

U.S. GENERAL SERVICES ADMINISTRATION

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MEETING OF THE MULTIPLE AWARD SCHEDULE

ADVISORY PANEL

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FRIDAY,
JANUARY 30, 2009

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The Panel convened at 9:00 a.m. in Room L-1301 of the offices of the U.S. General Services Administration, 2200 Crystal Drive, Arlington, Virginia, Elliott Branch, Chairman, presiding.

PANEL MEMBERS PRESENT:

ELLIOTT BRANCH, Chairman, Naval Sea Systems
Command
LARRY ALLEN, Coalition for Government
Procurement

ALAN CHVOTKIN, Professional Services Council
DAVID DRABKIN, General Services Administration
JACQUELINE JONES, General Services
Administration
JUDITH NELSON, General Services Administration
GLENN PERRY, Department of Education
LESA SCOTT, General Services Administration

THOMAS A. SHARPE, JR., Department of the
Treasury
DEBRA SONDERMAN, Department of the Interior
THEDLUS THOMPSON, General Services
Administration

DESIGNATED FEDERAL OFFICIAL:

PAT BROOKS, General Services Administration

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

2 9:14 A.M.

3 MS. BROOKS: Good morning,
4 everyone. Welcome to another panel meeting.

5 A couple of administrative things
6 and then I'm going to turn it over to
7 Elliott, the Chairman.

8 You've all found the donuts in
9 the back. There is a shop right across the
10 hall for you to pick up coffee or if the
11 donuts are not to your liking. The ladies'
12 and gentlemen's restrooms are out the door
13 and to your left. We will break during
14 lunch. There are a couple of facilities on
15 the underground area. If you go out on
16 Crystal Drive, there's several restaurants
17 there, McCormick & Schmick and I forget
18 whatever else is there.

19 The usual rules apply this
20 morning. The discussion will be among the
21 panel members. You will not be permitted to
22 ask questions or make comments during the

1 meeting.

2 I had no requests for comments,
3 but we were not taking written comments
4 anyway, but the written comments that we did
5 receive -- I just realized that I forgot to
6 bring copies for the public members, so I'll
7 make sure that I get copies for you during
8 one of the breaks.

9 So with that, I'm going to turn
10 it over to Elliott.

11 CHAIRMAN BRANCH: Thank you, Pat.
12 Before I start our meeting this morning, I'd
13 just like to recognize that our panel is one
14 member short due to the retirement of Tom
15 Essig from the Department of Homeland
16 Security. Tom retired at the end of the
17 year to devote more time to his children who
18 are in college and I just want to say a few
19 words about Tom because Tom was a member
20 over the 30 plus years of his career of the
21 Navy family for a very long time. Tom and I
22 personally go back to when we were

1 acquisition interns together and then had an
2 opportunity to work together at NAVSEA. Tom
3 as probably one of the giants of our
4 business. If there was anyone who
5 understood things from both a policy and
6 execution standpoint and how to get a better
7 deal for the taxpayer, it was Tom. And I
8 just wanted to make those remarks,
9 recognizing his service and wishing him well
10 in retirement. We will certainly miss his
11 keen insights on the panel.

12 With that, let me get started.
13 We are slowly, I think, coalescing toward a
14 final deliverable, a report. We have some
15 draft sections today and we have a draft
16 detailed outline.

17 So this is how I would like to
18 proceed. I'd like to start with the panel
19 outline. I think the panel outline is
20 important for us to produce a product that
21 hangs together coherently. I think Pat has
22 hard copies for all the members of the

1 Panel. What I'd like to do is I'd like to
2 kind of go through that outline to see if
3 we're comfortable with the way I propose
4 that we structure the report.

5 And I want to pay particular
6 attention to the last piece of the outline
7 which deals with our recommendations because
8 while I have stated our recommendations, in
9 general, I think we probably want to talk
10 today about the key points we want to make
11 that underpin those recommendations.

12 The other thing that I've done in
13 that section is I've actually taken them out
14 of the grouping by which we pass the motions
15 which was supply services and solutions and
16 tried to draft them functionally. And I
17 think we need to have a discussion as to
18 whether that works for the Panel or people
19 are more comfortable writing across the
20 product and service offer areas, because as
21 I looked at the recommendations, there
22 seemed to be about five natural affinities.

1 So with that, I just would like to go
2 through it line by line. If we need to
3 modify it, Pat has it up on the screen. If
4 you're not comfortable with the wording, if
5 you want to add topics, if you believe we
6 should delete topics from the outline, this
7 is the time for us to do that.

8 So I'd like to spend -- I'd like
9 to start off doing that today. And if we
10 can do that today in our energy efficient
11 building which I think has lights on timers.
12 Is this part of the green energy initiative.

13 (Pause.)

14 CHAIRMAN BRANCH: If we can get
15 through the outline, then what I'd like to
16 do is I'd like to turn to the draft
17 submissions that we have. We have draft
18 submissions for Mr. Drabkin. We have draft
19 submissions on the background of the
20 schedules program section and I think a
21 couple of others. If we can agree on the
22 outline today and we can at least start to

1 work on some of the draft sections, then I
2 think it should be a fairly easy task for us
3 to fill in the body of the report and I
4 think if we apply some diligence to this, I
5 know everybody's schedule is very busy, but
6 if we apply some diligence to this, we may
7 be able to finish this off in two more
8 meetings. I'm thinking Monday and a final
9 meeting to be determined.

10 Questions or comments about the
11 plan for today?

12 (No response.)

13 Okay, with that, if we could
14 proceed to the draft outline. I think you
15 all have copies of that in front of you.

16 Pat, I think Debra needs a copy.

17 I'll just give kind of a general
18 overview of the outline. I propose that we
19 break it up into five parts: an
20 introduction, which generally talks about
21 the schedules; the panel itself; basically a
22 description of the schedule contract pricing

1 and award process which we have a draft to
2 look at today. I have drafted a piece
3 called findings and I mean those findings to
4 be at a summary level, not a detailed level
5 and those findings essentially answer the
6 five question framework that we have used in
7 our deliberations throughout our tenure
8 here. And then the last section which is
9 recommendations.

10 So at a very, very high level,
11 I'm proposing that those be the five
12 sections of the report. Does anyone believe
13 that we need to add a section, a major
14 section to the report or delete any one of
15 those five sections? I'd like to just kind
16 of start there.

17 (Pause.)

18 MR. CHVOTKIN: Chairman, then
19 you'll have lots of appendices with other
20 names and stuff like that.

21 CHAIRMAN BRANCH: My assumption
22 was any presentations, any source material

1 we wanted to refer to in the report itself
2 as attached as appendices, I see no reason
3 to insert that in the body of the report.

4 Thedlus?

5 MS. THOMPSON: I might have
6 missed it when you were going through, but
7 is there going to be sort of like a sense of
8 the Panel in terms of the overall viewpoint
9 in addition to the specific recommendations?

10 CHAIRMAN BRANCH: My intention
11 was to include that piece in I think what I
12 call Section 4, Summary Findings. So if
13 that's not sufficient, there's no pride of
14 authorship. Let's address that here, but
15 yes. My intention was to use our five
16 question framework to establish that sense
17 of the Panel about those things that we
18 talked about and then to put the
19 recommendations out there underpinning them
20 with whatever detail we believe is
21 compelling to support the recommendation.

22 So at the very top level are we

1 comfortable with those five sections, those
2 five major sections of the report? I see
3 heads nodding up and down, so I think we
4 have a consensus on that.

5 So why don't we simply turn to
6 the
7 -- we'll just go through each section one by
8 one and see whether there are any
9 insertions, modifications, or deletions in
10 terms of the topic areas that need to be
11 covered.

12 MR. CHVOTKIN: Mr. Chairman, A3
13 in the range of customers, instead of
14 talking about states, a better topic might
15 be cooperative purchasing. There are four
16 areas where Congress has authorized -- GSA
17 is a lot more authoritative than they're
18 using, but at least Congress has authorized
19 four specific areas for cooperative
20 purchasing. So instead of talking about
21 states, because it's broader than just state
22 capability to buy up the schedules.

1 MR. DRABKIN: There is another
2 category of customers that is international
3 organizations.

4 MR. CHVOTKIN: Slow down. Can
5 you
6 -- as you go through here can you help me
7 with what you want added and deleted so Pat
8 can keep up.

9 MS. NELSON: What I would say
10 rather than international customers, there's
11 an ADM that references and we can put it in
12 and it lists -- if we go to B instead of the
13 District of Columbia, we can reference the
14 ADM which lists out authorized users of the
15 schedule beyond the federal agencies and
16 instances in which states are authorized to
17 use it. That would include instances in
18 which international customers, quasi-
19 governmental agencies, instances in which
20 say the American Red Cross or things like
21 that, and it specifically lays out who and
22 how.

1 CHAIRMAN BRANCH: So I think
2 maybe it would be better to just collapse B
3 into C and say "other nonfederal users"?

4 MS. NELSON: No. I would say B
5 and reference the ADM, authorized users per
6 ADM XYZ.

7 MR. PERRY: I would say, Mr.
8 Chairman, I would suggest since our focus is
9 on the federal agencies and basically we
10 talked the whole time about the federal
11 acquisition regulations and federal policy
12 as to how we carry out, use the schedules,
13 we didn't talk about other people using the
14 schedules. If you want to break up the
15 dollar amounts in the schedules program, I'd
16 just identify the spend with the federal
17 agencies and then just put other or
18 something for other people that may use
19 those schedules.

20 MS. SONDERMAN: I agree because
21 our recommendations, well, the
22 recommendations that I voted on I wasn't

1 doing those with the intention that they
2 would apply to any other than federal
3 customers.

4 CHAIRMAN BRANCH: Well, this
5 phrase is an interesting question though. I
6 know essentially that when we use schedules
7 in the District of Columbia, we follow Part
8 A of the FAR to use those schedules, so to
9 the extent that our recommendations as they
10 are implemented in Part A affect non-federal
11 agencies, I think we probably -- you know,
12 this is just the introductory part.

13 My thinking was we need to give
14 recognition to the fact that the schedules
15 and our recommendations will affect more
16 than just federal agency users.

17 Thedlus?

18 MS. THOMPSON: I agree that the
19 focus here of the Panel has just been for
20 federal agencies. So I would assume that
21 our recommendations would be tailored to
22 those federal agencies. However, I think it

1 is important to just mention that our
2 customers include beyond federal agencies
3 and perhaps cite the GSA order so that the
4 reader will know, but we don't have to go
5 into detail. That's my thoughts.

6 MR. DRABKIN: And of course, keep
7 in mind that in the federal context there's
8 the authorization, at least in cost-type
9 contracts for use of sources of supply and
10 the schedules are used by prime contractors
11 with the appropriate clause. And that
12 affects ordering officers in their
13 decisions, but I also agree with I think
14 Elliott, I think everybody, this is just an
15 introductory piece that talks about the
16 schedules program. The recommendations, at
17 least the way I've drafted them for your
18 consideration only speak to what we
19 considered which is the ordering contracting
20 officer and the placing contracting officer
21 and the mass program contracting officer.

22 MS. JONES: The schedules

1 background piece does outline the GSA order
2 and all of the authorized users under the
3 schedule. I believe that these
4 recommendations as it relates to how the
5 customers will use the program and how we
6 are recommending the program be restructured
7 is going to apply to everyone using the
8 schedules. It's going to be a program
9 change, if they're implemented.

10 CHAIRMAN BRANCH: Yes, I mean my
11 sense of it when drafting the outline is
12 that you had to help the reader to
13 understand, assuming this was read by more
14 than people inside GSA, that there are other
15 users other than federal agencies. I
16 certainly hadn't planned to linger on that
17 or go into a dissertation as to who they
18 were and how that worked.

19 So I guess hearing the
20 discussion, my recommendation would be to
21 change B to just say "other authorized
22 users" and to take in Pat's parenthetical

1 comment where they're referenced in the GSA
2 order. And as we've covered that in detail
3 in the section that talks about the
4 schedules program background, we're really
5 talking about a sentence or two that just
6 mentions federal agencies and a whole bunch
7 of other people who are authorized for GSA
8 to do this for specific purposes, homeland
9 security, law enforcement, cooperative
10 purchasing and stop right there.

11 Do I have a sense of the Panel
12 that that's acceptable? Okay. So we can
13 just kill C entirely, Pat.

14 MS. NELSON: If we make the other
15 authorized users per GSA order XYZ and
16 congressional authority, then it covers both
17 the order and states.

18 CHAIRMAN BRANCH: Okay. This is
19 probably a couple of sentences, not even a
20 paragraph. But I think we need to simply
21 convey the sense that this is -- this goes
22 beyond just federal agency users. Okay.

1 MS. NELSON: I'm only making the
2 point that the order doesn't cover the state
3 and local programs.

4 CHAIRMAN BRANCH: Okay, so we
5 just want to put in the parenthetical --

6 MS. SONDERMAN: But state and
7 local programs are authorized uses.

8 MS. NELSON: But not through the
9 order. In other words --

10 MS. SONDERMAN: Elliott just said
11 call it other authorized users. So anyway.

12 MR. ALLEN: Just listing them in
13 the introduction. It's not anything that --

14 MR. DRABKIN: Perhaps it would
15 help if we just -- I think everybody has
16 expressed their opinion what should go here.
17 Someone, I guess Elliott, is going to write
18 the actual words and when you get the actual
19 words, perhaps then if there's something
20 that's not clear to you, you can clarify it
21 as an edit to the words that Elliott writes.
22 But I think everybody is clear, we're

1 talking about all the other -- we want to
2 identify other authorized users and there's
3 a multitude of them.

4 (Pause.)

5 CHAIRMAN BRANCH: So we're agreed
6 that we'll just shorten that up.

7 Moving on, any other changes to
8 the outline in the introduction?

9 MS. SONDERMAN: In Section B.2,
10 the sentences or the phrase is "provide
11 vendors who wish to sell their commercial
12 products to the government." Do we need to
13 say "or services"?

14 MR. DRABKIN: I think so.

15 MS. SONDERMAN: Products or
16 services?

17 (Pause.)

18 CHAIRMAN BRANCH: And services.

19 MR. DRABKIN: I think you also
20 want to add the word "solution" since we
21 addressed that in the recommendation.

22 CHAIRMAN BRANCH: Okay.

1 MR. DRABKIN: So it would be
2 "products, services, and solutions."

3 CHAIRMAN BRANCH: Okay.

4 MS. NELSON: In both B.1 and B.2?

5 MR. DRABKIN: That makes sense.

6 MR. PERRY: I hate to -- we're
7 going to be wordsmithing I can see today. I
8 guess I'm a little on the -- including
9 solutions here is going to run amok with the
10 last set of recommendations where we
11 determined that solutions really weren't
12 something to be acquired, they could be
13 acquired in the schedules, but it was a
14 combination of goods and services, based on
15 our discussion that we had back in -- last
16 whatever it was.

17 So when we introduce it here,
18 you're giving it a different emphasis than I
19 think we came to the conclusion that we
20 should on a technical basis.

21 MR. DRABKIN: Since it was only
22 last night that I wrote up my section on

1 recommendations and reviewed this stuff, I
2 believe what we had talked about was the
3 fact that there are already solutions being
4 purchased under the schedules, that the
5 schedules weren't really designed for that
6 purpose and therefore our recommendations,
7 as I recall, said that the Administrator
8 should develop a set of guidance for the
9 purchasing of solutions. So I'm not sure --
10 I don't think it runs amok of anything, but
11 maybe I missed your point, Glenn.

12 MR. PERRY: My memory was on that
13 was that we only -- we kind of tee'd up our
14 solutions recommendations to say that really
15 the only thing we're doing technically is
16 acquiring a combination of goods and
17 services under schedule orders. And I just
18 don't know whether you want -- and we were
19 going to refer back this issue back to the
20 Administrator to provide more clearly and be
21 explicit that a solutions word could be
22 introduced into the use as a purpose of the

1 use of the schedules. I think it's the last
2 page of the recommendations we talked about.

3 CHAIRMAN BRANCH: That was our
4 last Panel meeting.

5 MR. PERRY: Yes.

6 MR. DRABKIN: I think if you look
7 at page 9 of 11 of the draft that I put on
8 your table this morning, I set out there the
9 language from the recommendations and the
10 format. I think the very first
11 recommendation that we approved identified
12 as number one on that -- bottom of that page
13 was -- it was recommended that the
14 Administrator perform a comprehensive review
15 of GSA policy to facilitate the acquisition
16 of solutions under the mass program.

17 Again, I'm not sure where we're
18 running amok to address it here, but I don't
19 know that it's worth a substantial
20 discussion now, as opposed to when we get
21 more language and look and see if it does
22 some harm to the idea that you've advanced,

1 Glenn.

2 MR. PERRY: Okay.

3 MS. SCOTT: I consider this kind
4 of a historical perspective at this point
5 and people do believe they're getting
6 solutions. So I kind of view it as we stand
7 now we think this is what's being offered,
8 so that's -- I would say leave it now here
9 and then revisit it later.

10 MR. PERRY: Okay.

11 CHAIRMAN BRANCH: Well, you know,
12 I'm going through the transcript of our last
13 meeting here. And I think we started out in
14 a place where we considered the idea of just
15 prohibiting the sale of solutions on the
16 schedules and as I read, kind of skim the
17 transcript, I think the sense of the Panel
18 was at that time that we were not
19 comfortable doing that and that we came to a
20 conclusion that while the acquisition of
21 solutions under the schedules was imperfect,
22 it was happening and our job was to make

1 recommendations to the Administrator that
2 improved the acquisition of solutions under
3 the schedule.

4 So I think it would probably be
5 appropriate to just talk about it here,
6 given that the sense of the Panel as we saw
7 it at our November meeting.

8 MS. THOMPSON: I view this as an
9 introduction. So we're looking at the value
10 of the schedules program currently and not
11 prospectively with just what the
12 recommendations would do. So that's why I
13 would not believe that solutions were
14 necessarily -- I like the language as it is
15 now.

16 CHAIRMAN BRANCH: So is there a
17 consensus to just not address solutions in
18 the introductory paragraph?

19 Okay. And I'm okay with that.
20 So Pat, if we could just make, if we could
21 just take solutions out and change goods to
22 products so we're consistent in subtopics 1

1 and 2, we call it products and services.
2 And I think it's important to make a note to
3 ourselves when we write the underpinning
4 language for the recommendations to perhaps
5 give some of our sense on solutions that
6 while we think they are imperfectly procured
7 under the current schedule program, we
8 recognize that they be procured. I think
9 that's a point that's too important to get
10 lost.

11 And without that point, I don't
12 think our recommendations have the right
13 context.

14 (Pause.)

15 Other changes we need to make to
16 the introductory section?

17 MS. THOMPSON: If we could go
18 back just a second to A when we're talking
19 about the scope of federal supplies
20 schedules. I think it would be appropriate
21 to add in the number of contracting officers
22 that administer the program.

1 We have the range of customers.
2 I think it would be helpful to see just how
3 many
4 -- the staffing, the administrating of the
5 program.

6 MS. SONDERMAN: So does everyone
7 who works on this program, is everyone a
8 contracting officer or are there other
9 contract specialists who are not contracting
10 officers who work in support of the program?

11 MS. SCOTT: Yes. There's
12 procurement technicians and contract
13 specialists and contracting officers.

14 CHAIRMAN BRANCH: So we need to
15 figure out the number of acquisition
16 personnel.

17 MS. SCOTT: We'll need to decide
18 if we're going to do big A or little A, is
19 what I think I'm hearing because there's
20 also the program side, too.

21 CHAIRMAN BRANCH: Yes, at best
22 it's sort of a general size of workforce.

1 And that also includes how many
2 contracts there are and all that stuff about
3 11.3 billion line items, whatever it is.
4 Just put it in the background.

5 All right --

6 MS. NELSON: I think that's in
7 the background.

8 CHAIRMAN BRANCH: It's in the
9 background part?

10 MS. NELSON: We can put it in one
11 or the other.

12 CHAIRMAN BRANCH: All right,
13 we'll work through it, as we work through it
14 -- so I've added below annual spend just in
15 this outline, a number of contracts because
16 we probably want to talk about the fact that
17 there are 18,000 contracts across the
18 schedule.

19 MS. SONDERMAN: If we're going to
20 do that, I think it's also material to
21 mention that 3,000 of them in any given year
22 have no activity.

1 CHAIRMAN BRANCH: Fair enough.

2 MR. DRABKIN: I think you should
3 have a fair representation of the whole
4 program. I mean --

5 CHAIRMAN BRANCH: Right.

6 MR. DRABKIN: Maybe even a chart
7 that shows sales, number of small
8 businesses, percentage of orders, I mean all
9 that kind of descriptive stuff.

10 CHAIRMAN BRANCH: Right --

11 MR. DRABKIN: Which is readily
12 available already.

13 CHAIRMAN BRANCH: Okay. So yes,
14 number of contracts, number of people, and
15 we've captured the spend. Okay. Great.

16 MS. NELSON: I'd like to make the
17 point that when we do that, that we do it
18 both for those contracts that are held
19 within FAS and those contracts that are held
20 by VA under the authority of FAS because
21 that represents the entire multiple awards
22 schedules program.

1 CHAIRMAN BRANCH: Okay, that
2 raises an interesting point. So is what we
3 do -- if we were to take the hypothetical
4 that our recommendations are just a roaring
5 success and that the Administrator does
6 everything we ask him to do, are those
7 recommendations going to flow down to VA?

8 MS. NELSON: Yes.

9 CHAIRMAN BRANCH: Okay.

10 MR. DRABKIN: Well, I mean just
11 to make it clear, VA operates under a
12 delegation of authority from the
13 Administrator, its schedules program which
14 are essentially for medical equipment and
15 pharmaceutical --

16 MS. NELSON: As well as medical
17 services.

18 MR. DRABKIN: Okay, whatever it
19 is that they operate, but they operated
20 under the context of our policies and rules
21 and in fact, we've had a very good working
22 relationship with VA. I wish Jan were here

1 to confirm that and we sort out issues
2 associated with operational issues that have
3 policy impacts between us, but yes, it will
4 have an impact on anybody who operates under
5 a delegation. We delegate the authority to
6 operate, but not the responsibility to
7 manage the schedules program.

8 CHAIRMAN BRANCH: All right.

9 MS. JONES: I have a question.
10 If we're going to refer to the number of
11 contracts and the number of FTE that are
12 required to run the schedules program, what
13 cutoff date are we going to include as of
14 what period? Because that constantly
15 changes.

16 CHAIRMAN BRANCH: I think we can
17 handle that with an approximate -- we're
18 talking about context for the reader, so I'm
19 not sure anybody is going to make any
20 personnel decisions based on the content.
21 Pick a date, whatever -- at the end of
22 Fiscal Year '08 is probably good.

1 MS. NELSON: It just helps me
2 gather or someone within FAS gather the data
3 for you, because the data that we provided
4 earlier in the Panel obviously didn't cover
5 Fiscal Year '08.

6 CHAIRMAN BRANCH: So I'll ask the
7 question, Judith, what's the easiest for you
8 because I really think this is purely
9 contextual and you've not gone out and hired
10 a thousand people or terminated a thousand
11 people unlike Ford Motor or Starbucks. So
12 what's the easiest data for you to pull?

13 MS. NELSON: Fiscal Year '08.

14 CHAIRMAN BRANCH: Okay, then
15 let's assume we're going to say Fiscal Year
16 '08.

17 MR. ALLEN: I have one suggestion
18 for C.3. Right above it in C.2 we said
19 initially created for the procurement of
20 fixed price supplies. I think we also ought
21 to include some more language in 3,
22 initially, a mandatory source of supply for

1 many agencies.

2 I think the only place that it's
3 mandatory today is maybe on GSA and on the
4 VA that I remember.

5 CHAIRMAN BRANCH: Larry, I guess
6 I don't understand how you want to modify
7 those?

8 MR. ALLEN: C.3 --

9 CHAIRMAN BRANCH: Right.

10 MR. ALLEN: Make the first word
11 "initially" and --

12 CHAIRMAN BRANCH: Okay, gotcha.

13 MR. ALLEN: Initially, A
14 mandatory source of supplies.

15 CHAIRMAN BRANCH: Okay.

16 MR. DRABKIN: Well, I presume
17 Judith will help Elliott by explaining the
18 few remaining mandatory -- that's fleet,
19 that's not the schedule. Okay, never mind.

20 CHAIRMAN BRANCH: I think we're
21 good because when we talked about -- my
22 sense is you have to start in 1950 and say

1 you know we were buying pencils, papers and
2 widgets and everybody was buying them and if
3 you look historically through the program
4 there have been some seminal changes and I
5 tried to just -- I'm not sure that's all of
6 them, but I tried to capture three of them.

7 So we changed the pricing models
8 going away from the DSMD to commercial sales
9 practice document. We said they were
10 primarily optional and we added services, so
11 I was hoping to just kind of capture here's
12 where we were in 1950, here are some of the
13 big swingers that have us today, just to
14 make the point that the schedules program
15 has evolved to be responsive and relevant to
16 the needs of the stakeholders.

17 MS. SONDERMAN: Elliott, speaking
18 of that phrase, I would agree the schedules
19 program has changed as sometimes Darwinist,
20 I'm not sure that it's evolved. I'm
21 comfortable with you using the word
22 "change." It's clearly change.

1 CHAIRMAN BRANCH: If you assume
2 that Stephen Jay Gould is right and
3 evolution is a messy thing, it would
4 probably be okay.

5 MS. NELSON: Do we have more
6 copies of the background?

7 MS. BROOKS: Of Elliott's?

8 MS. NELSON: No, the background
9 document.

10 MS. SONDERMAN: The draft that
11 you

12 --

13 MS. BROOKS: No, because I sent
14 them to everyone so I didn't print out -- I
15 can bring it up here. I've got it on my
16 disk.

17 CHAIRMAN BRANCH: While Pat is
18 doing that, Alan, you had a comment?

19 MR. CHVOTKIN: In that same
20 section C.4, the changes, just to reflect
21 also not only the addition of services, but
22 the growth in the number of schedules and

1 the addition of constantly changing number
2 of schedules.

3 CHAIRMAN BRANCH: Okay, good.

4 MS. BROOKS: Okay, there it is,
5 Judith.

6 (Pause.)

7 CHAIRMAN BRANCH: Pat, I'm making
8 changes as you're making changes, and I know
9 we have you multi-tasking over there, so you
10 and I will just get together and reconcile
11 our markups.

12 But I've added as a fourth
13 thought under C.4, based on Alan's
14 suggestion, that we recognize the growth in
15 the number of schedules.

16 MS. THOMPSON: And Elliott, I
17 think the 19th of this should be 1949.

18 CHAIRMAN BRANCH: Actually, when
19 I go back to the transcript, the transcript
20 indicates that the schedules program came
21 about a year after the Act did which is why
22 I used 1950.

1 MS. THOMPSON: All right.

2 MR. DRABKIN: Is counsel
3 corrected?

4 (Laughter.)

5 MS. THOMPSON: This time.

6 (Laughter.)

7 MS. NELSON: I would also
8 recommend per -- in addition to Alan that
9 when we note the growth in the number of
10 schedules, we note the growth in the scope
11 of the schedules.

12 CHAIRMAN BRANCH: Okay, just for
13 my edification, so we would express that as
14 the number -- the increased number of SINS,
15 would that be the way to talk to that?
16 Okay.

17 MS. NELSON: Sure.

18 CHAIRMAN BRANCH: Okay.

19 MS. NELSON: SINS takes care of
20 it whether or not they're under a specific
21 solicitation or multiple solicitations, SIN
22 represents one measure. It's a way of

1 measuring growth.

2 CHAIRMAN BRANCH: We need to
3 strike a balance with this section, so we
4 need to provide context for the reader, but
5 we also I think need to understand that our
6 purpose here is not to give somebody a
7 history on the schedules program. So I'd
8 like to just impart that information in as
9 general a way as we can because if we get
10 too specific, we'll lose the reader before
11 they get to the recommendation.

12 MS. JONES: That's why I was
13 recommending schedules in lieu of SINS
14 because that is at a more detailed level
15 where all of the other information we're
16 referencing at a schedules level.

17 CHAIRMAN BRANCH: Okay. I guess
18 I heard two different comments, so this is a
19 good discussion to have. I heard not only
20 had we increased the number of schedules, in
21 other words, we were buying a wider variety
22 of items, but I think the thought that

1 Judith was going at is and within each of
2 those schedules, we've also increased the
3 number of product offerings.

4 So for example, we added training
5 as schedule 69 and if you go to schedule 69
6 over the years we've grown from training and
7 federal financial administration to business
8 process improvement, the Lean Six Sigma to
9 all these other things that would be the
10 SIN.

11 So am I not getting the thought
12 that I thought was being conveyed?

13 MS. JONES: Yes, but rather than
14 drill down to the SIN level, I would say
15 scope, the scope of the schedules has
16 expanded, because that's what a SIN
17 represents.

18 CHAIRMAN BRANCH: Right.

19 MS. JONES: Part of the scope.

20 CHAIRMAN BRANCH: Okay, I think
21 we're in agreement, so we're going to
22 operate on a rule for this section. We're

1 going to pull the information that's easily
2 available. If it's not easy to count SINS,
3 then we won't count SINS and we'll just say
4 we'll just note the growth and scope and if
5 we can count SINS, we'll put it in there.
6 Does that work for everyone?

7 I don't know how easy it is for
8 you to tell me how many SINS across every
9 schedule there are and I don't want you to
10 have to go do that. I'm happy to just
11 generally refer to a growth in scope. Okay.

12 MS. THOMPSON: I have an
13 additional suggestion for adding the volume
14 of sales that has increased tremendously and
15 I don't see that that is added as one of the
16 changes that has occurred.

17 CHAIRMAN BRANCH: I did not put
18 that in there intentionally. I think --
19 your point is well taken. I think where you
20 might want to talk to that is in A.2.
21 Instead of annual spend, you might want to
22 say "increasing spend, over the period spend

1 has grown from X" and pick a Fiscal Year,
2 Fiscal Year 1990 to an astonishing Y today.
3 But what I was trying to capture in that
4 last piece was you've made process changes
5 to the schedules that have essentially
6 really changed the nature of what schedules
7 are today versus what they started out
8 being.

9 MS. THOMPSON: Okay, then can we
10 say process changes then?

11 CHAIRMAN BRANCH: Okay.

12 MS. THOMPSON: That will
13 specifically delineate exactly what you're
14 talking about.

15 CHAIRMAN BRANCH: So let me
16 change that to numerous and significant
17 process changes.

18 MS. NELSON: Yes, I just assumed
19 that A.2 is annual spend would be associated
20 with an appendix that showed annual spend
21 over a period of years by the government
22 customer.

1 CHAIRMAN BRANCH: Yes.

2 MR. PERRY: Yes, I think it you
3 mention the process changes and then the
4 last point that you had on the next page,
5 Elliott, I think you'll find in the piece
6 the committee did on the issues and findings
7 which were done without benefit of any
8 collaboration about the structure here, I
9 tried to address the fact that the
10 marketplace itself has changed considerably
11 and also how the government, the role of
12 government and the way we -- and the role of
13 industry as far as how we're getting our
14 work done has changed dramatically over that
15 time and the schedule is just a reflection
16 of that.

17 CHAIRMAN BRANCH: Okay. So I can
18 just kind of make that point.

19 MR. PERRY: I think I would just
20 talk about the change in the general
21 environment.

22 CHAIRMAN BRANCH: All right, hold

1 on. Let me catch up.

2 (Pause.)

3 Just Debra, so you know, I had
4 the same thought. I was going to use the
5 word evolve, and I just didn't -- I wasn't
6 comfortable with the word "evolve."

7 MS. SCOTT: In this case I
8 suggest we use the word adapt.

9 MR. DRABKIN: This is what
10 happens when you write a document by
11 committee. You may recall that the
12 Continental Congress spent quite a bit of
13 time writing the Declaration of Independence
14 and Mr. Adams was incredibly frustrated by
15 it.

16 (Laughter.)

17 CHAIRMAN BRANCH: We're going to
18 be using this in legal communities.

19 MR. PERRY: This is the guiding
20 light for GSA for the next 200 years.

21 (Laughter.)

22 CHAIRMAN BRANCH: All right, so I

1 have just noted on that fifth one the key
2 point that schedules have evolved and I will
3 stick by that word.

4 (Laughter.)

5 CHAIRMAN BRANCH: Throughout the
6 history of the program to meet the needs of
7 government and industry stakeholders as the
8 political and economic environment has
9 changed. I think that goes to your point,
10 Glenn.

11 MR. PERRY: All right.

12 CHAIRMAN BRANCH: Okay, so are we
13 comfortable, generally, with the outline of
14 the introduction?

15 Then I will take an action to try
16 to complete that section over the weekend
17 and we can review that on Monday.

18 That moves us to Section 2, where
19 I simply tried to then describe the Panel.

20 (Pause.)

21 MS. SONDERMAN: Looks good to me.

22 MS. THOMPSON: Paragraph B under

1 II, that's not quite a complete sentence.

2 You say the important issue --

3 CHAIRMAN BRANCH: An important
4 issue. It's certainly not the only one as
5 we've discussed. You'll have to excuse the
6 shorthand, my father is turning in his
7 grave.

8 MS. BROOKS: Thedlus, did you
9 want the correction?

10 MS. THOMPSON: Paragraph II.B, an
11 important issue to the relevance and
12 responsiveness.

13 MS. SCOTT: It might be easier to
14 start with the word pricing and that would
15 make it more clear cut. Pricing is an
16 important issue.

17 CHAIRMAN BRANCH: I guess my
18 question would be have we captured the
19 thought? Because this is an outline from
20 which detailed text will be written. If
21 we're successful, no one will ever see this
22 after the final product is delivered.

1 MS. SCOTT: I like it.

2 CHAIRMAN BRANCH: Have we got a
3 consensus that Section 2 describing the work
4 of the Panel and the way we went about
5 deriving recommendations is sufficient?
6 Okay. Good.

7 MS. JONES: Elliott, I have one
8 more comment, subparagraph C, the last line
9 there where it says "especially the use of
10 the Price Reduction clause." I would
11 recommend saying "especially the application
12 of the Price Reduction clause."

13 CHAIRMAN BRANCH: Okay. Other
14 comments on Section 2?

15 MS. NELSON: Just one small
16 point.

17 CHAIRMAN BRANCH: Sure.

18 MS. NELSON: Editorial point. I
19 think we might want to capitalize
20 Administrator.

21 CHAIRMAN BRANCH: Okay, then can
22 we say we've reached consensus on the topics

1 to be covered in Section 2 of the report?

2 Outstanding.

3 Okay, I did not outline Section 3

4 because we have, I think, a very good write

5 up describing how the schedules program

6 functions with respect to contract pricing

7 and award, so we can either stop here as

8 we're at this part of the outline and go

9 through that or continue to finish the

10 outline?

11 All right, then let's move right

12 along to Section 4 and we'll come back to

13 review the drafts.

14 Before we start looking at that,

15 this is what I attempted to do here. I

16 attempted to put our findings not in terms

17 of the discrete recommendations, but to use

18 the five questions that we came up with that

19 kind of constituted our framework for

20 deliberation and debate.

21 And as I look back through

22 transcripts to see what the sense of it was,

1 I tried here to capture the sense of the
2 Committee, so here there really is no pride
3 of authorship whatsoever. This is, I think,
4 the heart of the matter, have I captured the
5 sense of our deliberations over time? So
6 this is the section that I think we'll
7 probably want to spend the most time on and
8 I think we need to read it carefully and if
9 you think I've omitted anything, if you
10 think I have stated anything that is not
11 consistent with your recollection, if you
12 think I have put things in here that are not
13 consistent with your recollection, please,
14 please let us know and we'll run this to
15 ground.

16 I think to a large degree this is
17 the heart of the report.

18 (Pause.)

19 It's about 5 after 10, so given
20 the importance of this, I'm going to give
21 everybody about a half an hour to really
22 take a look at this, take a hard look at

1 that, so if you've looked at it and you're
2 good with it, or you've decided quickly,
3 feel free to get another cup of coffee or
4 look at your BlackBerry. And let's plan to
5 start substantive discussion around this
6 section at 10:30.

7 (Whereupon, the above-entitled
8 matter went off the record at 10:06 a.m. and
9 resumed at 10:37 a.m.)

10 CHAIRMAN BRANCH: Okay, we have a
11 quorum. We're missing our DFO which is
12 somewhat problematic since she has control
13 of the machine, but since I do have Section
14 4 up on my machine as she has it, I'd like
15 to start the discussion, so if we can kind
16 of walk through this.

17 Let me tell you what I tried to
18 do here in findings. I tried to convey the
19 reality that the Panel saw, so I am not
20 going to tell you that these are absolutely
21 empirically proven facts, but this was my
22 summary of the way Panel saw reality after

1 listening to all the evidence and having a
2 discussion. So if I did not see that
3 correctly, I apologize in advance and I'm
4 open to modifying this absolutely. So
5 comments on summary findings?

6 Theedlus?

7 MS. THOMPSON: I have a question
8 on A.1(b) purchases of quantities not
9 contemplated by the government and vendor at
10 the time of contract of work. Are you
11 referring to purchases exceeding the maximum
12 order threshold?

13 CHAIRMAN BRANCH: I am referring
14 to both purchases exceeding the maximum
15 order of threshold and the possibility that
16 purchases may be made over and above those
17 comparable to the tracking customer. So
18 you've got two situations. One is the
19 tracking customer may have said I sold that
20 10,000 of these units. We may have looked
21 at our data and said hey, that tracking
22 customer sounds about right for the amount

1 we do. And then we find that demand
2 significant exceeds that or we look at the
3 kind of average unit sales and the tracking
4 customers averaging sales through its
5 commercial partner and then we have
6 something that's significantly larger than
7 that.

8 A really good example of that
9 would probably be the BPA that DOD uses with
10 IT vendors on site licensing agreements. I
11 doubt when the GSA contracting officer put
12 in place a price for say Microsoft Office he
13 ever contemplated that the entire Department
14 of Defense would put it on every desktop.
15 So that was the thought I was trying to
16 capture there.

17 MS. THOMPSON: Can we put some of
18 that -- obviously, you could go on and a
19 whole paragraph, but something with a little
20 bit more meat that would flesh out the
21 context in which you just discussed in those
22 two particular instances?

1 CHAIRMAN BRANCH: Sure.

2 MS. THOMPSON: Because that gives
3 a little bit better meat to --

4 CHAIRMAN BRANCH: Okay, so --

5 MS. NELSON: May I offer somewhat
6 of a rewrite of this?

7 CHAIRMAN BRANCH: Absolutely.

8 MS. NELSON: I had looked at it
9 and come up with a different way of stating
10 it.

11 CHAIRMAN BRANCH: Sure.

12 MS. NELSON: It may not meet -- I
13 wrote that procurement requirements of
14 government customers cannot be foreseen by
15 GSA PCOs and contractors at time of base
16 contract award.

17 MR. SHARPE: Why? If there's
18 historical volumes, is that considered?

19 MS. NELSON: They can be
20 considered, but well, we had discussed this,
21 that your need for an IBM desktop solution
22 versus six months later Glenn's need for an

1 IBM desktop solution may be totally
2 different.

3 CHAIRMAN BRANCH: Before we go on
4 discussing those words, let me make sure
5 I've captured them accurately. I think what
6 I heard you say was procurement requirements
7 cannot be foreseen by GSA contracting
8 officer at the time of contract award, is
9 that correct?

10 MS. NELSON: I just added in
11 procurement requirements of -- you can say
12 varying, but of government customers, of
13 different government customers cannot or
14 always be foreseen.

15 MR. SHARPE: Cannot or is not?

16 MS. NELSON: Cannot.

17 MR. SHARPE: Do they attempt to
18 do it?

19 MS. NELSON: Be foreseen by GSA
20 contracting officers and contractors at time
21 of base contract award.

22 CHAIRMAN BRANCH: Okay, just to

1 make sure we're talking about the same
2 language, so procurement requirements of
3 different government contract, government
4 customers cannot be seen by GSA contracting
5 officers and contractors at time of initial
6 contract award or base contract award?

7 MR. SHARPE: Is that accurate
8 though? They cannot? There's no way to
9 survey and estimate that?

10 MS. SCOTT: We do, but it's not
11 to the level of detail that would satisfy
12 most --

13 MR. SHARPE: Judith is saying
14 it's an impossibility, it cannot.

15 MS. SCOTT: Well, what I would
16 say is what we don't have -- we're trying to
17 describe the instant requirements versus the
18 generic, so the award is based on generic
19 information, not on a specific instant, so
20 there can be some -- if there are cost
21 savings done, that's just what happens at
22 the level where the competition occurs.

1 CHAIRMAN BRANCH: Well, is that -
2 - is that a better way of stating it?
3 Awards are based on a generic rather than a
4 specific requirement at the time of contract
5 award?

6 MR. ALLEN: They're IDIQ
7 contracts which suggest that there's no
8 definite quantity being contemplated.

9 MS. JONES: Yes. I have a
10 suggestion to just say that purchases of
11 quantities and delivery is indefinite and
12 not contemplated by the government, blah,
13 blah, blah.

14 MS. SCOTT: Maybe we could just
15 say it's broad scoped quantities and
16 deliveries.

17 CHAIRMAN BRANCH: All right, let
18 me --

19 MS. SCOTT: Something like that.
20 Possibly recraft it a little bit. I think
21 the general consensus is we need to recraft
22 this a little bit.

1 CHAIRMAN BRANCH: Let me try to
2 help people with the thought I was getting
3 at here. The thought I was trying to get at
4 here and I thought the sense of the panel
5 was schedule pricing alone does not result
6 in the lowest overall cost to the government
7 in all circumstances. Why not? Well, first
8 they're services which requires statement of
9 work and you can't get to the best value or
10 low overall cost conclusion until you match
11 the rates in the mix against the statement
12 of work.

13 The second was essentially the
14 thought that I was trying to capture was
15 because we have no idea what ordering
16 activities are going to order against
17 schedule contracts at the time of contract
18 award, we essentially pick and I don't want
19 anybody to take any kind of value judgment
20 from my word here, but we pick an arbitrary
21 point that is a combination of what the
22 basis of award contractor looks like in

1 terms of total volume as well as per
2 transaction sales and what we think is a
3 reasonable forecast of government demand and
4 that the actual ordering under that
5 contracting vehicle may well be very
6 different from that arbitrary point. That
7 was really the thought I was trying to get
8 at. So if those words don't convey that, I
9 understand that. I'd be more than happy to
10 entertain changing the words, but I wanted
11 to share with you the thought that I was
12 trying to craft there so we can perhaps more
13 effectively come up with the right words to
14 express that.

15 MS. SONDERMAN: Is the point
16 you're trying to -- is this leading to some
17 issue related to the period of time that the
18 contracts are set in place or you know, that
19 options should be every three years instead
20 of every five years or is this more an
21 observation?

22 CHAIRMAN BRANCH: This was really

1 more an observation. If you go look at the
2 model and this is really kind of a -- my
3 paraphrase of Jackie's question when we set
4 up the five-part model, does competition
5 occur at the schedule pricing level and I
6 think the consensus of the panel is that
7 yes, it does. Now whether that competition
8 is of any real value when you place an order
9 is another question entirely. So the
10 thought I was trying to convey was while the
11 answer may be yes to that question, that
12 isn't sufficient to guarantee the objectives
13 of pricing against the GSA contract.

14 Now if you've got issues with
15 that thought, I was trying to express this
16 is the time we need to discuss this.

17 MS. NELSON: I completely agree
18 with the sense that you're conveying and the
19 only issue that I was bringing up and I
20 think Thedie said it, was that subparagraph
21 B didn't convey adequately what you were
22 saying.

1 CHAIRMAN BRANCH: And I accept
2 that. I guess what I was -- we seem to be
3 getting off on some different paths with
4 respect to wording that, so I was just
5 trying to convey the sense of a thought so
6 that we could maybe better focus our efforts
7 on picking the words that either match that
8 thought or match the thought that was the
9 consensus of the panel.

10 MR. DRABKIN: But I do think
11 Elliott has an important point that needs to
12 be captured and that is we don't award these
13 contracts based on a requirements analysis
14 that we've determined. And in fact, the
15 very nature of our program is that it's open
16 and continuous announcement and anybody can
17 apply for a contract and the test for
18 getting a contract isn't do we need that
19 additional capacity in order to meet
20 government requirements. The test of
21 whether you get the contract is wholly
22 different. Are you responsible? Do you

1 have commercial product? Do you have
2 commercial sales? Etcetera.

3 I have never heard us, as a
4 matter of policy, anywhere say we've got
5 enough contractors right now, no more are
6 welcome. In fact, it would disturb our
7 entire -- our entire programs policy and our
8 commitment to the small business community
9 in particular, were we to ever cut off the
10 ability of a company to apply for and get a
11 schedules contract.

12 I think Elliott's point here is
13 that, at least as I understand it, is that
14 these contracts aren't awarded based upon a
15 forecast of government requirements other
16 than a general requirement for the item.
17 And if it's not conveyed in his words, I
18 think that's what he meant. That's
19 certainly what I would say if it were me and
20 I leave him to find those words to convey
21 that thought.

22 CHAIRMAN BRANCH: I guess I was

1 trying to convey a little more than that.
2 That was kind of my beginning thought that
3 we don't award these contracts based on an
4 analysis. We award them based on this
5 composite of factors and therefore in
6 execution the reality of how we buy and what
7 we buy in terms of both quantities and
8 timing is very different from the assumption
9 made at contract award.

10 MR. DRABKIN: I wouldn't -- and I
11 know it's semantics and we can spend a lot
12 of time perhaps discussing it, but I
13 wouldn't say
14 -- we do do an analysis of whether the
15 product or the service is required by the
16 government, but we don't make the decision
17 about the number of contractors we will have
18 based upon an actual requirements analysis
19 of what the government may need this year or
20 next.

21 I think that's how I would split
22 the hair, if you will.

1 MS. SONDERMAN: And I guess for
2 me that gets back to the statement in A, and
3 I apologize for being out of the room, did
4 we determine that competition occurs at the
5 contract level?

6 CHAIRMAN BRANCH: Well, I think
7 that's a good question. That was my kind of
8 recollection of the consensus and I think we
9 were of a split mind on that. And what I
10 was trying to convey in this was yes, I
11 think we generally agreed to that point, but
12 I think we also generally agreed that it
13 wasn't sufficient.

14 MR. ALLEN: I think that's
15 accurate, but I also think -- I think you're
16 right on that, but I also think the last
17 part of A needs to be changed because the
18 schedules program at its core does -- is
19 predicated on the fact that the contract
20 price is, in some way, fair and reasonable
21 so to suggest that it's not fair and
22 reasonable turns the program on its head a

1 little bit.

2 I think perhaps better wording
3 would be that the price does not always
4 result in the absolute or you could just say
5 the lowest price available.

6 CHAIRMAN BRANCH: Let me talk to
7 that because I really struggled with that
8 piece of wording, and again, this is, I
9 think, a good discussion. But I picked fair
10 and reasonable for a particular reason
11 because I saw this really in terms of we've
12 been looking at this in terms of three or
13 four lenses and I'll kind of split this into
14 a little Jahari window if you will.

15 So one of those lenses is is it
16 the most favored customer price or is it the
17 basis of award price?

18 The other access to windows are
19 is it a fair and reasonable price or is it a
20 price that results to the lowest overall
21 cost to the government?

22 The reason I used the word fair

1 and reasonable here was because the words,
2 the lowest overall cost to the government
3 are the words reflected in the statute. So
4 while the Administrator may well determine
5 that this results in the lowest overall cost
6 to the government, the sense of the
7 Committee, I believe, based on the fact that
8 we think true or full competition takes
9 place at the task order level, I made a, if
10 you will, a semantic decision to say that
11 while this pricing was competitive, it
12 didn't always result in a fair and
13 reasonable price. So there was a little bit
14 of, if you will, bureaucratic artistry in
15 the words I picked there.

16 MS. SONDERMAN: We did have a
17 rather compelling presentation from a
18 private citizen that asked us to -- invited
19 us to ask that very question, how can for
20 the same item on the same day, I don't
21 remember the specific numbers, but they were
22 in the range of \$5,000 per item, \$800 per

1 item, and \$500 per item. How can those
2 prices all be for the identical item on the
3 same day? How can that price be fair? All
4 of those prices be fair and reasonable?

5 MR. SHARPE: The way this is
6 structured, do you mean to say the prices
7 are the result of competition or are there
8 two separate thoughts? There's some
9 competition, but the price is determined
10 fair and reasonable on a different basis
11 than the competition?

12 CHAIRMAN BRANCH: That's
13 precisely what I mean to say. They're
14 competitive pricing. No doubt about that.
15 But I guess I'm breaking the paradigm --

16 MR. SHARPE: How do you square
17 that with Debra's comment?

18 CHAIRMAN BRANCH: We have a
19 paradigm, I think, in the community that
20 competition always results in a fair and
21 reasonable price and I'm not sure it does in
22 the case of the schedules and I guess that

1 was really the thought I was trying to
2 convey. We've got competitive pricing, but
3 we have this kind of -- if you will, and
4 again, I assign no value judgment to the
5 word I'm about to use, but we have this
6 artificial economic environment. And it's
7 artificial in the sense that there is not a
8 quantity certain for delivery on a date
9 certain of a specification certain. What it
10 is is it's a set of assumptions that we use
11 to construct a price that may or may not be
12 reasonable in the context of a particular
13 procurement.

14 And I go back to points that
15 Debra has made continuously throughout our
16 meetings as well as points made by Lesa. If
17 you are a small agency and you're in the
18 middle of Yellowstone National Park, that
19 schedule price may be an absolutely fair and
20 reasonable price for the one unit that
21 you're going to buy when you have no
22 competitive alternatives. But if you were

1 sitting in Washington, D.C. and you were
2 planning a buy for 10,000 of those units to
3 be spread throughout the National Capital
4 Region, there is no way in that particular
5 procurement situation that price is fair and
6 reasonable.

7 Judith?

8 MS. NELSON: There are two things
9 that would make me more comfortable with
10 paragraph A. Despite the testimony from our
11 private citizen that came forward, I could
12 do research that either would show that he
13 was completely right and there was no
14 competition and for that particular item
15 there were completely erroneous awards. Or
16 it could show that the contractor was --
17 contractors were deficient in managing their
18 contracts and that had a CO procuring would
19 have found that in doing their own due
20 diligence in awarding.

21 So there's no real empirical
22 evidence. So one of the things that I would

1 say is I would be comfortable is if it's
2 said, while the panel -- and we did not,
3 despite requests from the Panel, both going
4 out in requests from the customer agencies
5 for testimony, did not receive it, nor did
6 we receive from the procurement executives
7 on the Panel, testimony showing whether or
8 not they were receiving fair and reasonable
9 pricing. So there was not presented to the
10 Panel any empirical evidence regarding fair
11 and reasonable pricing at the customer
12 level.

13 So I would be more comfortable
14 with the statement that said while the Panel
15 determined that competition does occur at
16 the contract level, it is the sense of the
17 Panel -- okay, because there was -- it is
18 our sense, and I think to a large degree on
19 a consensus-level basis we came to a sense
20 that fair and reasonable pricing does not
21 exist, but we have in none of the documents
22 that I have read through and none of the

1 transcripts I have read through any
2 empirical evidence. But we do have a great
3 deal of sense. And GSA itself has multiple
4 times and is in the process of trying to run
5 a project to look at that pricing, at the
6 task order level and it's not going so
7 successfully as far as gathering that
8 information at the task order level.

9 The second thing that would make
10 me more comfortable is if we were to amend
11 it to say that the Panel has the sense that
12 it does not always result in fair and
13 reasonable pricing at the task order level.

14 MS. SONDERMAN: Well, Judith, I
15 appreciate your frame of reference. I would
16 offer that you could go -- one could go to a
17 document as publicly available as the
18 Department of the Interior's Strategic Plan
19 where you would see that our goal for our
20 strategic sourcing program is written in
21 such a way that we gauge our success by what
22 level of percentage savings we gain from the

1 GSA schedule price for whatever commodities
2 or services are being obtained in that way.
3 And I think that is a fairly common
4 benchmark in the procurement community. You
5 know, oh, I got six percent off. I got 20
6 percent. Oh, I got 90 percent off.

7 Another example, you know, the
8 family example, I go home last night. My
9 husband is complaining -- who is also a
10 federal employee, complaining about the
11 price of tickets from the City Pair Program,
12 a schedules program. Wow. I went in my
13 mandated -- I won't name the name of the
14 vendor that we use for our etravel program.
15 Went there. The City Pair rate for a trip
16 to Atlanta on such and such a date is \$546.
17 I went out to Orbitz. It was \$180, for an
18 unrestricted ticket. Now how can that be a
19 reasonable price for me to pay?

20 So I regrade that we haven't
21 provided adequate testimony for you to
22 believe that there is empirical evidence

1 that the prices on the schedule aren't
2 necessarily fair and reasonable, but there
3 is certainly more than a sense that they
4 aren't.

5 MR. DRABKIN: I'm sorry, Mr.
6 Chairman, but I think there's a lack of
7 context here. I do think that at many of
8 our meetings, not only were there questions
9 and discussions among the Panel which, by
10 the way, the Panel is empaneled. You were
11 picked to be here because of their
12 experience and you bring your experience to
13 your judgment as you view facts here. And
14 you're expected to do that. But there's lot
15 of discussion and also with witnesses about
16 this whole issue of pricing.

17 The credit schedule's pricing is
18 fair and reasonable by definition, based
19 upon a quantity of one. I think that's what
20 we heard. Some people tried to argue about
21 it, no, that's not true, but I mean in the
22 end we said how did you determine the price?

1 It's a quantity of one. In fact, the
2 schedule's program itself encourages,
3 directs its customers to seek competition as
4 they place orders against the schedule
5 because even with a quantity of one,
6 depending on the time of the year or a
7 particular day of the week, a vendor may
8 wish to reduce the price because they got
9 more stock than they need. It's the end of
10 a cycle or it's whatever.

11 And so to suggest that the
12 schedule pricing based upon one is not fair
13 and reasonable I don't think that's a fair
14 observation, particularly when it's the
15 price to beat. I mean, as a leader in the
16 marketplace, I'd like to be the price to
17 beat. That makes me the benchmark. It
18 doesn't please me that people think that
19 somehow that's a detractor from it. I'm
20 setting the price. You've got to get a
21 better price than that when you buy more
22 than one or when you go out and ask for a

1 ticket.

2 Now as to your specific example
3 about the airline ticket, I'd really like to
4 find out from your husband if it was an
5 unrestricted, totally refundable fare,
6 because generally speaking, I don't think
7 that's the case. I remember that just like
8 for many of the schedule items we set these
9 prices based upon a set of factors which are
10 standard across the enterprise of the
11 government. And when you go out to buy
12 paint or chairs or desks or computers, your
13 requirement may not be the standard
14 requirement that was used to price it at the
15 first place.

16 But I don't think we really need
17 to argue this amongst ourselves because in
18 the end, we all recognize that better
19 pricing can be achieved and we agreed to
20 this in the recommendations by having
21 greater competition, exposure to pricing
22 that's obtained and that this will occur at

1 the order level which in the end is actually
2 where we really wanted to drive a two-step
3 competition.

4 We also recall in the
5 recommendations address that we need to have
6 not just vertical pricing within a company,
7 based upon its best price to its customer
8 who buys similarly to the government, we
9 also said that GSA should add a horizontal
10 pricing view to compare that price to the
11 market to make sure that we're getting a
12 good price for one at both levels, both from
13 the perspective of what they sell to their
14 other customers and from the perspective of
15 what that product or service is being sold
16 for in the market or similar products or
17 services are done.

18 But it isn't a sensitive issue
19 because I believe by either regulation or
20 statute we say that the pricing is fair --
21 is presumptively fair and reasonable at the
22 schedules and then we encourage you to go

1 get competition. Now part of the problem
2 many of have experienced is that our
3 ordering officers don't get competition or
4 they don't ask for discounts or when they
5 ask for discounts and don't get them in an
6 offer, they don't negotiate with the vendor
7 and say I still want a reduction in price.

8 And all those things get to the
9 bottom line, experience that we've shared
10 and the frustrations that we shared which is
11 we could get better pricing for our
12 customers. We're using the GSA prices as a
13 benchmark to get 20 percent off or 6 percent
14 off. A strategic sourcing by its very
15 nature is aggregating requirements instead
16 of buying them one at a time, and changing
17 the way we buy those requirements in order
18 to get better pricing whereas the schedules
19 were set up contemplating that you're going
20 to buy one. You're going to pay for it
21 individually. You're going to have it
22 shipped to an individual location and then

1 you may buy another one. Of course, I could
2 talk forever and I'm stopping.

3 MS. JONES: I just wanted to make
4 a point too concerning the fair and
5 reasonable price issue.

6 One of the things to remember is
7 that the schedules program is open to all
8 responsible sources, so you have all levels
9 of suppliers that you're requiring these
10 products and services from. You know, we
11 have manufacturers, wholesalers, retailers,
12 resellers, and a whole myriad of contractors
13 that provide services at a different level,
14 for example, to acquire consulting services
15 from a highly-specialized company, say
16 McKinsey, for example, versus buying those
17 same consulting services from a company that
18 also does consulting who may be a large or
19 small business in nature, but does not have
20 the specialized expertise that one company
21 would over another. You call it all
22 consulting, but you're going to see a range

1 of prices based on that company's particular
2 expertise. You're going to see a variance
3 based on their locale and where they're
4 located. So there are a lot of variables
5 that go into determining fair and reasonable
6 price. So it's really an adequate apples to
7 apples comparison to say that I saw this
8 same thing at one price versus a range of a
9 much lower price versus a range of a much
10 higher price and that makes it not fair and
11 reasonable based on the variables that I've
12 seen.

13 You have to know what's gone into
14 that analysis to determine that and I think
15 we addressed that in another issue where we
16 talked about transparency and the customer
17 agencies having the information behind the
18 information and the data that established
19 the price as fair and reasonable as another
20 level for the agency customers to determine
21 their requirement to be fair and reasonable
22 once they get the quotes back from the

1 vendors.

2 CHAIRMAN BRANCH: So at the risk
3 of displaying my split personality, I agree
4 with everything that's been said on this.

5 (Laughter.)

6 So let me attempt to harmonize
7 this into a finding. So first, Judith's
8 point. I think your point is very well
9 taken. We don't really have the information
10 systems available to prove definitively what
11 the delta between schedule pricing and task
12 or delivery order pricing is. And I think
13 Debra is right in that if you simply go out
14 at any given instance you can probably
15 finding pricing better than GSA pricing that
16 every one of us in an executive agency who
17 orders from schedule probably has some sort
18 of strategic sourcing initiative to beat the
19 GS price which to David's point is when we
20 look at the basis of schedule pricing at
21 contract award it is, if you will, to use
22 the word the purest form of pricing. It is

1 the simplest case. It does not take into
2 account leverage buying power, strategic
3 sourcing initiatives or anything of the
4 matter which goes to Jackie's point that
5 fair and reasonableness is highly contextual
6 to a situation.

7 So let me offer the following
8 compromise here. Accepting Judith's change
9 so that the major topic head will read
10 "while the Panel determined that competition
11 does occur at the contract level, it is the
12 sense of the Panel that schedule pricing
13 alone does not always result in a fair and
14 reasonable price at the task order level."

15 And to modify subpoint B to
16 David's point, "the basis of schedule
17 pricing is rarely the basis on which
18 ordering agencies buy products and services
19 using schedule contracts" because I think
20 that's the thought we're really trying to
21 get at. You know, we price them on one
22 basis and then we use them in a totally

1 different way to buy products and services.
2 So I would offer that up to be the consensus
3 of the Panel.

4 Tom, you look like you've got a
5 thought.

6 MR. SHARPE: Well, I get it. I
7 sit here and I struggle at our centralized
8 buyer prices things on a quantity of one.
9 But I get it. It's what we agreed to do and
10 I get the thing in the task order that folks
11 are getting better prices and I don't know
12 how often that occurs. I hope it happens
13 more times than not.

14 But then in the aggregate, across
15 all those orders, no one ever goes back and
16 closes the circle and say look it, if we did
17 this, you know, bundled that or DC-based or
18 whatever would be allowed, that's really the
19 real value and that loop never closes and we
20 reset to a quantity of one. And taxpayers
21 today, I would think would be pretty
22 disappointed.

1 CHAIRMAN BRANCH: If you would
2 permit me one minute. So could you frame as
3 one of the -- I think that's a very
4 important point. Do you have language to
5 frame that as a third subpoint under this,
6 that -- and we never go back and look at our
7 actual data to rationalize what our central
8 buy does in setting prices.

9 MR. SHARPE: I guess it's three
10 steps, right? It's what you just said. I
11 thought pretty well about how GSA sets the
12 price. I agree, it's a quantity of one.
13 And the second opportunity is at the order
14 level, right, that the buyer does a good job
15 or not so good job, right?

16 Then the third level, I think, is
17 now focused on do we look at that history
18 and figure out a centralized way to do it
19 for some of that quantity next time around,
20 next year.

21 MR. DRABKIN: And I think Tom
22 makes an excellent point and I don't think

1 that we have discussed this -- I could be
2 wrong, but I don't remember that we've had a
3 real serious discussion on GSA's role
4 outside of the schedule's program to do the
5 strategic sourcing type analysis that Tom
6 mentions. Clearly, if we were able to
7 promise customers a guaranteed minimum of
8 more than one, it could affect pricing, or
9 alternatively, if we were to buy in
10 anticipation of historic quantities, at a
11 single contract, lump sum buy, one-time
12 payment, we could get even further
13 discounts, generally speaking, in the market
14 and then resell that product to our federal
15 customers.

16 It's a model that GSA doesn't
17 currently operate on. It's a model which is
18 not funded, but could be funded through any
19 number of means to accomplish that goal. It
20 would result in lower prices, even the
21 strategic sourcing initiatives that you've
22 chaired for the CAOC have not gone the

1 additional step of saying what if we were to
2 aggregate sufficient funds and go out and
3 make a one-time buy, what would that -- what
4 impact would that be able to make on our
5 buying power with the companies that we buy
6 these things from based upon historic
7 analysis.

8 So I do think you make an
9 excellent point, but it's beyond the scope
10 of the current schedules program and we did
11 not undertake to look at whether we should
12 recommend a change in scope because it
13 changes completely the idea of the schedules
14 program which is we make it available to
15 you, for you to use as you see fit. We
16 don't buy product and resell it. We got out
17 of that business back in the '90s when we
18 got out of warehousing, etcetera.

19 MR. SHARPE: What you said would
20 make sense, but I think there's other ways
21 to do that at the third step. We don't
22 restrict the supply base at all, right? So

1 as soon as you allow anyone in, you know,
2 you're diffusing what volume you have
3 historically. So there's other ways to get
4 to that. If you don't think it has bearing
5 for what we've been chartered to do, I get
6 it, but that's where the money is.

7 MR. DRABKIN: I didn't say that.
8 I just said we didn't discuss it.

9 CHAIRMAN BRANCH: I'm not we did
10 discuss it. So I'm going to just read for
11 the record one of our recommendations. I
12 believe it was Alan's recommendation that I
13 thought started to get at that issue. And
14 it was a recommendation that GSA with the
15 consent and active participation of the
16 ordering agencies establish a process that
17 will enable ordering agencies to collect and
18 report on purchasing experiences of buying
19 activities including quantity and quality
20 considerations as well as price.

21 So we did have some discussion
22 with respect to, I think, the point that

1 both you and Tom are making in that we don't
2 use the transactional data to get better at
3 any level. And we need to do that.

4 MS. JONES: And I was saying that
5 that information would be useful, especially
6 for establishing prices for the option
7 period at the schedule level. If we were
8 able to see what the contractors were
9 consistently selling to federal agencies,
10 then we could reset those prices when we go
11 to renegotiate option periods.

12 CHAIRMAN BRANCH: So I think we
13 may have gotten at that. Let me make a
14 recommendation going back to the third topic
15 level under summary findings. So to Tom's
16 point, I think it might be useful to add a
17 sub-bullet C that says "GSA and the agencies
18 do not currently use ordering agency
19 transaction history to improve schedule
20 level pricing."

21 Is that kind of a fair
22 representation of your thought, Tom?

1 MR. SHARPE: I think that's
2 accurate. I don't even think as a strategic
3 approach it's even being considered or
4 talked about or -- you know, your statement
5 is accurate.

6 CHAIRMAN BRANCH: Okay, well,
7 we're in a finding section.

8 MR. SHARPE: I won't get too
9 confused when we talk McKinsey, right? I'm
10 just -- how about some of the basics, you
11 know? Office supplies.

12 CHAIRMAN BRANCH: Let's -- if you
13 would agree that that is an accurate
14 reflection of finding of fact as we see it
15 or a sense of us, maybe we want to revisit
16 that particular fact when we look at the
17 recommendation. I agree with you. We don't
18 do any strategic sourcing government-wide.

19 So I think we all agree on that
20 fact.

21 We agree on the fact that the
22 agencies don't use that data either in

1 conjunction with GSA to get better, so maybe
2 the place to deal with your concern that we
3 ought to be doing that is in the
4 recommendation section. So as we go through
5 recommendations, I'll exercise my
6 prerogative as the chair to entertain any
7 additional recommendations that we make that
8 may come out of today's discussion. I'd
9 like to limit them to the discussion of
10 today, but I think that's fair.

11 MR. SHARPE: One way to influence
12 would be that fair and reasonable
13 determination for a CO in the field to rely
14 on it, but it only works if you're buying
15 the one.

16 MR. DRABKIN: Assuming that you
17 haven't had -- you haven't asked for a
18 discount and you haven't gotten competition
19 at the order level which is what essentially
20 they're supposed to do anyway.

21 But the one other point I'd like
22 for you to consider as we think about a

1 possible additional recommendation is that
2 GSA as a nonmandatory source for the
3 majority -- well, for everything we've
4 talked out, is a nonmandatory source and you
5 made references to GSA as a centralized
6 buyer. In fact, GSA is not a centralized
7 buyer. We are a centralized provider of
8 contracts, but we buy very little and then
9 resell it to our government customers.

10 Personally, I think if we were a
11 corporate entity and we viewed the
12 acquisition across the federal government as
13 a horizontal activity, I think there are
14 things we would do differently because as
15 you know better than anybody else here, Tom,
16 probably I mean strategic sourcing is a
17 spectrum. At one end in the strategic
18 sourcing analysis, you decide that there are
19 things which we cannot anticipate buying and
20 so we plan, in order to satisfy those
21 requirements to write contracts as those
22 requirements come up and on the other end,

1 there are things we know we're going to buy
2 and basically the same quantities, year in
3 and year out, and the best way to buy those
4 in terms of price is to run a competition,
5 somebody wins, buy it and then we get a
6 better price. That's not how we, GSA,
7 operates as a central buyer. That's not the
8 mission, you as our customer, have really
9 give us, nor is it one that GSA has decided
10 to take on kind of in the build it and
11 they'll come kind of theory.

12 So I think your point is
13 excellent. I think it's something that
14 should be considered and I think a
15 recommendation that at least forces GSA to
16 look at that regardless of what they decide
17 to do with it, I think it may also be
18 appropriate, because ultimately the tax
19 payer is best served when we have a total
20 strategic sourcing analysis that does break
21 up our spend into those various categories
22 and then we decide, collectively or

1 individually, how we're going to address
2 that.

3 The taxpayer is disadvantaged in
4 the current process because they aren't
5 getting the best price. And office supplies
6 may be an absolute perfect example of
7 something where we could really drive the
8 price down, save the taxpayer dollars, but
9 because of the way we all choose to do
10 business, we don't do that.

11 CHAIRMAN BRANCH: So I think
12 where we are is to add a third thought in
13 that finding that addresses the fact that
14 well, we don't use the transaction data
15 strategically. I think we will consider
16 when we start to review our recommendations
17 whether we want to add an additional
18 recommendation which addresses specifically
19 whether GSA should have a role as a central
20 buyer as opposed to simply -- or I guess a
21 central negotiator as opposed to simply a
22 facilitator of ordering instruments. Is

1 that kind of a fair -- does everybody think
2 that's a fair way to proceed through this?
3 Okay.

4 Are there any other thoughts that
5 we want to add under summary finding number
6 one? So we've agreed that it is the sense
7 of the Panel that competition does occur at
8 the contract level, that the schedule level
9 pricing alone does not result in a fair and
10 reasonable price at the task order level for
11 those three reasons. We have service with
12 the statement of work. It's impossible to
13 price those at the schedule level.
14 Purchases, basically, I think the way we
15 reworded that, that the basis of schedule
16 pricing is rarely the basis on which
17 ordering agencies actually buy products and
18 services using the schedules. And thirdly,
19 GSA and the agencies don't currently use
20 agency ordering transaction history to
21 improve schedule level pricing.

22 MR. PERRY: Mr. Chairman? When

1 we do write this in more detail, I guess I
2 would -- there's no issues with this. I
3 would like -- I feel like based on my
4 review, going back, that this section
5 reflect what myself feels reluctantly
6 accepting that there is some competition at
7 some minimalist level at the contract
8 schedule award and that -- and also
9 acknowledge that the awarding, GSA is the
10 awarding body of the schedule contract, is
11 working with a very limited set of data and
12 information, the majority of which is only
13 what comes from the prospective schedule
14 contractor providing to that person as the
15 basis for making that fair and reasonable
16 determination.

17 I think we came to -- I think we
18 accepted that, but I sense a lot of
19 reluctance in getting there, but we did have
20 a feeling that at least the minimum
21 requirements were met in order to at least
22 establish the contract itself, but it was

1 certainly probably wanting of what we would
2 expect normally would occur when you award
3 such a contract.

4 And I think some way, more
5 artfully said than I just did, that that
6 sense is there, that we didn't come to that
7 lightly that conclusion and it was with some
8 reluctance based on the context of how GSA -
9 - what it was left with in order to come
10 back.

11 MR. DRABKIN: Tom?

12 MR. SHARPE: I agree with that.
13 You're elaborating on kind of step one,
14 right, what GSA does and we talked at length
15 about three. Even at two, right, the prices
16 are competed, maybe some volume influence at
17 the second step, but people help me with the
18 rules. It's based on suppressed
19 competition, right, three bids?

20 MR. DRABKIN: Well, actually, at
21 the time we began our discussions, the rules
22 on the schedule said that you had to

1 consider three offers, not get three bids.

2 But now that -- solicit three.

3 But you didn't have to even get
4 three bids. You could just get one. The
5 rules now that will be implemented this year
6 as a result of the NDAA which I do mention
7 here because we talked about requiring the
8 Section 803 competition requirements, those
9 rules have been mandated by statute now, so
10 they will have to either solicit everyone on
11 the schedule, get three bids, or do a
12 justification as to why they -- establishing
13 how they got, why they got maximum
14 competition without getting -- without doing
15 the first two.

16 I'd also like to point out,
17 Glenn, and maybe I misunderstood your point,
18 maybe point out is the wrong words, but we
19 did and I think if you look at my draft,
20 page 6 of 11, now we begin talking about the
21 issue of products and the price reduction
22 clause and competition. We did recommend,

1 we agreed to recommend that there be not
2 only the vertical pricing which is currently
3 done on the schedules, but there also be
4 horizontal pricing within the market to make
5 sure that the pricing that we accepted from
6 the vendor which might be vertically correct
7 in terms of how they priced to their best
8 customer also was -- correct is the wrong
9 word -- was competitive with the same or
10 similar items in the market and then we went
11 further on to recommend on the next page, I
12 think page 7 of 11, that GSA obtained and
13 disclosed to both the contracting and
14 ordering officers more pricing information
15 so that they could make better pricing
16 judgments both at the schedule pricing level
17 and then the ordering contracting officer
18 would have that information available to
19 make better pricing judgments at the
20 ordering level.

21 Now --

22 MR. PERRY: I agree. I just

1 wanted to tee it up.

2 MR. DRABKIN: Oh here. Okay, I'm
3 sorry. Which I think is an excellent
4 recommendation. Although we report these as
5 being majority, I believe this was unanimous
6 for most of those recommendations.

7 MR. PERRY: I just wanted it
8 adequately tee'd up.

9 MR. DRABKIN: Okay.

10 MR. SHARPE: David, if I
11 understood you correctly, soon all schedule
12 holders need to be quoted?

13 MR. DRABKIN: Soon the rule will
14 read that in order to run a competition on
15 the schedules you must either solicit all
16 the schedule holders for the item that
17 you're buying. And by the way we heard
18 testimony about the e-buy tool. And you may
19 also remember we heard that DOD's experience
20 is that doesn't result in oodles of bids,
21 but they're getting now as a result about an
22 average of three I think it is, five to six,

1 fix to six bids as a result. Or the first
2 choice is solicit everybody or solicit
3 whoever you want, but make sure you get
4 three bids which is a crap shoot. Or the
5 third piece, do a justification that
6 explains why you got maximum competition if
7 you didn't solicit everybody or you didn't
8 get three bids. That will not be, that has
9 been the rule at DOD for three, four, five
10 years -- implemented in 2002, wasn't it, the
11 statute? And now it's the rule for all
12 civilian agencies.

13 It actually talks in terms of all
14 IDIQ contracts, but fair opportunity defined
15 in FASA already basically does that. It
16 requires you to consider all GWAC holders,
17 except in four circumstances. And the
18 language in this also identifies those four
19 circumstances, logical follow-on, need to
20 satisfy a minimum, the minimum is on the
21 schedules are minimum, and bad past
22 performance on the last order and there's

1 one other exception, I can't remember it
2 right now off the top of my head.

3 CHAIRMAN BRANCH: Before we lose
4 Glenn's thought, I just want to make sure
5 I've captured it properly.

6 So it is not an issue of adding
7 another sub-thought, but as we expand these
8 thoughts into an outline, what I think I've
9 heard you say, is that we should make it
10 clear that the Panel considered that finding
11 very carefully and came to that conclusion
12 reluctantly, primarily because the GSA
13 regulation calls for using a very narrow
14 slice of data, i.e., the vendor's commercial
15 sales data to determine price reasonings.
16 Is that essentially the context in which you
17 want us to cover these three bullets?

18 MR. PERRY: Yes.

19 CHAIRMAN BRANCH: Okay, I just
20 wanted to make sure I had your thought
21 right.

22 MR. PERRY: It doesn't include a

1 traditional -- I think someone called it
2 head-to-head competition.

3 CHAIRMAN BRANCH: Right.

4 MS. SCOTT: I was going to
5 actually offer some wording up.

6 CHAIRMAN BRANCH: Okay.

7 MS. SCOTT: Schedule prices in
8 some circumstances are not -- wait, excuse
9 me. Schedule prices in some circumstances
10 are based on a limited data set versus based
11 on head-to-head competition.

12 CHAIRMAN BRANCH: Okay, so we
13 think -- do you that thought --

14 MS. SCOTT: I didn't want to
15 presume for everybody.

16 MS. NELSON: I mean just to
17 elaborate, they're never based on head-to-
18 head competition. When a schedule contract
19 is awarded, the contracting officer has
20 within their toolbox to do market research
21 and clearly doesn't want to award a contract
22 for similar items that are already on

1 schedule, except when they fall within
2 reasonable percent of that which is already
3 on schedule. But it's never going to be
4 based on head-to-head competition at the
5 award, you know, like a Part 15 award. So
6 it's not in some circumstances. They have
7 multiple tools within that toolbox to be
8 able to determine that their prices are
9 competitive to those that are on schedule,
10 but it's not going to be a head-to-head
11 competition.

12 MR. SHARPE: And how does 4A
13 work?

14 In that statement, there's both competition
15 and fair and reasonable price. I think it's
16 very misleading. So there's never
17 competition in terms of price.

18 CHAIRMAN BRANCH: Well, I think
19 we have to be really careful about this.
20 And again, I was trying to word this in a
21 way to stay consistent with the wise counsel
22 I knew I was going to get from counsel.

1 (Laughter.)

2 So the words I picked, I tried to
3 stay consistent with our discussion about
4 the statute. The statute essentially says
5 "however the Administrator thinks we do this
6 reasonably." In his opinion, he meets the
7 objective of the statute which is lowest
8 overall cost to the government. He has the
9 right to determine (a) that it's
10 competitive, and (b) that it's fair and
11 reasonable.

12 So I think we really need to be
13 really careful here about applying our, if
14 you will, traditional parts 14 and 15
15 paradigm to reasonableness on the schedule
16 because it isn't the same paradigm. So my
17 words were really attempted to get at that
18 and maybe as we flesh this section out, we
19 need to make it really clear that the
20 assumptions about fairness and
21 reasonableness and competition are solely
22 within the purview of the Administrator

1 pursuant to the Act and not necessarily do
2 they need to be consistent with the Act with
3 respect to other types of procurement.

4 MR. SHARPE: I guess I'm a little
5 lost. Where it says specific meanings to
6 procurement folks, so we're backing into
7 this because the Administrator believes he's
8 achieving lowest overall cost either by
9 their competitive --

10 CHAIRMAN BRANCH: I didn't say
11 the Administrator believes that. I said he
12 has the authority to determine what that
13 reality is.

14 MS. THOMPSON: Our limited MAS
15 authority under 41 U.S.C. 259(b) does say
16 that the procedures for the schedule
17 contract are competitive procedures. They
18 are competitive procedures. So --

19 CHAIRMAN BRANCH: So
20 theoretically
21 -- exactly.

22 MR. PERRY: It is what it is. We

1 understand the findings and the
2 recommendations that sort of ties up to say
3 the recommendations we're making is to
4 address the deficiencies that we feel are
5 left based on that approach.

6 CHAIRMAN BRANCH: I think the
7 solution to this is probably to bolster the
8 narrative on this finding with what the Act
9 says with respect to schedule contracting.
10 Tom, I agree with you, okay? In our world,
11 putting out a solicitation, it isn't
12 competitive. But as Dr. Halprin who taught
13 me tax accounting many years ago says the
14 code doesn't have to make sense, it is so
15 because the code says so.

16 So we're dealing with one of
17 those situations where the code basically
18 says the statute says by definition these
19 are competitive procedures. I mean absent
20 abusing his authority, he could literally
21 stand on the corner of 23rd and Crystal
22 Drive here and just hand out contracts and

1 say that was the result of a competitive
2 procedure.

3 MR. SHARPE: I get it. So we're
4 going to restate what the Act says. The
5 context here is how the prices are derived,
6 right? And what we're learning is, at least
7 in terms of competing to get the price is
8 not the case. They're not competed.
9 They're set up in a quantity of one, absent
10 the changing rules, right, soon to hit the
11 civilian world. The order price is based on
12 suppressed competition and we never close
13 the circle on routine and historical
14 volumes. This is not a good pricing
15 program.

16 MR. DRABKIN: And I think we
17 identified that which is why we've made
18 recommendations to improve it, although I
19 mean historically I think it's fair to say
20 that at least on average, hasn't been bad.
21 Not the best, but hasn't been bad.

22 I mean we get reviews and I think

1 somebody referred to them in one of the
2 testimonies. IGs and GAO reviewed these
3 programs periodically and frequently over
4 the last two decades, and as a general rule
5 they found that we do get competitive
6 pricing, not the best pricing, and that's
7 part of the problem. I mean one of the
8 discussions and I tried to address it
9 somewhat in how I wrote up explanations for
10 the recommendations is we keep forgetting
11 that the goal of the schedules program, the
12 lowest overall cost, is different than the
13 goal of your ordering officer which should
14 be best value defined by the nature of the
15 requirement. And sometimes for pencils that
16 may be the lowest price, and sometimes it
17 may be a higher price, but with a contractor
18 who performs better generally over time or
19 who's done this work and the risk is lower
20 by doing business with him.

21 And so to focus -- it's
22 difficult. But let's keep in mind that

1 there are unfortunately, multiple
2 applications of the same term of art which
3 have different meanings because not only
4 does the Federal Property Administrative
5 Services Act say that these are competitive
6 processes, SECA, which defines competition
7 for all of us also says these are
8 competitive processes and we know that that
9 means different things based upon how
10 they're operated.

11 But you're right, the
12 uninitiated, even amongst ourselves who read
13 this, might be confused because they don't
14 understand that there are different programs
15 set up different ways to achieve different
16 outcomes.

17 CHAIRMAN BRANCH: So just to
18 review the bidding on this one, I have the
19 following notes to myself. So we need to
20 introduce this particular finding by
21 narrowing our definitions of these terms to
22 the Act that allows GSA to put in place

1 multiple awards schedules so as not to
2 confuse those of us who tend to use them in
3 the broader -- as a broader term of art.

4 We need to make it very clear to
5 the reader that this was a carefully
6 considered set of conclusions and that we
7 came to this finding reluctantly and we came
8 to this finding reluctantly for five
9 reasons. One, this clearly has no
10 applicability when we require a statement of
11 work for services. Two, the basis of
12 schedule pricing is rarely the basis on
13 which the ordering agency buys products and
14 services on the schedule. Three, the
15 pricing is based on suppressed, and I have
16 suppressed in quotes, competition.

17 The old model of you just have to
18 consider three sources, you never really are
19 required to aggressively seek competition
20 under the schedule. Four, that GSA and the
21 agencies do not currently use ordering
22 agency transaction history to improve

1 schedule level pricing. And five, schedule
2 level pricing is not based on head-to-head
3 competition.

4 MS. SCOTT: Elliott, could you go
5 back to the third one again?

6 CHAIRMAN BRANCH: Yes.

7 MS. SCOTT: My question is are
8 you talking -- I'm hearing that as though
9 you're talking in terms of ordering as
10 opposed to establishing the schedule. Am I
11 missing something?

12 CHAIRMAN BRANCH: No, I'm sorry.
13 I'll clarify that. I was talking about the
14 schedule pricing not being based on head-to-
15 head competition.

16 So ordering, I mean we often do,
17 we drive our people, you go get competition
18 head-to-head for the task order, but on the
19 scheduling it's basically the narrow slice
20 of the contractor's commercial sales
21 practices and whatever other tools that GSA
22 contracting officer might decide to use to

1 determine price reasonableness. So I'll
2 just modify that letter C to be schedule
3 pricing is based on suppressed competition
4 and the word in the report, that's just a
5 shorthand to myself.

6 Are we comfortable with the first
7 topic under that summary finding as we've
8 explained it? Great.

9 (Pause.)

10 Does anybody have any comments on
11 I guess the next finding which is fair and
12 reasonable pricing matters at the schedule
13 level?

14 MS. THOMPSON: Excuse me, can we
15 go back to capital A. I just want to see
16 what -- sorry.

17 (Pause.)

18 CHAIRMAN BRANCH: Counselor, if
19 you are not comfortable with that speak now
20 or forever hold your peace.

21 MS. THOMPSON: Can we go back up.
22 I'm still on that A. Just a possibility,

1 the second phrase of that sentence, first
2 sentence under A, schedule level pricing
3 alone does not always result in a fair and
4 reasonable price for the ordering activity's
5 requirement.

6 CHAIRMAN BRANCH: I think the
7 assumption is you say that the task or
8 delivery ordering level that's clearly the
9 ordering agency's requirement because you
10 don't have those at GSA. So I think we've
11 captured --

12 MS. THOMPSON: Okay, all right.

13 CHAIRMAN BRANCH: But you're
14 right, I think let's make that test delivery
15 order.

16 (Pause.)

17 So our finding B now, fair and
18 reasonable pricing does matter at the
19 schedule level.

20 MS. NELSON: I have a comment on
21 subparagraph 2. I would recommend a change
22 that reads schedule pricing acts as a

1 ceiling. I don't know if I would change
2 that to benchmark, but from which -- or
3 ceiling, from which agency contracting
4 officers must seek better pricing as
5 appropriate.

6 It's only below certain levels
7 that they should seek it and the
8 regulations, actually, direct that you must
9 seek a price reduction. I will say in
10 recently reading this last year's customer
11 compliance survey, there is a serious
12 deficit in customer contracting officers
13 seeking price reduction clauses when they
14 should be.

15 CHAIRMAN BRANCH: So we'll change
16 the word should to must.

17 MS. NELSON: As appropriate.

18 CHAIRMAN BRANCH: Okay, so that
19 should read must seek better pricing as
20 appropriate.

21 MS. JONES: I have a comment
22 about subparagraph one. When you say

1 contract level pricing, are we talking about
2 schedule level pricing there?

3 CHAIRMAN BRANCH: Yes.

4 MS. JONES: So should we change
5 that to be consistent?

6 CHAIRMAN BRANCH: Yes, we'll
7 change that to be consistent.

8 MS. THOMPSON: I also have a
9 question, when you say this is -- contract
10 level pricing is an important market
11 research device, what is your intent there
12 because I'm not --

13 CHAIRMAN BRANCH: I guess my
14 intent was that at the end of the day, if I
15 work for Tom, either one of the Toms, as a
16 matter of fact, and I discard the schedule
17 level pricing as being the best pricing, it
18 at worst provides with a market research
19 tool. It gives me a baseline to do an
20 independent government estimate. It gives
21 me information that tells me what the market
22 generally runs for a certain category of

1 good or service. It gives me kind of a high
2 and a low and a medium. So it's a great
3 market research tool, even if I decide I
4 need to seek better pricing from that
5 schedule price.

6 MS. SONDERMAN: And if I recall,
7 this was discussed in the context of should
8 we abandon pricing at the schedule contract
9 level entirely and only have pricing at the
10 task order or delivery order level. And so
11 I agree it is a very valuable market
12 research tool.

13 MR. PERRY: There is some pricing
14 information or otherwise we would not be
15 able to get hold of.

16 MS. THOMPSON: I'm just trying to
17 make sure we're talking in the context of
18 the schedule and not market research for
19 Part 12 or Part 15 or you know, that's -- my
20 concern is I'm just using that --

21 CHAIRMAN BRANCH: Well, we can
22 expand that to say it's an important market

1 research tool for schedule purchases and
2 other types of procurement.

3 MS. THOMPSON: Okay.

4 CHAIRMAN BRANCH: Because it is.
5 That's a great place, the schedule is a
6 great place to go whether you're going to do
7 it yourself or do it under the schedule.

8 MR. DRABKIN: And just a minor
9 point, I think is FAR Part 11 market
10 research, that's right, doesn't make a
11 distinction between whether you're doing it
12 for 12, 13, 14, 15 or schedule. It talks
13 about market research.

14 MS. THOMPSON: I just wanted to
15 find the context here, because I know that a
16 lot of times I've heard ordering activities
17 do use the schedules as their market
18 research for other --

19 MR. DRABKIN: Actually, I think
20 we heard people testify that they go to GSA
21 Advantage to do their market research.

22 MS. THOMPSON: Right.

1 MR. DRABKIN: And then they use
2 that pricing information to go out and
3 determine whether or not the prices they've
4 received are fair and reasonable, again,
5 using the schedule price as the benchmark
6 and if they got a better price, then they
7 obviously got a fair and reasonable price,
8 not necessarily so, but that's the logic
9 they presented to us and the testimony we
10 heard.

11 MS. NELSON: Out of curiosity and
12 not part of our findings or recommendations,
13 when agencies use schedule pricing as a
14 benchmark for you all to do your Part 15
15 competitions, do we actually get a finder's
16 fee on that market research?

17 I mean our COs are doing the
18 research, I guess.

19 CHAIRMAN BRANCH: We consider
20 that information in the public domain.

21 (Laughter.)

22 MR. DRABKIN: It's the service we

1 provide all of our customers to better the
2 procurement process and give a better result
3 to the taxpayer.

4 MR. PERRY: I think as a third
5 item, Elliott, I believe we had a
6 conversation that again it was after quite a
7 bit of deliberation and maybe consternation,
8 but didn't we -- it was important because we
9 needed that determination in order for GSA
10 to actually consummate a contract, schedule
11 contract versus having something else, not
12 having a contract.

13 CHAIRMAN BRANCH: They had to
14 have pricing in order to get to a contract.
15 Is that required by statute or regulation?
16 Statute.

17 MS. SCOTT: I'd offer -- and you
18 might change the word device to resource and
19 that would solve the problem.

20 CHAIRMAN BRANCH: I think we
21 changed it to tool.

22 MS. SCOTT: Okay, tool, device,

1 resource.

2 CHAIRMAN BRANCH: That's --

3 MS. SCOTT: I found it to be a
4 very handy place to verify when you're
5 getting ODC's proposed on a cost
6 reimbursable contract in FAR 15, a great
7 place to double check whether the ODC
8 pricing that you're getting quoted is good.

9 CHAIRMAN BRANCH: All right, any
10 other comments on that second finding?

11 So I think the finding now reads
12 as follows: Fair and reasonable pricing
13 matters at the schedule level. And the
14 first thought to support that is schedule
15 pricing is important as a market research
16 tool for schedule purchases and other types
17 of procurement. Two, schedule pricing acts
18 as a ceiling from which agency contracting
19 officers must seek better pricing as
20 appropriate. And three, statute requires
21 pricing at the schedule level.

22 MR. CHVOTKIN: For a contract

1 formation?

2 CHAIRMAN BRANCH: Okay, for
3 contract formation.

4 Okay, any comments on the second
5 finding, summary finding? All right, so we
6 think we've expressed the thoughts we want
7 to go into that?

8 Okay, looking at Pat's computer
9 it's 10 of 12 and this is probably a good
10 place to stop and have lunch. So let's --
11 there are plenty of places to eat here. And
12 since we all ought to be able to get back
13 comfortably in an hour, let's say that we're
14 back at 10 of 1 and we'll pick with summary
15 finding number three.

16 (Whereupon, the above-entitled
17 matter went off the record at 11:50 a.m. and
18 resumed at 1:06 p.m.)

19

20

21

22

1 MS. THOMPSON: Can I suggest a
2 modification for C?

3 (Laughter.)

4 And that would read, I kind of
5 want to turn it around a little bit.
6 Instead of as stated, it would read GSA's
7 procedures are frequently inadequate in
8 ensuring fair and reasonable prices and
9 maintaining the pricing relationship with
10 the basis of award customer.

11 CHAIRMAN BRANCH: Okay, I have no
12 heartburn with that suggested wording.
13 Again, let me just put this in context. I
14 pretty much took the wording and all the
15 findings from our five question frameworks
16 so it's the only reason it's worded that
17 way. If we want to soften that language, I
18 have no philosophical issues with that.

19 MS. THOMPSON: I must admit I'm
20 really much into editing. I can't resist.

21 CHAIRMAN BRANCH: My father
22 taught high school English for 25 years so I

1 understand your pain.

2 MS. THOMPSON: Adequate in
3 ensuring fair and reasonable prices.

4 MS. SCOTT: Ensuring or
5 demonstrating?

6 MS. THOMPSON: And after prices
7 and maintaining the pricing relationship
8 with the basis of award customer.

9 It shouldn't change the intent.
10 I just want to make sure it's not either,
11 but I was just --

12 CHAIRMAN BRANCH: I have no
13 objections to the recommended change. Do we
14 have a consensus that that's reflective of
15 our finding?

16 Jackie?

17 MS. JONES: Well, I have
18 something. Where we said in 4 subparagraph
19 A, where we added "resulted in a fair and
20 reasonable price at the task order level" do
21 we want to also --

22 CHAIRMAN BRANCH: Jackie, if you

1 could hold off on that for one minute. Do
2 we have -- are we okay with Thedlus'
3 proposed wording for this one and then we
4 can go back up to --

5 MS. JONES: That's where I'm
6 going with this one, the one that Thedlus is
7 proposing.

8 CHAIRMAN BRANCH: Okay.

9 MS. JONES: After "ensuring fair
10 and reasonable prices" do we also say at the
11 task order level, at that juncture because
12 we're talking about fair and reasonable
13 prices where?

14 MS. SONDERMAN: At the schedule
15 level.

16 CHAIRMAN BRANCH: Let's go back
17 to the tape here. My intent here is to stay
18 faithful to the framework that we used to
19 deliberate. So while there may be more
20 clarity around that because of our
21 deliberations, I don't want to lose the
22 spirit of the original framework because I

1 think it kind of gives the reader a flow as
2 to how we thought about it at the time we
3 were deliberating.

4 And so I just want to verify what
5 we meant by that question.

6 MS. SONDERMAN: Isn't it true
7 that GSA determines that the schedule price
8 is fair and reasonable?

9 MS. NELSON: If that's the case
10 then the edit by Thedlus, then I don't agree
11 with the edit by Thedlus.

12 If we are stating that we're
13 discussing at the schedule price, then I
14 take -- then the edit by Thedlus, I would
15 rephrase the edit because by definition the
16 contracting officer makes a determination of
17 fair and reasonable pricing at the schedule
18 level.

19 MS. THOMPSON: How would you edit
20 it?

21 MR. CHVOTKIN: Mr. Chairman, I
22 think now it just raises the conundrum we

1 face and I think we benefit even in the
2 summary discussion and more appropriately in
3 the recommendation discussion to separate
4 out the decisions and actions that GSA takes
5 in forming the schedules and the decision it
6 makes that fair and reasonable prices at the
7 schedule level and separate out the actions
8 that the ordering activities take, because
9 the contracting officer at the order level
10 makes a different decision, fair and
11 reasonable price, at the transaction level.

12 In an effort to try to simplify
13 some words, I think we're creating -- we
14 understand it here, and so I'm not really
15 worried about wordsmithing this set of
16 outlines, as long as the writer is going to
17 be clear. But I think it would help
18 enormously in clarity to separate out the
19 decisions and actions that GSA takes at
20 formation and the actions that the ordering
21 activities take at the transaction level.

22 CHAIRMAN BRANCH: Alan, I think

1 that's a point well taken.

2 MS. THOMPSON: Well, actually, I
3 don't know that fair and reasonable pricing
4 applies at the order level at all. It's
5 really best value at the order level, so --

6 CHAIRMAN BRANCH: Well, not
7 necessarily.

8 MS. THOMPSON: In terms of
9 procedures.

10 MS. SONDERMAN: I thought the FAR
11 said that the prices have already been
12 determined by GSA to be fair and reasonable
13 and agencies are encouraged or required to -
14 -

15 MR. DRABKIN: It's another
16 situation where we have terms of art that
17 are used to describe different processes at
18 different times.

19 A contracting officer under FAR
20 Part -- I can't remember which part it is,
21 you got me, I'm stumped. Actually, it's
22 probably in all four places, in 12, 13, 14,

1 and 15. The contracting officer is
2 determined -- is required to determine at
3 time of contract award and this would also
4 be true for an ordering officer, that the
5 price is fair and reasonable.

6 In FAR Part 15, we tell them that
7 the goal of the pricing objective is to get
8 best value which may -- which requires a
9 consideration of at least three mandatory --
10 three, two -- price, past performance, or
11 mandatory, and then whatever other source
12 selection, nonprice factors they want to
13 add.

14 And they're required to determine
15 best value, but no matter what, best value
16 is one determination, but one of the things
17 the contracting officer has to do at the
18 time of contract award, along with
19 determining that a contractor is responsible
20 immediately prior to making the award is
21 also to determine that the price is fair and
22 reasonable and that definition of fair and

1 reasonable is then made in the context of
2 the best value source selection criteria
3 that they establish.

4 And the way we're discussing it
5 here almost makes it sound like best value,
6 and fair and reasonable might be separate
7 and they're not. They're not competing.
8 It's just that the price may be not as
9 important as part performance or as
10 important as technical, but the contracting
11 officer in light of his best value source
12 selection factors has to determine that he's
13 gotten best value and therefore the price is
14 fair and reasonable, even though the price
15 taken in the abstract might be higher than a
16 price he could obtain, but since it's not
17 taken in the context of beset value, then
18 you're not -- you're -- it becomes -- I
19 think as Alan said, I think we all
20 understand it, but the writing is
21 complicated, but the suggested fair
22 -- the fair and reasonable issue is clear.

1 The schedule's program, I think it's FAR
2 Part 8, we say it is fair and reasonable and
3 you can use it based upon that.

4 But when you do your best value
5 analysis in your ordering, that price may
6 change. It doesn't change the fact that the
7 price in the schedule is fair and
8 reasonable, but the contracting officer at
9 the time he places -- or she places the
10 order, has to say it's now again fair and
11 reasonable in the context of the best value
12 decision that he's made. Is that right?

13 Alan, are you with me?

14 MR. CHVOTKIN: Absolutely right.
15 As to the last sentence, absolutely right.

16 (Laughter.)

17 CHAIRMAN BRANCH: Okay, so why
18 don't we try getting at this backwards?
19 Because I think what's happened here is when
20 we frame this question, we knew what we
21 meant and the discussion and deliberations
22 around this question were reflective of what

1 we meant and now our larger task is to
2 explain it to a wider audience. So we may
3 have to modify those words in order to
4 maintain the intent of our framework.

5 So I'd ask us to kind of answer
6 two questions. One is if we look at the
7 four thoughts under that particular finding,
8 do we agree on them? And if we agree on
9 those four findings, then what language
10 would that suggest for a summary finding?

11 MS. SCOTT: I would suggest that
12 it says -- there's a lack of confidence that
13 GSA procedures are adequate to ensure prices
14 are fair and reasonable and the pricing
15 relationship is maintained. So make it a
16 confidence factor, as opposed to sounding
17 like it's something we don't do or it
18 doesn't get done. Because it's a
19 perception, it's an issue of perception as
20 to how GSA folks feel that they do it and
21 how client agencies understand how we do it.

22 There's a lack of confidence that

1 GSA procedures are adequate.

2 MS. SONDERMAN: But we are
3 talking about pricing at the schedule
4 contract level. Do we agree on that?

5 MS. SCOTT: Absolutely.

6 CHAIRMAN BRANCH: Yes, yes.

7 MR. CHVOTKIN: Except that number
8 four talks about the transaction level.

9 CHAIRMAN BRANCH: Well, number
10 one really one says there's a lack of
11 transparency on the part of ordering
12 activities as to what the basis of the
13 schedule pricing was.

14 MS. NELSON: And that goes to the
15 recommendation that there be some type of
16 database or otherwise disclosure of what, in
17 general, was the most favored customer.

18 MR. PERRY: When we get to four I
19 was going to ask to be added to talk about
20 making available what was the basis of award
21 to the CO so they know to what extent they
22 have to fill in the gaps in order to come to

1 that best value determination.

2 MS. NELSON: I think that tees up
3 that recommendation.

4 MS. JONES: I have a fundamental
5 problem with this whole statement because
6 one is an issue of contract formation where
7 we talk about the fair and -- ensuring fair
8 and reasonable prices. And when we say
9 maintaining the pricing relationship, that's
10 a function of contract administration.

11 So what we want to say rather
12 than maintaining the pricing relationship,
13 establishing the pricing relationship
14 because those are two contract formation
15 functions.

16 MS. THOMPSON: Or we could say
17 both, establishing and maintaining.

18 CHAIRMAN BRANCH: Yes, I think
19 that really was the spirit of our
20 discussion, that the price reduction clause
21 does nothing for you in establishing a
22 contract price and frankly, it doesn't do a

1 whole lot in maintaining that relationship
2 between the government and the vendor with
3 respect to the price that was determined at
4 contract formation.

5 MS. SONDERMAN: Right, and I
6 think this follows on to Tom's comments that
7 we were discussing before the lunch break
8 that we don't have a mechanism to feed -- we
9 the ordering agencies, don't have a
10 mechanism to feed back information to you
11 that's instructive to the GSA contracting
12 officer in maintaining the pricing
13 relationship or changing the pricing
14 relationship, you know, to reflect what the
15 market place is actually.

16 MS. JONES: But the ordering
17 activity has no input in that -- in
18 establishing that. That's strictly between
19 GSA and the contractor.

20 CHAIRMAN BRANCH: Well, yes, and
21 I think we understand that. And I'll speak
22 from an ordering activity perspective. I

1 accept that by statute and regulation that
2 the Administrator has the right to deem that
3 fair and reasonable. As someone who is
4 experienced in cost and price analysis, I
5 will not accept that intellectually. I have
6 no confidence in that price being fair and
7 reasonable because I believe that the fair
8 and reasonable price is highly contextual
9 and that there is no way that I'm going to
10 buy an item on that basis. So I think it's
11 a fair statement to statement and I open the
12 floor to my colleagues from other ordering
13 agencies to chime in, that the average
14 contracting officer isn't willing to accept
15 that, prima facie, for many delivery order
16 procurements, that that's absolutely a
17 reasonable price, that they're not going to
18 go any further, they need go no further and
19 ask for pricing discounts or concessions.

20 And I think that's really what
21 we're trying to express there.

22 MS. JONES: When we established

1 the prices at the schedule level, it is
2 strictly -- and I say this cautiously,
3 because I see David looking at me, but it is
4 strictly --

5 (Laughter.)

6 Well, it's primarily based on the
7 commerciality of that product or service in
8 the commercial marketplace. So in
9 establishing fair and reasonable, it very
10 well may be based on the commercial
11 marketplace whereas the other tests for
12 reasonableness is when you develop a
13 definitive requirement with a definitive
14 delivery time frame, so I think we need to
15 be a little bit cautious about saying that
16 the not fair and reasonable, it's just that
17 there is a single method for determining
18 reasonableness at the schedule level and
19 that's based primarily on commerciality.

20 MR. DRABKIN: Let me see if we --
21 because Elliott's tried to go frontwards and
22 then backwards. Now let me try sideways.

1 The only reason -- the only reason we make a
2 fair and reasonable determination at time of
3 contract award in the schedule's program is
4 because we are required by law, under SECA,
5 to determine that the price is fair and
6 reasonable.

7 Unfortunately, the schedule's
8 program is not what SECA contemplated when
9 the people who wrote SECA wrote it. They
10 wrote it contemplating that at that time
11 that IDIQ contracts were very rarely used,
12 if ever. In fact, there was a perception
13 that they were not compliant with SECA and
14 couldn't be used. They were thinking about
15 a one time contract where there was a head-
16 to-head competition, however you choose to
17 interpret that and the contracting officer
18 could make a determination on that one-time
19 contract for that one-time requirement,
20 whether it was an indefinite delivery
21 contract or definite delivery or indefinite
22 quantity contract or definite quantity

1 contract, make a determination that it's
2 fair and reasonable.

3 Rather than clearing up the
4 statutory language to address the issue of
5 the schedule's program where at the time we
6 place the award, we don't place an order, we
7 don't buy anything, we have a program which
8 follows the rules for definite type quantity
9 contracts or even indefinite quantity
10 contracts where there's an initial order
11 placement and make a fair and reasonable
12 determination.

13 If we had our druthers and could
14 reframe the statute, we would take out the
15 requirement, I think, that we make that
16 determination because we all agreed, all of
17 us, I think in our conversations that the
18 real determination of whether the price is
19 fair and reasonable as the time you actually
20 buy something, place the order.

21 And so we're spending a lot of
22 time trying to rationalize something which

1 is irrational and we're driven to do by
2 statute and not driven to do by good
3 purchasing practices.

4 Perhaps what we should have -- if
5 -- perhaps if I raised this issue before,
6 one of our recommendations to the
7 Administrator might be go back and seek
8 statutory relief to revise SECA and any
9 other appropriate statutes to eliminate the
10 requirement at the time you place a
11 schedule's contract to make a determination
12 that the price is fair and reasonable. But
13 we didn't think about or talk about that,
14 although we talked around it a lot. But we
15 really didn't think about, talk about that.

16 And so I think part of our
17 consternation is I think we really, if we
18 were all -- took off the various
19 organizations we represent, I think if we
20 looked at it, we'd say why would you ever
21 waste your time trying to make a fair and
22 reasonable determination unless you were

1 placing an order at the time you placed the
2 contract and then even then you would only
3 make that determination for the order you
4 placed, not for the whole contract. Because
5 you have no idea what the price will
6 actually be on subsequent orders placed
7 under the contract. All you can do is set
8 up a framework for a pricing decision which
9 will ultimately determine that the price is
10 fair and reasonable.

11 MS. SONDERMAN: I agree, well
12 said.

13 MR. DRABKIN: Thank you, Ms.
14 Sonderman, particularly since I made a snide
15 remark at the beginning of the day for which
16 I apologize.

17 MS. SCOTT: This is a two-for-one
18 deal, Deb.

19 (Laughter.)

20 MS. SONDERMAN: Accepted, thank
21 you.

22 CHAIRMAN BRANCH: All right, so

1 given that discussion, I guess is the
2 rewording of that finding acceptable?

3 It's the one that says
4 alternative.

5 (Pause.)

6 MS. SONDERMAN: Works for me.

7 CHAIRMAN BRANCH: Jackie is
8 shaking her head.

9 I think it's missing a thought
10 and this finding may take two sentences. So
11 here's the thought that I, at least, have in
12 my mind.

13 GSA has followed the rules when
14 they award a schedule contract. There is
15 absolutely no doubt in my mind about that.
16 And because they have followed the rules,
17 the price is fair and reasonable at the
18 schedule level.

19 When I look at that as an
20 ordering agency, however, as a contracting
21 officer bound by my duty to determine a
22 price fair and reasonable, I am not willing

1 to accept GSA's price determination of
2 reasonableness a priori, so I lack
3 confidence -- as an ordering contract -- and
4 maybe that's the way we phrase it. But it's
5 the sense of the Panel that agency ordering
6 officers lack confidence that GSA's
7 procedure are adequate to ensure a fair and
8 reasonable price at the task order level.

9 Because I really think that's the
10 issue. I will stipulate until judgment day
11 that GSA has done what they were supposed to
12 do and they've done a fine job at it. What
13 I am saying is but that's not good enough
14 for me at the ordering activity level for me
15 to simply accept the premise that the price
16 is fair and reasonable without further due
17 diligence.

18 MS. SONDERMAN: For me overseeing
19 a lot of people who are in a highly
20 decentralized organization doing purchasing
21 in remote areas, this manifests itself in
22 the language in the FAR that comes from the

1 statute that says prices have already been
2 determined or words to that effect in 8.4,
3 that prices have already been determined to
4 be fair and reasonable.

5 The implication of that, whether
6 it's correct or not, is that they don't need
7 to do anything further than place an order
8 for one or ten and that they're good to go
9 and they're always in a hurry and there's
10 never enough of them. So I think that
11 drives behavior that might not happen if
12 that language were not there in the FAR.

13 MR. DRABKIN: And there's
14 conflicting guidance further. If the price
15 is fair and reasonable, why would we also in
16 the same 8.4 tell you that you're supposed
17 to seek further discounts and further
18 competitions. Perhaps since we're talking
19 about this and maybe we're not prepared to -
20 - quite frankly, I think it's unrealistic to
21 ask Congress to change SECA. We'd get
22 changes we wouldn't want anyway.

1 (Laughter.)

2 But perhaps to address this,
3 maybe we ought to keep in mind, Mr.
4 Chairman, when we get to the recommendations
5 that maybe we want to recommend that the
6 Administrator consider revising or
7 withdrawing that language. It may not be
8 necessary to the proper functioning of the
9 schedule's program to repeat in 8.4 what's
10 already laid out in the statute and it might
11 also deconflict folks who look at that and
12 then look at the admonition to get more
13 competition, maybe -- at least maybe we
14 should consider a new recommendation to have
15 the Administrator look at that since what
16 appears in 8.4 is the result of what the
17 Administrator tells the FAR counsel should
18 appear in 8.4.

19 MS. SONDERMAN: I support that.

20 CHAIRMAN BRANCH: I think that's
21 fair.

22 MS. JONES: I just have a

1 comment. Are we trying to say -- I'm just
2 trying to wrap my brain around this, are we
3 trying to say that there is a lack of
4 confidence by ordering activities that GSA's
5 procedures for ensuring fair and reasonable
6 prices solely based on establishing a basis
7 of award customer is inadequate?

8 MS. SCOTT: No, we're saying that
9 GSA's -- there's a lack of confidence in the
10 procedures that we use to establish and set
11 the prices as fair and reasonable, because
12 they don't understand the whole
13 commerciality argument.

14 MS. THOMPSON: No, there should
15 be an "and" after prices because there's two
16 different thoughts there.

17 MS. SCOTT: There's two different
18 thoughts.

19 MS. THOMPSON: One is ensuring
20 fair and reasonable prices. And the other
21 thought is in establishing and maintaining a
22 price relationship with the basis award, at

1 least that's how it was written originally.
2 They're two different thoughts.

3 MS. SCOTT: What happens is that
4 the ordering officers look at the prices
5 that are in there and if you -- one of the
6 things that happens is we set the prices up
7 and we set them up today, but those prices
8 could be there for five years.

9 MR. SHARPE: If these prices are
10 not supportable, they should come out.

11 That's what we keep circling
12 around.

13 MS. SCOTT: No, we've had this
14 argument and we don't agree with you.

15 MR. SHARPE: I know you don't.

16 MS. SCOTT: We do believe that we
17 set up prices and we intend to set them up
18 fair and reasonable.

19 MR. SHARPE: We're spending
20 considerable time on this, this bit of
21 wording and fiction and if the price is not
22 valid for quantity one, it shouldn't be used

1 as a benchmark or anything else. And it is.

2 MS. SCOTT: I don't want to
3 readdress this fight. We went through this
4 one already.

5 We do set up prices. The hassle
6 is -- the hassle that we have to deal with
7 is that the prices are set up for a long
8 period of time and then they need to be
9 revisited which is why the transparency is
10 such a good issue and the feedback from the
11 contracting officers at the ordering
12 activity is so critical is that we don't get
13 to revisit the prices as often as we should.

14 MR. SHARPE: That really doesn't
15 hold water because in a lot of instances GSA
16 themselves are setting up these orders off
17 of the schedules.

18 CHAIRMAN BRANCH: Well, Tom,
19 philosophically I agree with you, at least
20 with respect to services. I for one would
21 just say just pull the pricing out entirely.

22 However, I think we've gone

1 through this ground. We had a motion and it
2 either was disapproved or it failed for lack
3 of a second. And I believe the issue -- so
4 if I remember the discussion at that
5 meeting, it was that that would take a
6 legislative change and that was probably a
7 bridge too far for our work here.

8 So I don't think anybody
9 philosophically disagrees with you. If you
10 want to charge that hill, I'll be right next
11 to you. But that would require us to
12 convince the powers that be that a
13 legislative proposal is in order.

14 MS. JONES: Well, one of the
15 reasons I asked that question is because
16 that's what these bullets support and then
17 we also made a recommendation that we also
18 include additional information in
19 establishing price reasonableness at the
20 schedule level. So I'm -- I was just
21 questioning if that's what we were trying to
22 say here that's solely based on establishing

1 most of the customers are inadequate.

2 CHAIRMAN BRANCH: I always speak
3 for myself on this. And since I drafted
4 that summary recommendation, it will give
5 you some insight into my beliefs and I am
6 willing to redraft those beliefs to reflect
7 the consensus of the group. But I for one,
8 and there is certainly no offense meant to
9 my brethren at GSA, have absolutely no
10 confidence in any GSA schedule price for a
11 unit greater than one unless I do more due
12 diligence.

13 So that goes to basis of award
14 customer, that goes to your GSAM guidance
15 that says go seek the most favored customer,
16 basis of award and then back tracks in the
17 most convoluted way I've ever read in a
18 procurement regulation through the
19 exceptions to why you don't have to do that.
20 It goes to the lack of transparency with
21 respect to disclosure of how the GSA
22 contracting officer arrived at that fair and

1 reasonable determination and a number of
2 factors.

3 So speaking for myself, I have no
4 confidence in GSA pricing for more than a
5 unit of one unless I do further due
6 diligence to confirm that. I think the
7 problem that we've discussed is as people
8 look for vehicles that are easy to order
9 from and the paramount objective becomes
10 speed, not every contracting officer
11 conducts that due diligence responsibly. So
12 we're looking for a way to either improve
13 GSA schedule pricing such that it does give
14 you the confidence if you don't have to do
15 more due diligence, or alternately, creating
16 a system that drives every contracting
17 officer who orders against the schedule to
18 do that due diligence through competition or
19 some other mechanism that is generally
20 accepted in the broader sense for
21 determining the price fair and reasonable.

22 So that was my thinking around

1 these words, if you will and as I said, no
2 pride of authorship, and if that's not the
3 thought, we as a Panel want to reflect then
4 let's draft that thought. I thought I
5 captured the sense of our deliberations,
6 generally.

7 MS. JONES: Well, the reason I
8 asked that though is because also made some
9 recommendations back here for better
10 determining price reasonableness which is
11 based on establishing pricing at the
12 contract level with additional information
13 that comes from the ordering activities.

14 So essentially does that mean
15 then that if we were to do that that
16 ordering activities would have more
17 confidence in the GSA pricing? I'm looking
18 for consistency here in what we're saying.

19 MR. DRABKIN: I seem to remember
20 in one of our discussions towards the end,
21 that one of the things we said with regard
22 to these recommendations on providing more

1 pricing information by sharing the
2 information that's generated every time
3 people use is that the original GSA schedule
4 price eventually becomes almost irrelevant
5 because the current pricing as a result of
6 the ordering will inform the benchmark. Now
7 that may also be a way to -- as a result
8 also, it's possible and I don't think it's
9 probable, but it's possible that that GSA
10 originally negotiated price turns out to be
11 a very relevant price because it closely
12 mirrors the subsequent pricing that people
13 get as a result of more competition and
14 better pricing information. We don't know.
15 I think it's not probable.

16 But I do recall that in one of
17 our discussions I think we posited that
18 eventually the price of the contracting
19 officer, the schedule contracting officer
20 negotiated becomes irrelevant as we have
21 more robust and current pricing information
22 resulting from the competitions at the order

1 level. I think we did that in the context
2 also of why the price reductions clause
3 under that circumstance is no longer
4 necessary because we're actually getting up
5 front as opposed to in a post review, we're
6 getting the benefit of better pricing
7 information, market pricing information,
8 competitive pricing information, prices that
9 are tested by the market.

10 MR. CHVOTKIN: And if I could
11 just add and the reason we wanted --
12 struggling about the feedback loop from the
13 transaction side is that that continues to
14 be the basis of market research for the GSA
15 review and so that's the feedback loop on
16 both sides.

17 MR. DRABKIN: I'm sorry, Alan,
18 and then to tie that together with one of
19 the last recommendations we have was, which
20 was to the schedule contracting officers to
21 refresh the schedule's prices more
22 frequently so that you have this continuous

1 feedback loop where you start out with a
2 benchmark price, you are informed by actual
3 competitive prices and then you go back and
4 change the benchmark price based upon that
5 continuous loop of information which we
6 have, but we don't have access to.

7 MS. SCOTT: If I could do it as a
8 concrete, it would be wonderful if, for
9 example, we opened GSA Advantage and you
10 look at it and the contract was awarded
11 three years ago and you have all the orders
12 that were placed against it and showing what
13 their price was, for example. It would be
14 my dream would be that as part of that
15 market research available on GSA Advantage,
16 you see what has been awarded against that
17 contractor, for example.

18 MR. SHARPE: This is not just
19 academic. Maybe I'm wrong, but on the FSSI,
20 do we not have FedEx prices and has GSA
21 rationalized those prices to the schedule
22 prices? I mean there's instances where GSA

1 is still doing both pricing programs.

2 MR. DRABKIN: I don't know the
3 answer to your question, Tom, I'm sorry.

4 MS. NELSON: Okay, I've been
5 listening to everything everyone has said
6 and attempted to write yet another
7 alternative rendition of C, alternative 3
8 that is perhaps a synopsis of what people
9 have said. I don't know.

10 Federal customers do not have
11 confidence in GSA's determination of fair
12 and reasonable pricing at the schedule level
13 as defined in FAR Subpart 8.4 for quantities
14 greater than one.

15 CHAIRMAN BRANCH: Well, let me
16 stop you there for a minute, because I do
17 have quantities --

18 MS. NELSON: For quantities
19 greater than one.

20 CHAIRMAN BRANCH: I do have
21 confidence in that the price is fair and
22 reasonable in accordance with 8.4. I just

1 don't believe that --

2 MS. NELSON: So let's 8.4.

3 CHAIRMAN BRANCH: -- fair and
4 reasonable generally.

5 MS. NELSON: For quantities
6 greater than one.

7 CHAIRMAN BRANCH: Right.

8 MS. NELSON: Okay. And then
9 sentence two, agencies must conduct further
10 pricing and competition analysis to make
11 fair and reasonable best value
12 determinations for orders.

13 MS. THOMPSON: Is that a finding
14 or a recommendation?

15 MS. NELSON: Just our findings.
16 Now how they need to do that or whatever,
17 but we didn't seem to be able to synopsise
18 what our finding was. Now it comes back up
19 in a recommendation.

20 MS. THOMPSON: I guess the way I
21 read this, okay, yes, agencies don't have
22 confidence, therefore they conduct -- they

1 feel they must conduct further competition
2 of pricing analysis? I mean that doesn't
3 quite -- so I'm not quite understanding the
4 second sentence.

5 MR. SHARPE: When you set a price
6 with a vendor, you're trying to determine if
7 that price from that vendor that they're
8 offering the government for quantity one is
9 fair compared to what that vendor would
10 charge another customer. It's a vertical
11 look. You never look where that could be
12 offered somewhere else, right?

13 So I think Elliott captured it.
14 It's fair and reasonable per Part 8.4. It's
15 not the way a CO would approach it on the
16 ordering because it could be a great price
17 out of that vendor, but it could be
18 obscenely high compared to the other options
19 for that pencil.

20 MS. SCOTT: Well, we're back to
21 the same issue which is the appearance of
22 how GSA does what they do. It's not the

1 same as what happens at the ordering officer
2 level. And people don't understand how the
3 GSA contracting officers do what they do.

4 So it's -- we're back to the recommendation
5 we have which is that lack of transparency.

6 Folks do not understand how we do what we
7 do. And that's the bottom line issue here,
8 they don't have confidence that we do it in

9 a way that -- we have very difficult time
10 explaining to people how we do what we do.

11 And it's because we're using again, like you
12 said earlier, we're using the same word in
13 two different contexts.

14 So we view what we do as very
15 competitive, but it is a different kind of
16 competition than what's done at the ordering
17 officer level. Because folks look at it
18 vertically, as you mentioned, but they do
19 look horizontally, but that's not clear to
20 ordering activities. And having been an
21 ordering activity in person, I clearly
22 didn't understand how the prices were what

1 they were.

2 I would offer to change from do
3 not to using the word lack because people
4 miss the word "not", it's a psychological
5 thing. So if you can change it so that you
6 use a verb or a word that gives that
7 negative without using the word negative, it
8 helps people comprehend it.

9 My biggest problem with this is
10 "lack confidence in GSA's procedures in
11 determining the price" because I don't want
12 it implied that we lack confidence in the
13 people. It's the procedures that they
14 follow. I don't want to slam the people.
15 That's not the intent.

16 CHAIRMAN BRANCH: I'm agnostic on
17 this. I can live with my original words or
18 any of those variants because I think what
19 we're trying to do is to summarize a very,
20 very nuanced thought.

21 MR. CHVOTKIN: Mr. Chairman?

22 CHAIRMAN BRANCH: Alan?

1 MR. CHVOTKIN: Who is the lead
2 author for subsection C?

3 MS. NELSON: The chairman.

4 CHAIRMAN BRANCH: I'm not sure
5 we've determined that. I signed up to do
6 the introduction and --

7 MS. NELSON: Are you
8 volunteering?

9 MR. CHVOTKIN: I'm not
10 volunteering. There's only a word or a
11 phrase or something different. I think the
12 discussion here, the transcript of this
13 meeting is actually far more valuable than
14 trying to capture the words. If the purpose
15 here is to have a summary -- if we're going
16 to publish a summary, then we need to get
17 the words down right. If the purpose of
18 this outline is to drive the report, then I
19 think we've had enough discussion around it
20 and hopefully whoever the author is can draw
21 from it, but it really is a process
22 question. Do you intend to publish the

1 outline or is it simply to lead the writer?

2 CHAIRMAN BRANCH: I don't intend
3 to publish the outline, but I was hoping at
4 least for C or actually A through E, that we
5 would come to consensus on those words
6 because I think at the end of the day if
7 anybody reads this report, anyone who does
8 not read this report in its entirety are
9 going to focus on two things. What did you
10 find, what was your sense and what are the
11 recommendations? So I think it's very
12 important that at least at that A, B, C
13 level that everybody walk out of here
14 comfortable with the way that finding is
15 worded.

16 So from a process standpoint, if
17 we want to move on to the next one, and come
18 back to this one after we've had some time
19 to consider it, maybe that's useful. I
20 think horses may be dying everywhere on this
21 one.

22 MR. CHVOTKIN: I like alternative

1 two. I think there's a good set of words on
2 that and the way that Pat has expanded it
3 and so if you want to start around the
4 table, I'll start and I'll start with number
5 two.

6 CHAIRMAN BRANCH: Okay.

7 MS. SONDERMAN: I support two.

8 MS. THOMPSON: Two.

9 MR. DRABKIN: Two.

10 CHAIRMAN BRANCH: I can work with
11 two.

12 MS. SCOTT: Two.

13 MS. NELSON: Fine, I'll go with
14 whatever you go with.

15 MR. DRABKIN: What kind of vote
16 is that?

17 MS. JONES: Yes, two is fine
18 except you're missing "not" after "are" in
19 the second line.

20 MS. SCOTT: No, it's phrased
21 positively, so there's a lack of confidence
22 that the procedures are adequate.

1 MS. JONES: Okay, okay. I got
2 you.

3 CHAIRMAN BRANCH: Then I think we
4 settled on two and we can move on.

5 MR. DRABKIN: If this does become
6 in print I really do think that a reference
7 should be made in a footnote to today's
8 transcript. I'm serious. I'm worried that
9 --

10 CHAIRMAN BRANCH: I think that's
11 --

12 MR. DRABKIN: You're right, not a
13 lot of people are going to read this, but my
14 worry is is that people will read this who
15 might decide they're going to use this as a
16 way to fix something and without benefit of
17 our discussion may come up with a solution
18 which is not what any of us intended
19 throughout our discussion.

20 CHAIRMAN BRANCH: Pat, can you
21 just insert a comment there that captures
22 David's thought? So the author should be

1 sure to insert a footnote that references
2 the transcript? I think this has been a
3 really good discussion and I think David
4 makes a good point that as much help as we
5 get fixing things in this system, if we're
6 going to get help at least the people who
7 are going to render that assistance should
8 give it to us based on all of the facts.

9 Okay, moving right along to
10 finding D. Wait a minute, before we do
11 that, we spent a lot of energy around the
12 summary finding. Did anybody have any
13 issues with the four thoughts that support
14 that finding?

15 MS. SONDERMAN: I think they're
16 all fine.

17 CHAIRMAN BRANCH: Okay, moving
18 right along to finding number four which is
19 labeled D.

20 MS. SONDERMAN: That's just a
21 summary sentence saying see the next
22 paragraph, correct?

1 CHAIRMAN BRANCH: Wait a minute.

2 MS. SONDERMAN: The Panel's
3 recommendation --

4 CHAIRMAN BRANCH: You're right.

5 MS. SONDERMAN: So I think we
6 need to strike D since the next paragraph is
7 the recommendation.

8 CHAIRMAN BRANCH: Okay. That was
9 a thought for the -- I don't take that out.
10 That was a thought to transition the editor
11 into the recommendation section.

12 So essentially we have --

13 MS. SONDERMAN: Are you leaving D
14 in, then?

15 CHAIRMAN BRANCH: We're leaving D
16 in. I mean it won't be in the final report,
17 but it's just a reminder to whoever edits
18 this it will probably be myself or Thedlus
19 to transition between okay, these are the
20 findings and based on these findings we
21 hereby make the following recommendations.
22 We probably just need to leave that as kind

1 of a work in --

2 MS. SONDERMAN: Okay.

3 CHAIRMAN BRANCH: If you will, a
4 cue card to the final editor.

5 MS. SONDERMAN: Cue card then
6 policy and procedures, because this isn't
7 just policy. Our recommendations also
8 address procedural things.

9 CHAIRMAN BRANCH: Right, right.
10 If you're concerned those words are going to
11 be in the final report, I doubt they'll
12 survive the final cut.

13 MS. SONDERMAN: I just wanted to
14 have a complete reminder.

15 (Laughter.)

16 CHAIRMAN BRANCH: Okay, we're on
17 to the recommendations now.

18 MR. CHVOTKIN: Mr. Chairman?

19 CHAIRMAN BRANCH: Yes, Alan.

20 MR. CHVOTKIN: Earlier I had
21 suggested that we think about these findings
22 from the role of GSA and the role of the

1 ordering activities. I think somewhere in
2 the summary and I've not written it because
3 I just had a chance to look at this today,
4 but there are really three parties to these
5 transactions. There's GSA. There's the
6 ordering agencies. And then there's the
7 vendors, both the existing and prospective.

8 And many of the changes we've
9 talked about have an impact on we hope a
10 positive impact from a competitive
11 standpoint and from a pricing standpoint on
12 the vendor community as well and I think
13 that's an important perspective to address
14 somewhere in this report. That's also an
15 element of it.

16 And I'm happy to try to craft a -
17 - raise a paragraph or something, but I
18 didn't want to do that unless there was a
19 view that that was not appropriate. So as I
20 said earlier, I think we ought to think
21 about this report from the role of GSA and
22 the role of the ordering activities and I

1 think there's a role in the vendor community
2 as well.

3 CHAIRMAN BRANCH: Alan, let me
4 suggest that and we haven't looked at this
5 section yet, but Section 3 which I think is
6 a very good description and a draft of how a
7 scheduled contract gets awarded, maybe what
8 we should potentially do is extend that and
9 say once this is awarded, here are the
10 responsibilities on the vendors and the
11 ordering agency ordering officers and then
12 you have a complete picture of what the
13 stakeholders do in the process and I think
14 that may address -- now I've read through
15 it. I understand how a contract gets in
16 place and I understand how a vendor does
17 that with GSA. I now understand how an
18 ordering activity defines a requirement and
19 gets a proposal and negotiates an order with
20 the vendor.

21 Would that address your --

22 MR. CHVOTKIN: It probably would.

1 thank you.

2 CHAIRMAN BRANCH: Okay, so if
3 you've got some thoughts on that, scribble
4 them down and we'll try to integrate your
5 thinking with that piece, but maybe what we
6 need to do is change Section 3 to kind of
7 roles and responsibilities of the parties in
8 GSA schedule contracting, expand that piece
9 a little bit.

10 MS. JONES: I would have to say
11 that I agree with Alan because this whole
12 section C bothers me in the sense that it's
13 coming from an ordering activity standpoint
14 and it doesn't really specify that as it
15 would if it were sectioned in terms of who
16 is addressing which issues or which
17 stakeholder, some of these areas involved.

18 CHAIRMAN BRANCH: So if we wanted
19 to clarify that, if we could come back to
20 alternative two which I think we came to
21 consensus on to address Jackie's point and I
22 would propose that we say there's a lack of

1 confidence on the part of ordering
2 activities. Does that clarify our intent?
3 Is that acceptable to everyone?

4 MS. SONDERMAN: Assuming that
5 ordering activities are proxies for
6 taxpayers. I mean I don't know that -- I
7 guess we can only speak for ourselves in
8 this context. I don't know how -- well, I
9 do know how some vendors feel, that they
10 lack confidence as well, that the government
11 is achieving the best price or the --
12 whatever. But then they always have the
13 opportunity to lower their prices which I
14 remind them, great, you can do something
15 about that. It's in your power.

16 CHAIRMAN BRANCH: Personally, I
17 think taxpayer is probably too broad. With
18 all due respect, everyone in the room, I
19 think if you tried to explain to the average
20 taxpayer how we go to contract formation on
21 the schedule and place and order their eyes
22 would roll back in their heads and they'd

1 faint dead away.

2 But those of us who are
3 stakeholders --

4 MS. SONDERMAN: But I think they
5 would get the idea that we don't -- that the
6 price on the schedule isn't the price that
7 we ought to pay.

8 CHAIRMAN BRANCH: Well, that may
9 well be.

10 MR. SHARPE: No confidence, why
11 doesn't it flip the other way. There should
12 be no reliance by the ordering officer.

13 CHAIRMAN BRANCH: Well, I don't
14 know that there should be or not. I think
15 we're trying to come up with findings, a
16 sense of our conclusions, so there is no
17 reliance.

18 MS. SCOTT: I think we're
19 confusing the price with again the process.
20 It's the process that people don't have
21 confidence in.

22 MR. DRABKIN: And again, the

1 price should be relied on as the starting
2 point for their market research and their
3 ultimate price evaluation at the time they
4 place an order. What is happening is
5 despite the guidance that they should be
6 seeking greater discounts and getting
7 competition, many of our customers -- I
8 don't know that they rely or don't rely on
9 the price, they simply use the schedule as a
10 shortcut to get work done in a fast way and
11 assume that because it is already determined
12 fair and reasonable that they don't have to
13 do any more work to get it done. I'm not
14 sure it's because they rely on the
15 intellectual veracity of the price that's
16 being offered there. It's because they're
17 in a hurry and they can take a short cut.

18 And I think we get circulate
19 again in our discussion. It is what it is.
20 But I do think if we get to the
21 recommendations and perhaps it will help
22 clear things up, let's just take out the

1 discussion in 8.4 because I can assure you
2 no contracting officer or very few of them
3 are going to go back and read the statute
4 that says that the price is presumed fair
5 and reasonable and I think if we take out
6 that word and we leave in and emphasize as
7 we've had, not only the competition
8 requirements, but not the use of additional
9 ordering pricing information that we achieve
10 what we want to achieve which is getting
11 them to do the job that the schedules
12 anticipate they will do, get competition,
13 seek price reductions, to the extent price
14 reductions are appropriate and the best
15 value context that they happen to be
16 ordering.

17 CHAIRMAN BRANCH: We can -- I
18 think we can get wrapped around the axle on
19 this one. So what I propose is that we
20 leave alternative two as it includes
21 Jackie's clarification and that we revisit
22 this when we look at a final report because

1 as we flesh this in or flesh this out, in
2 terms of narrative, maybe it will hang
3 together more cohesively.

4 And with that, I think we're on
5 recommendations which is Section 5. I'm
6 watching Pat's cursor move.

7 MR. DRABKIN: Mr. Chairman, could
8 I suggest that since I've taken -- as I
9 chastise my daughter, why are you doing it
10 the night before the test is due, but
11 nonetheless last night, I did try to flesh
12 out a recommendation section and I gave
13 everybody a copy and Pat has an electronic
14 copy. Might it be more productive if we
15 worked through what I've already started to
16 write as opposed to your outline?

17 CHAIRMAN BRANCH: Yes, and
18 because basically these recommendations are
19 purely cut and paste from our motion. So
20 there's no amplifying narrative. The one
21 thing I would want to discuss is I guess I
22 took a slightly different approach and I

1 grouped them and I guess I'd like to see if
2 people are comfortable with grouping them or
3 do we want to address them in the form we
4 had originally started down which was supply
5 services and solutions and the reason I
6 grouped them is that if you look at the
7 first three, for example, one comes out of
8 supplies, one comes out of services and one
9 comes out of solutions and they say almost
10 exactly the same thing.

11 So I just kind of want to take a
12 conceptual poll on that and if we can get
13 that I think the smart thing to do is to
14 then go through your narrative.

15 MR. DRABKIN: I have absolutely
16 no pride of authorship is what I've drafted.
17 I think you're right. There is at least, I
18 think, two groups of recommendations that
19 are virtually -- one group cuts all through
20 all three, the price reduction clause, basis
21 of award, customer. 803 I think also cuts
22 through all three.

1 CHAIRMAN BRANCH: Right. And
2 that's really the first group.

3 MR. DRABKIN: Right. So I don't
4 care how -- I shouldn't say I don't care. I
5 am at your pleasure, sir, in terms of how we
6 approach this.

7 MS. SONDERMAN: I like the
8 buckets.

9 MR. PERRY: We split them up so I
10 think -- remember, we talked why we split
11 them up was to make sure we covered all the
12 issues surrounding each of those. But when
13 you go back and look at them together then
14 after that, they all end up racking up
15 against the same against everything.

16 We just made sure we came to that
17 conclusion for products, for services, for
18 the other.

19 CHAIRMAN BRANCH: I just bucketed
20 them because you know, to make it easier
21 really for the reader to follow and I think
22 if we're okay with buckets, the concept of

1 buckets in general. I'm not even suggesting
2 these are the final buckets, but as I went
3 through the motions and just kind of cut and
4 paste them, these are the ones that seem to
5 be, to have an affinity. We seem to talk
6 about 803 and price reasonableness. We seem
7 to talk about the idea of disclosure, the
8 idea of contract type and what I call
9 program evaluation review where we go back
10 and tell or suggest to the Administrator
11 that there are some things he should look
12 at.

13 So if we can conceptually agree
14 that it makes more sense to bucket them than
15 talk about them in terms of product services
16 and solutions, then I think it's time to
17 really go to the substantive work that David
18 has done and look at what the text is
19 because we can always take the text and
20 repurpose it to deal with that.

21 MR. DRABKIN: I have basic word
22 processing skills. I can cut and paste,

1 sir.

2 CHAIRMAN BRANCH: Duly noted. Do
3 we think buckets are a good approach to
4 take?

5 Okay. All right, then I think we
6 have probably put the detailed outline to
7 bed with the exception of that one issue on
8 the last recommendation which we're going to
9 defer until we see the words in the final
10 report.

11 Alan, I think you have an action
12 to talk about, some of the stakeholder
13 roles, responsibilities with respect to the
14 vendor community and we'll add that to
15 Section 3.

16 MR. CHVOTKIN: I want to build on
17 the short discussion we had about the
18 discussion assessment of the three areas of
19 product services and solutions.

20 Will that be addressed in sort of
21 the Committee, the work of the Panel
22 activity because I think it is an

1 interesting transition that we made in the
2 Panel activity. It says the Panel
3 considered in the three broad categories in
4 D4 and I think Glenn makes an important
5 point as we thought at the beginning that
6 there's going to be wide variances in our --
7 in the approaches and actually in our
8 recommendations. And as we worked our way
9 through as the Panel, we found that there
10 was a high degree of commonality and that
11 may be addressed then in Roman IID4, Panel
12 activity.

13 CHAIRMAN BRANCH: Agreed. I
14 think it's really important in this report
15 that whoever picks it up gets at least at a
16 very top level the evolution of our thinking
17 as we went through, saw presentations, heard
18 testimony and deliberated, so a point well
19 taken and if we missed that in the final
20 product you'll focus.

21 So at this point I think Mr.
22 Drabkin has the floor. I think you all have

1 a draft of his recommendation section in
2 front of you. It is 10 after 2. So why
3 don't we do the same thing we did with the
4 outline, give people an opportunity to read
5 it and think about it for a few minutes and
6 start our discussion say at 2:30. That will
7 give folks 20 minutes to go through it and
8 do some regulating.

9 MR. CHVOTKIN: Mr. Chairman, I
10 asked you earlier, and I apologize, but I
11 need to leave around 3 o'clock and I'll stay
12 for as much, but we discussed briefly the
13 editing process and there will be some
14 drafts coming out, revisions to this, other
15 chapters coming, and how do you want us to
16 handle those?

17 CHAIRMAN BRANCH: I think at this
18 point, Pat is our configuration control, so
19 what I plan to do at the end of our meeting,
20 either today or Monday, depending on how far
21 we get, is to make sure everybody has a
22 section of this or rather not that everybody

1 has a section of this, but somebody has all
2 sections of this and then we'll set a hard
3 deadline for submission to Pat on those and
4 my hope is that we ought to be able to come
5 up with a final report in one more meeting.

6 So finish up what we've got, make
7 sure each one of the sections is covered,
8 establish a firm deadline to get those
9 inputs back to Pat, and then meet one more
10 time to attempt to put the report to bed.

11 David, do you want to -- I guess
12 when we come back do you want to talk
13 generally about what you've written here,
14 kind of give people an overview of it or
15 should we just start at the top and launch?

16 MR. DRABKIN: Yes.

17 CHAIRMAN BRANCH: Okay, so 2:30.
18 David will kind of walk us through his
19 thinking on this and we'll dive into this
20 section.

21 (Whereupon, the above-entitled
22 matter went off the record at 2:12 p.m. and

1 resumed at 2:31 p.m.)

2 CHAIRMAN BRANCH: We have a
3 couple of the members of the Panel who have
4 to leave early and counting our numbers,
5 with Mr. Essig's retirement and some
6 question about his status as a part of the
7 Panel, I fear that we lack a quorum to
8 proceed. So in order to secure the
9 integrity of the process, I'm going to
10 change the order of the business. We're
11 going to discuss the schedule for the
12 meeting after next, so the meeting after the
13 second of February meeting and I think then
14 we will be done with our business today.

15 MR. DRABKIN: Given that we were
16 going to reconvene on Monday, I'd like to
17 ask that -- I know this is a lot to ask for
18 homework, but if you could send suggestions
19 for my draft as changes in Word, I think
20 that would help us in trying to -- and if we
21 get enough of them between now and Sunday
22 night, send them to me and Pat, we can have

1 another document and perhaps save some time
2 on Monday. I mean if you can.

3 CHAIRMAN BRANCH: I was about to
4 ask that, do we have this electronically
5 yet, Pat?

6 MS. BROOKS: I have it now, so I
7 will get it, send it to everybody tonight.

8 CHAIRMAN BRANCH: Very good.

9 MS. BROOKS: What I will send
10 tonight is everybody's drafts as well as the
11 changes that we've made to the outline.

12 CHAIRMAN BRANCH: Very good.

13 MR. DRABKIN: And given your
14 earlier, the earlier preference of the Panel
15 to reorganize the recommendation section in
16 the buckets, I will go ahead and do that
17 reorganization. That doesn't mean you
18 shouldn't send me your words. I'll try to
19 make sense of any changes you make in the
20 context of the reorganization of the
21 material.

22 CHAIRMAN BRANCH: Dave, as the

1 buckets were conceptual device to do this,
2 if you should find in going through
3 recommended changes in your own narrative
4 that other buckets were appropriate, go
5 ahead and change the buckets.

6 MR. DRABKIN: Thank you, Mr.
7 Chairman.

8 And now on to the business that
9 you wanted to do.

10 MS. SONDERMAN: Did we get a
11 clarification on the editing procedures and
12 specifically the -- do we have to edit in
13 the public domain in order to comply with
14 the rules of the FACA rules governing our
15 Panel?

16 CHAIRMAN BRANCH: I guess let me
17 kind of state this as a general principle.
18 Whenever we convene to edit collaboratively,
19 yes we must do that under FACA. So to the
20 extent that you are reviewing material that
21 is provided to you as a result of our
22 sessions and you are expressing your own

1 views with respect to that material and
2 formulating suggested changes, no, but when
3 we come together to decide on what the final
4 edits will be, yes, we have to do that in
5 public.

6 So I'm going to turn it over to
7 Pat now. She does have one piece of
8 business left. As I expressed at the
9 beginning of the meeting, it is my hope that
10 we conclude the majority of our business on
11 Monday and that we schedule another meeting
12 to put the final report to bed, so I'm going
13 to ask her to poll the Panel and get
14 appropriate dates for that last meeting.
15 And once we finish that, yes, the beers will
16 be on me.

17 (Laughter.)

18 MS. BROOKS: Okay, based upon --
19 remember, whenever we set up a meeting, I
20 have to do a Federal Register notice and
21 then our meetings cannot occur until 15 days
22 after the Federal Register notice.

1 So factoring in the time that we
2 are now, and I'm anticipating that we could
3 get the Federal Register notice published no
4 later than the 9th, so the window of
5 opportunity, this is February 9th, so the
6 window of opportunity for our next meeting
7 would be between the 25th of February and
8 the 4th of March and the meeting would be
9 held here. So I would ask that you look at
10 your schedules over the weekend, so that we
11 can decide on a date. Again, the window of
12 opportunity is 25 February through 4 March
13 for our last meeting.

14 CHAIRMAN BRANCH: Alan?

15 MR. CHVOTKIN: Mr. Chairman, I
16 think while we made great progress today, I
17 would recommend that we pick two days going
18 back to back. It's always easier to cancel
19 than to try to schedule yet another one, so
20 in the past we've done Friday, Monday or
21 something like that which would be the 27th
22 and the 2nd. I'm open to any combination,

1 but or Thursday, Tuesday, whatever is good
2 for members, but I just suggest we think
3 about two days in that window, announce
4 them. It's always easier to cancel.

5 CHAIRMAN BRANCH: Alan, I think
6 your point is well taken. Margin for error
7 is always good. Thoughts of the Panel?

8 Do you think we can wrap this up
9 in one more day after Monday or should we
10 schedule two to have a little bit of error
11 budget.

12 MR. DRABKIN: Given the
13 scheduling process, I think Alan makes an
14 excellent point. It's much easier to decide
15 we finished at noon on the next day and
16 cancel the rest than it will be then to go
17 and publish and wait 15 more days and
18 elongate the process further. Although Mr.
19 Chvotkin did not make it a motion, I guess I
20 move Alan's suggestion.

21 MS. NELSON: Fine, I'll second
22 it.

1 CHAIRMAN BRANCH: I don't know
2 that calling meetings of the Panel is
3 something that we need to do through
4 parliamentary procedure, so I would simply
5 ask you to identify the best two days that
6 you can in that window so Pat can schedule a
7 meeting with the understanding that our goal
8 is to give you a day back, but I think we
9 need to make sure we can wrap this up sooner
10 than later.

11 Any other comments from the
12 Panel? Then due to the departure of a
13 couple of our members and I think running
14 the risk of lacking a quorum, we are
15 adjourned.

16 (Whereupon, at 2:38 p.m., the
17 meeting was concluded.)

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