policy for
21 question number two, maintaining the price
22 relationship, is not adequate, can the panel

1 help to improve the policy that GSA uses to
2 establish fair and reasonable pricing, and to
3 maintain the pricing relationship with the
4 basis of award customers?

5 And then the fourth: If the answer
6 to question 2 on the price relationship is
7 fair and reasonable determination at the
8 schedule contract level has not been
9 official, and price reasonableness is to be
10 determined only at the task order level, what
11 is the GSA role?

12 MS. NELSON: Speaking on behalf of
13 April, who is not here, I think she had added
14 in a fifth question, which was if you didn't
15 accept the premise of question number 1,
16 which is in the positive, right? She had
17 thrown in.

18 MR. BRANCH: And I don't recall
19 what it is offhand.

20 MS. SONDERMAN: Given that
21 competition primarily takes place at the task
22 order level?

1 MS. NELSON: Right. When Elliott
2 threw out those questions, she said, "Well,
3 what if you don't accept the premise of the
4 first question?"

5 MS. BROOKS: She threw out the
6 fourth one.

7 MS. NELSON: Oh, she threw out the
8 fourth one?

9 MS. BROOKS: Yes.

10 MS. NELSON: Okay.

11 MR. BRANCH: Okay, so the proposed
12 rule of engagement is that we use that as a
13 framework to form our deliberations and shape
14 the report?

15 MS. JONES: Well, I wasn't here
16 for the last meeting, either, but I -- in my
17 opinion, statement number 1 is a presumption,
18 and I don't think that that's been actually
19 determined.

20 MR. BRANCH: Debra, could I ask
21 you to read that again, please?

22 MS. SONDERMAN: Given that the

1 competition primarily takes place at the task
2 order level, does a fair and reasonable price
3 at the contract level really matter?

4 That's the question. So perhaps
5 that becomes a framework for discussion in
6 the looking at the lens of services,
7 solutions, and products.

8 MR. BRANCH: Yes, I think you
9 could take the word -- I agree with you.
10 That is a premise that's not been proven,
11 which is why the question is phrased the way
12 it is. So take the word "given" out, and put
13 in the word "if." Because what -- all the
14 question was meant to say was if you believe
15 that competition really takes place at the
16 task order level, then do you believe that a
17 price at the schedule level really matters?

18 MR. PERRY: And how are we going
19 to -- will this include those? I guess I'm
20 sensing somebody would want to argue the --
21 that there's some competition at the contract
22 -- scheduled contract level. So will they --

1 will they say that? Is that what -- since
2 we're not going with the "given."

3 MS. JONES: Yes, I would.

4 MR. PERRY: Okay.

5 MS. JONES: I would say that. I
6 don't agree that the competition is primarily
7 at the task order level.

8 MR. PERRY: Well, I'm just saying
9 under this question, we will --

10 MS. JONES: Right.

11 MR. PERRY: We will capture both
12 sides of that argument then.

13 MR. BRANCH: That is my intent in
14 having framed that question. Now, I think
15 there's a variance of opinion on that, and I
16 think certainly the record reflects very,
17 very exhaustively the process of putting a
18 schedule contract in place, and what role
19 commercial pricing schedule plays in that,
20 and -- and how contracting officers
21 negotiate.

22 So I -- I think that's -- I think

1 that's a question for discussion. I think
2 two people could look at that information and
3 reasonably come to two different conclusions.

4 MS. JONES: Well, then I think it
5 should probably be rephrased so that we are
6 looking at both sides of it. Right now, it's
7 saying that the competition takes place at
8 the task order level primarily. Maybe it
9 should be rephrased so that we can visit both
10 aspects of the competition at the schedule
11 level, and at the contract level.

12 MS. SONDERMAN: So does that
13 suggest we should add a -- I guess I'm asking
14 of this sort of like a decision tree. The
15 first question is where does competition take
16 place.

17 MS. JONES: Right.

18 MS. SONDERMAN: If it's at the
19 task order level, then this set of things, if
20 at the contract level. Then this other set
21 of things.

22 MS. JONES: And if at both, then

1 there's another set of questions to be
2 answered.

3 MR. ESSIG: I think it's okay with
4 the change that's just been suggested; that
5 first decision point. Right, again it may be
6 one answer for major actions, and a different
7 action for small actions, or something else.

8 MR. BRANCH: All right, so we'll
9 expand the four question framework to five
10 questions, and the first question is where
11 does competition take place?

12 MS. NELSON: Then when we get to
13 our discussions, we can expand upon it
14 appropriately.

15 MR. BRANCH: So we have a
16 consensus: that's a good five question
17 framework? Okay, so that will be the five
18 questions.

19 MS. BROOKS: The other
20 recommendations that we start with basic
21 definitions so that when you use terms,
22 everybody is meaning the same thing by -- by

1 the terms.

2 MR. BRANCH: Okay, do we have an
3 agreement on including a definitional
4 section? It appears that the ayes have it on
5 that one. And I think we further agree that
6 the first definition will be the word
7 consensus.

8 MS. SONDERMAN: Or perhaps in
9 alphabetical order, competition needs to go
10 in front of consensus because it's apparent
11 that there are a lot of different
12 interpretations of what that means.

13 MR. DRABKIN: I would agree with
14 my colleague from Interior. We ought to do
15 it alphabetically.

16 MR. BRANCH: Certainly we should
17 list them alphabetically, but I think Mr.
18 Essig makes a very good point, and the first
19 useful definition to agree on is the one of
20 consensus.

21 MR. DRABKIN: The wisdom of our
22 chairman cannot be denied.

1 MS. BROOKS: Okay, the next one
2 was when you identify -- if you identify the
3 key issues, and everybody agrees on them,
4 just move those to the side and then discuss
5 those things that have a little bit more
6 issues, or disagreements on it.

7 MR. BRANCH: Are we good with
8 that?

9 MR. ESSIG: Could you repeat that?

10 MS. BROOKS: Identify the key
11 issues, and those that you agree upon, just
12 move those aside. And the last one: separate
13 things by -- by what's GSA's responsibility
14 and associated issues, the customers'
15 responsibility and associated issues, as well
16 as the vendors' responsibility and associated
17 issues. So you would have three separate
18 categories where you would discuss those two
19 areas for each of the categories.

20 MR. BRANCH: Okay, are we good on
21 that one? Judith?

22 MS. NELSON: Somehow I think two

1 got put together, or I missed something. I
2 do know that this -- I don't know that it was
3 separate, but I know that there was the
4 recommendation that had come out that we look
5 at them from the perspective of each of those
6 three stakeholders: internal to GSA, internal
7 to the customer, and internal to -- from the
8 perspective of the vendor.

9 So from the perspective of GSA,
10 from the perspective of the customer, and
11 from the perspective of the vendor. So I
12 don't necessarily know separate them, but
13 looking at them from all three of those
14 perspectives. And then there was also, I
15 thought, engagement of -- what was I thinking
16 of?

17 MR. BRANCH: See, this is a really
18 easy one. Since it's the last one on the
19 list, can I ask Glenn to clarify? Because we
20 know that was his comment.

21 MR. PERRY: Yes, it was mine. I'm
22 sorry. And Alan had a similar issue, but it

1 was a little different way he put it. Yes,
2 roles and responsibilities.

3 MS. SONDERMAN: So should the verb
4 be identify rather than separate?

5 MS. NELSON: Alan had one, and
6 this is what I'm saying is missing. Alan put
7 one in that was to define what is the role
8 and responsibility at the -- for the PCO at
9 the base contract level, the GSA contracting
10 level, and what is the role and
11 responsibility at the ordering level. And
12 that one is not on there.

13 MS. SONDERMAN: instead of
14 "Separate," the things, "Identify," or
15 "Define?"

16 MS. NELSON: Two separate ones,
17 Pat. One is missing on there, which is to
18 say roles and responsibilities. So roles and
19 responsibilities is the one you're writing
20 now, which is GSA based contract versus at
21 ordering level.

22 MR. BRANCH: I think Alan also

1 addressed responsibility of vendors as well.

2 MS. SCOTT: What I wrote down was
3 Alan said, "Identify GSA responsibilities
4 separate from client agency, separate from
5 industry."

6 MR. BRANCH: Right.

7 MS. SCOTT: Want me to repeat
8 that, Pat?

9 MS. BROOKS: No, I think this --

10 MS. SCOTT: Okay. I can't see it
11 from here.

12 MS. BROOKS: I had separated. I
13 think Debra was suggesting that I use
14 identified instead of separate. So that was
15 the confusion.

16 MR. PERRY: There was a reason I
17 added onto Alan. I only wanted to make clear
18 that -- make sure that each of those -- now
19 we've got five. Make sure we've got each
20 perspective so that we make sure and address
21 everybody's issues. Because they come at it
22 from a different angle, so I wanted to make

1 sure we don't get lost in one and not address
2 the other two if we don't have some kind of
3 structure.

4 MR. BRANCH: All right.

5 MR. PERRY: I'm making sure we've
6 addressed all three aspects.

7 MR. BRANCH: Okay, could you bring
8 the previous page back? Because I'll make a
9 recommendation then. Let's see, where's our
10 five question framework one?

11 MS. BROOKS: Number two.

12 MR. BRANCH: Number two. So use
13 the five questions previously discussed as
14 the content -- or as the context for
15 discussion from -- what I'll suggest that we
16 add to that is from GSA, ordering agency and
17 vendor viewpoints. Does that capture your
18 thought, Glenn? And everybody's okay with
19 that modification?

20 MS. SCOTT: Then attach that onto
21 the products and services.

22 MR. BRANCH: Right, because we'll

1 go through the five question framework for
2 products versus services.

3 MS. NELSON: I guess because it's
4 to me not sufficient. I mean roles is one
5 thing. Responsibilities is another. But
6 needs needs to be captured there as well.

7 MR. BRANCH: Okay, I think --
8 well, what I was trying to do was address
9 Alan's, and then capture Glenn's, which --
10 and I don't think we quite capture the last
11 two faithfully. So that was to go back and
12 collect Glenn's. So maybe now we need to go
13 back to the way we captured Alan's, which is
14 roles, responsibilities.

15 MS. NELSON: Right. I mean I
16 think it's all wonderful to define what is my
17 -- what is GSA's job, and what is DoD's job.
18 But if in the process we're not meeting our
19 customer agency's needs, then we've not
20 improved the schedules.

21 MR. BRANCH: Okay, so do you just
22 want to add needs to roles and

1 responsibilities in this one? Okay.

2 MS. NELSON: If we -- we can do a
3 million things to change it, but at the end
4 of the day, if we can't meet Interior or DoD,
5 or DHS's needs, right, we've done nothing.

6 MR. BRANCH: Okay. Everybody good
7 with that modification? Okay, it appears
8 we've got consensus on that. So I think -- I
9 think we have a set of operating rules to
10 deliberate starting in September on the 19th.
11 So I'll just ask if there are any other
12 issues that folks want to raise at today's
13 meeting.

14 MS. NELSON: Pat, can we get a
15 copy of those prior to the transcripts?

16 MS. BROOKS: Yes, you -- I will
17 get copies of this out to you this week.

18 MR. BRANCH: Any other comments,
19 questions or concerns?

20 MS. JONES: Well, I -- I just have
21 another question concerning the five
22 questions. They are primarily addressing

1 competition and price reasonableness. Are
2 those the only areas that we're going to
3 focus on? Are we limited to these five
4 questions in terms of our discussion?

5 MR. BRANCH: No. I think the
6 suggestion is that we just use those as our
7 starting framework.

8 MR. PERRY: Is there something --
9 I guess is there something you're afraid
10 that's going to miss?

11 MS. JONES: No, I'm not afraid
12 we're going to miss anything. They're very
13 narrow in terms of the -- the content, the
14 depth of our discussions. These are very
15 narrow, and there could be other issues
16 surrounding these areas that could come up as
17 well. That's all.

18 MR. BRANCH: Okay. Folks still
19 comfortable with those five as a starting
20 framework?

21 MS. BROOKS: Could you repeat what
22 the fifth question was? I have the other

1 four. I think the fifth one was what is --
2 what are we going to make the fifth.

3 MS. SONDERMAN: The fifth is
4 competition takes --

5 MR. BRANCH: Right, and that
6 really becomes question number one.

7 MS. SONDERMAN: So former question
8 number 1 becomes question number 2, and
9 rather than being given that the competition
10 takes place at the task order level, it's if
11 the complainant takes primarily takes place
12 at the task order level.

13 MR. BRANCH: Any other questions,
14 comments or concerns? Okay, so just to
15 summarize things, we have -- we've
16 established the next four meetings: two in
17 September and two in October. I think we
18 have a set of rules of engagement for our
19 deliberations and to prepare deliverables.

20 So I'd like to do two things
21 before we adjourn this afternoon. The first,
22 I'd like to ask for folks to volunteer for

1 specific areas. I'll express a preference.
2 I'd like to be on the editing team, and I'd
3 like Thedlus to be on the editing team with
4 me, because I never go anywhere without my
5 lawyer. Folks have preferences as to what
6 areas they'd like to work?

7 MS. SONDERMAN: I prefer to be on
8 the editing team.

9 MR. BRANCH: Okay.

10 MS. JONES: I'll volunteer for the
11 services team.

12 MR. SHARPE: I'll volunteer for
13 services.

14 MR. BRANCH: Okay, we have Tom
15 Sharpe for services.

16 MS. SCOTT: Pat, I'll go on the
17 products team.

18 MR. PERRY: I'll do services
19 solutions.

20 MR. ESSIG: I can do products.
21 You can put me on products. I can also float
22 to any if you need somebody. One thought: we

1 may want to take another look at this after
2 we go through the deliberations. If somebody
3 is instrumental in crafting the position,
4 they should probably be on that team.

5 MR. BRANCH: I think point well
6 taken.

7 MR. SHARPE: Elliott, an
8 observation. These teams are looking pretty
9 small.

10 MR. BRANCH: We have 15. We're
11 going to have to go reconcile this with our
12 five absent members. So if we distribute
13 evenly, that'll give us about five people a
14 team. I think that probably works.

15 MR. DRABKIN: I want to do
16 services, please.

17 MR. BRANCH: Judith, I think it's
18 down to you.

19 MS. NELSON: How about if we let
20 the other members who are not from GSA
21 choose, and I'll fill in the gap. Otherwise,
22 I would choose to be on the editing team.

1 MR. BRANCH: Okay.

2 MS. NELSON: Or the products.

3 Either way.

4 MR. BRANCH: All right, so --

5 MS. NELSON: I'm more interested

6 -- I truly am more interested in -- the

7 reason why I chose the editing team is I'm

8 more interested in letting the customers make

9 the recommendations. So I guess I would

10 rather be on the editing team than on the --

11 MR. BRANCH: Okay. Why don't we

12 put Judith on the editing team. And then

13 Pat, if I could ask you to get a list of the

14 proposed teams out to our five absent folks

15 and see where they wish to fill in, and

16 please I guess convey my wishes that we stay

17 as balanced in number as possible.

18 But let's say tentatively these

19 are the teams we have until we hear from the

20 other five members of our panel. And if we

21 need to make some minor adjustments, let's

22 take that as the first order of business at

1 our meeting on the 19th, since we will not be
2 writing. We will just be deliberating. Does
3 that work for everyone?

4 I think that's our last order of
5 business today, unless someone has one final
6 comment. If not, we're done. Thank you very
7 much.

8 (Whereupon, the above-entitled
9 matter went off the record at 3:20 p.m.)

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