

GENERAL SERVICES ADMINISTRATION

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MULTIPLE AWARD SCHEDULE ADVISORY PANEL

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MEETING ON FAIR AND REASONABLE PRICE FOR
PRODUCTS AND SERVICES MAS CONTRACTS

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MONDAY,

OCTOBER 6, 2008

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The meeting was held in Doyle
Room A of Jury's Hotel, 1500 New Hampshire
Avenue, NW, Washington, D.C., at 9:00 a.m.,
Elliott Branch, Chairman, presiding.

PRESENT:

ELLIOTT BRANCH Naval Sea Systems Command
JACQUELINE JONES U.S. General Services
 Administration

DEBRA SONDERMAN Department of Interior
DAVID DRABKIN U.S. General Services
 Administration

LARRY ALLEN The Coalition for
 Government Procurement

JUDITH NELSON U.S. General Services
 Administration

THOMAS ESSIG Department of Homeland
 Security

ALAN CHVOTKIN Professional Services
 Council

GLENN PERRY U.S. Department of
 Education

JAN FRYE Department of Veterans
 Affairs

STAFF PRESENT:

PAT BROOKS Designated Federal
 Official

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

2 9:21 a.m.

3 MS. BROOKS: Good morning,
4 everybody. We're going to get started with the
5 panel meeting.

6 For our attendees, would you
7 please make sure that you do sign the
8 attendance sheet that is on the table right
9 outside?

10 Remember to turn off cell phones
11 and pagers.

12 During the break, the ladies' and
13 men's bathrooms are out the door to your
14 right. I think most of you are familiar with
15 where the eating places are, when we break
16 during lunch, down P Street.

17 So I am going to turn it over to
18 Elliott.

19 MR. BRANCH: Excuse me, Pat.
20 Didn't you mention earlier that there would
21 also be masseuses available?

22 (Laughter.)

1 MS. BROOKS: Yes, massages
2 available. Sign-up sheet is outside also.

3 MR. BRANCH: I guess that is the
4 beauty of running an industrial fund, right?

5 (Laughter.)

6 Good morning, everyone.

7 Don't ever say you didn't get
8 value for your money.

9 (Laughter.)

10 Good morning, everyone. Welcome
11 to the latest in a series of very long, but I
12 think productive meetings.

13 The last meeting I think we have
14 fairly much disposed of many of the global
15 issues surrounding the price reduction clause
16 and have made a good set of recommendations to
17 be proposed to the Administrator with respect
18 to service contracting.

19 So today it will be our task to
20 take up the question of whether the price
21 reduction clause belongs in products.

22 So we are going to do things a

1 little differently this time. I started out
2 last time on services, laid a motion on the
3 table. I come to this with perhaps a slightly
4 different mindset.

5 We haven't spent a lot of time on
6 products. Most of the testimony that we got
7 was either on services or solutions, as we
8 talked to them before, and we will come back
9 to the issue of solutions.

10 So, instead, what I think I will
11 do is I'll simply start with Larry, since he
12 is in my line of sight, and come around the
13 table and see if anyone has any proposed
14 recommendations they would like to put on the
15 table this morning for our discussion.

16 Larry, anything?

17 MR. ALLEN: Well, I appreciate
18 that. I would like to say that my going-in
19 proposition is going to be in favor of
20 removing the price reductions clause from the
21 schedules program, period.

22 A lot of the reasons that we

1 discussed for removing the program from the
2 services part of the schedules I think are
3 also valid for the products.

4 The price reductions clause is a
5 manifestation that is at least 30 years old.
6 This is a time when the commercial market has
7 changed substantially over that time.

8 In all the discussions I have had
9 with companies, even companies of moderate and
10 modest size, it is clear that they don't have
11 nearly the standard pricing policies that they
12 used to have maybe 25 years ago, 30 years ago,
13 when this price scheme was initially put into
14 place.

15 Therefore, I think the price
16 reductions clause serves largely today as a
17 "gotcha" mechanism where companies, even those
18 that try very hard to comply and put a lot of
19 time into compliance, may end up finding
20 themselves running afoul of the clause.

21 On that point, it is not
22 necessarily a meaningful price reduction tool

1 for the government; it is more of a spring-
2 trap, if you will, that can get sprung on even
3 some of the more diligent contractors, given
4 the vulnerability and flexibility of their
5 prices in the commercial market.

6 Similarly, some of the arguments
7 we use for services in terms of federal market
8 competition also hold true for products. I
9 have written for the Coalition over the course
10 of many years, before services were added to
11 the program, various letters and bits of
12 testimony attesting to the fact that it is
13 competition that keeps prices reasonable on
14 the schedules program for products. Again,
15 this was before services were even added to
16 the program and not the price reductions
17 clause.

18 Therefore, I think that because we
19 have significant pricing now, we have
20 significant competition rather, and now thanks
21 to Congress, we also have the prospect of
22 having Section 803 competition requirements

1 expanded governmentwide.

2 We are certainly going to be
3 ensured of an even greater level of
4 competition at the task order level. I think,
5 therefore, that the price reductions clause
6 has outlived its usefulness.

7 When you get to a point where you
8 have companies, some of them spend literally
9 millions of dollars a year trying to comply
10 with this clause, and even still having to pay
11 fines, I think that that suggests that the
12 clause has shifted from perhaps being a useful
13 tool to ensure price reasonableness to
14 something that is essentially a pay-to-play
15 penalty, and I am not sure that that is a good
16 reason to keep it.

17 MR. BRANCH: Thank you.

18 Debra?

19 MS. SONDERMAN: I agree and would
20 suggest that we introduce a motion to
21 eliminate the price reduction clause from
22 multiple awards schedule program supply or

1 products contracts, very similar to the motion
2 that we have put in place for the services.

3 MR. BRANCH: Okay. It sounds like
4 a motion has been made. Do I have a second to
5 that?

6 MR. ALLEN: Second.

7 MR. BRANCH: We have a second. So
8 we have a motion to remove the price reduction
9 clause from product schedules as well.

10 I will continue around the table.

11 MS. SONDERMAN: I want to just,
12 you know, adopt the 803-like approach, blah,
13 blah.

14 MR. BRANCH: Okay. Thank you.

15 Glenn?

16 MR. PERRY: I'm tending to lean
17 toward making the same motion. The only thing
18 that I think more than services, this will
19 have to be, I think, accompanied by some kind
20 of I believe more aggressive pricing at the
21 contract level by GSA, only because of the
22 general nature of many of the items that are

1 products and the small quantities that people
2 typically purchase under these.

3 I'm not sure I'm comfortable going
4 down the road, as we go through today, I
5 wouldn't be comfortable -- sort of the
6 services, that is an area that generally
7 prices or costs are going up, and it is
8 probably served under the general types of
9 contracting tools that we use also at the
10 agencies. It is okay for the base cost or
11 base prices to stand for a while as long as we
12 have that competition piece.

13 My concern is with lots of the
14 products on the schedule, if we don't have
15 some way to aggressively -- for those folks
16 who don't have the ability to accumulate their
17 buys or do it in a way that strategically gets
18 them much better prices, I think we need to
19 find a way where the government as a whole can
20 leverage what totally is happening across the
21 country, even though it might be done in tens
22 and dozens or two dozens, that we could get

1 the advantage from that company doing several
2 dozen, to use a bad analogy, but somehow we
3 can wrap that around.

4 So I think we are going to have to
5 be a little more precise and maybe give a
6 little more direction to GSA as to how maybe
7 to use some of the resources that maybe will
8 be freed up on the GSA side, the way we
9 recommended the services be handled, to maybe
10 boost up what is happening at GSA at the
11 contract formation and also during the
12 administration of that contract, during the
13 period, whatever time, we have the agreement.

14 But I am all for starting off with
15 removing the price reduction clause and then
16 see where that takes us after that.

17 MR. BRANCH: Thank you.

18 Yes, I guess I'm of mixed mind on
19 this. Philosophically, I believe that the
20 smart thing to do would be to remove the price
21 reductions clause because fundamentally it is
22 an after-the-fact check on the integrity of

1 the pricing. I think we, as an acquisition
2 community, have an obligation to figure out
3 how we exercise that due diligence at the time
4 of order formation.

5 On the other hand, I look at
6 products somewhat differently than I do
7 services. Products tend to be somewhat
8 fungible. Certainly, within a class of
9 products, there may be features that
10 discriminate one product from another, but for
11 us to really make a case to buy those products
12 on those discriminating features, they have to
13 be directly related to the needs of the
14 agency.

15 So price, I believe when we were
16 talking about more commodity-like buys, is
17 certainly a more important factor. My concern
18 with eliminating the clause would be I think
19 it is important, when we are talking about
20 fungible goods, essentially what are fungible
21 goods, is to have a sufficient set of tools in
22 the arsenal to ensure the integrity of that

1 price.

2 So if we remove that clause, I
3 think very strongly we have to make a
4 recommendation to the Administrator as to what
5 tools go in the toolbox to ensure pricing
6 integrity consistent with the guidance and in
7 the mandates given to us by the statute, which
8 essentially allows the Administrator to
9 determine that the prices are a result of
10 competition, that they do optimize the lowest
11 overall cost to the government.

12 Alan?

13 MR. CHVOTKIN: Thank you, Mr.
14 Chairman. I think you have encapsulated a lot
15 of the discussion that we had on services is
16 equally applicable here to products.

17 I agree with Debra and Larry that
18 the price reduction clause is probably an
19 anachronism that can be done away with.

20 When we addressed services, we
21 clearly coupled the elimination with the
22 competition element, and I think our motion

1 here does as well.

2 As Larry pointed out, Congress has
3 already included in the FY09 national defense
4 authorization bill a provision that would
5 adopt the DoD 803 approach governmentwide.
6 They don't use the word "like", but I guess we
7 just didn't have a chance to get our oar in
8 the water fast enough with them.

9 But before we can, in my view,
10 feel comfortable eliminating the price
11 reduction clause as to products, because of
12 the replicability of products versus services,
13 I think we have to also address the basis of
14 contracting officers' determination of fair
15 and reasonable prices. We adopted a motion to
16 that effect that was not -- well, I'm not sure
17 if Motion No. 3 from our September meetings,
18 whether those were limited to just services.
19 If they are, we might want to put that Motion
20 No. 3 on the table again, just for my
21 colleagues that said that GSA disclosed a
22 basis upon which the contracting officers

1 determine that the program contract prices are
2 fair and reasonable. Since it was in the
3 context of services, I want to make sure that
4 that is also in the context of products.

5 Then I think we have to also
6 address the price objectives that the agency
7 is going to seek in products. Somewhere along
8 the line, there's got to be that -- if we
9 eliminate the price reduction clause, I agree
10 with you, Mr. Chairman, we ought to look for
11 an alternative, and maybe there isn't one, on
12 the continuity of pricing and products. They
13 tend to have a little bit more stability and
14 less volatility because of the nature of
15 products versus services. I think there could
16 be some healthy discussion around that first
17 before we get to eliminate the price reduction
18 clause.

19 MR. BRANCH: Okay, thank you.

20 Judith?

21 MS. NELSON: I've thought about
22 this long and hard. I have to say that I am

1 not of a mind of eliminating the price
2 reduction clause for products. I do believe
3 that the price reduction clause should be
4 revisited and altered in some manner. I do
5 not agree with Mr. Allen that a basis for
6 removing it could possibly be the requirements
7 for compliance and the effort perhaps on the
8 part of our vendors and that requirement.

9 I think that GSA's role in
10 protecting the integrity of those prices and
11 providing best value to the agencies, and
12 therefore the U.S. taxpayer, is tantamount and
13 paramount. Therefore, the compliance issue is
14 less of an issue.

15 I think that there are things that
16 GSA can do and is working toward doing as far
17 as easing those compliance requirements which
18 should be looked at. But our first
19 requirement is to the U.S. taxpayer, not to
20 the compliance requirements, but we should
21 look at efforts on how to ease those
22 requirements.

1 There are some electronic tools
2 that can be looked at in best practices from
3 other agencies. I think also that, when I
4 look across the other agencies that have GWACs
5 and ID/IQs and MACs in place, all of them have
6 to some degree in place the award of their
7 pricing based on a relationship between how
8 the vendor sells to a customer and how they
9 are going to price to the government.

10 Because products go down in price
11 and not up like services do, and GSA is not
12 the procuring agency except in the case where
13 we are offering assistance services, but the
14 acquisition agency, and therefore putting them
15 out for our sister agencies to buy ad hoc, we
16 have a requirement to make sure that when
17 those sister agencies come in to buy, that on
18 a regular basis those prices have been deemed
19 fair and reasonable.

20 We have to have some type of
21 mechanism to make sure that as those prices go
22 down in price, there's some way that we have

1 looked at that, based on the relationship that
2 that product has gone on.

3 I'm not sure that the current
4 price reduction clause is any longer valid
5 based on how products are sold in the market.
6 For instance, IT products are constantly
7 changing. When I say, "constantly changing",
8 I mean on a daily, sometimes five times a day
9 pricing. You know, at the worst case, let's
10 look at memory. It could be hourly, but say
11 laptops, daily. In other cases, when we are
12 talking about security-based products, it
13 could be every week or something like that.

14 So compliance issues are major,
15 but a lot of these products are not competed
16 to the same degree that services or solutions
17 are competed, where it is done on a statement
18 of work basis. I think that we need to look
19 at that very carefully before we say let's nix
20 the price reduction clause.

21 I think that there are things that
22 the Administrator and the Administrator's

1 offices within GSA can do, but I'm not so fast
2 to say we should eliminate that because there
3 are no statements of work. So that's my
4 position.

5 MR. BRANCH: Thank you.

6 David?

7 MR. DRABKIN: I'm conflicted here.
8 I'm not at all conflicted about the use of the
9 price reduction clause with regard to services
10 because, quite frankly, I don't think we are
11 buying services the right way. I made a
12 motion that I thought would take us in the
13 right direction, and we have chosen not to
14 adopt it.

15 But, nonetheless, for products it
16 is a very different world. I have heard
17 companies tell us on many, many occasions that
18 they are incapable of tracking all the various
19 prices that they offer their customers, and
20 based upon that information, assuming
21 momentarily it is true at least for some of
22 those companies in the product world, then I

1 don't know what protection the government has
2 in terms of the pricing model.

3 And I'm not talking about
4 companies who are intending to hide prices
5 from us. I'm talking about companies who in
6 the orderly course of their operations
7 accidentally, because of the breadth of their
8 business or because they acquire new customers
9 who might fit into the most favored customer
10 definition or who might fit into the base
11 customer definition, quite by accident could
12 change in the product arena.

13 I don't know what protection the
14 government has, and taking away the price
15 reduction clause kind of takes away the safety
16 net.

17 Now in a different world, if we
18 were a private sector company, I would have no
19 right to have a safety net unless, of course,
20 I was the biggest buyer that company had, in
21 which case if they wanted to do business with
22 me, they would agree to that deal or they

1 wouldn't do business with me. If I found that
2 they weren't keeping that deal, they certainly
3 wouldn't be doing business with me anymore.
4 I would find somebody else.

5 By the way, in another panel we
6 heard testimony to that effect. I mean it was
7 no question that big companies like GM and
8 Disney and Wal-Mart drive behavior by the
9 suppliers that want to do business with them.

10 The federal government isn't quite
11 as big a buyer in some markets as it is in
12 others. So eliminating the price reduction
13 clause for products without putting in place
14 some other regimen that protects us from well-
15 intentioned companies, companies who want to
16 comply but who, for whatever reason, because
17 of the breadth of their business, maybe
18 because of the way they operate their own
19 pricing within the company, can't comply, I
20 think does a disservice to the taxpayer.

21 Having said that, we also talked a
22 number of times about using transparency as a

1 way to help. Certainly, we discussed it a lot
2 in the context of services, but transparency
3 in the product world is probably going to be
4 a lot more difficult because what's really
5 more important isn't what they sold to other
6 government entities for; it is what they sold
7 to their private sector customers for in the
8 product world.

9 We will have no transparency into
10 those prices under anything that we have
11 talked about or, for that matter, under
12 anything that I have read about in the press
13 or in scholarly papers for the last couple of
14 years. No one has talked about how we get
15 that kind of visibility.

16 If there was that transparency, if
17 companies regularly posted their prices so
18 that buyers could see what their pricing was,
19 then the price reduction clause I think would
20 not be necessary. But in the absence of
21 transparency, and in the absence of another
22 regimen, particularly in the product world --

1 I mean I think my colleague mentioned IT as an
2 example. I mean IT pricing changes all the
3 time; models change all the time.

4 I don't know how we protect the
5 government, which is what I am concerned
6 about, in the product world without the price
7 reduction clause. So I will be voting no on
8 that in the absence of further discussion
9 about do we put together a regimen that
10 replaces it.

11 It seems to me that one might
12 argue that our system isn't perfect, but it
13 does kind of have some checks and balances in
14 it. It seems we are taking out some of the
15 checks, which means to me that usually in a
16 mathematical equation, although I only
17 understand the concept of mathematical
18 equations having only studied philosophy and
19 not pursued Aristotle in any depth, but my
20 memory is kind of if you take one part of an
21 equation away, all of a sudden something is
22 unbalanced. So I would have to vote no.

1 MR. BRANCH: Thank you.

2 Jan?

3 MR. FRYE: Yes, thank you.

4 I am not conflicted on this. I
5 absolutely believe that in terms of products
6 we've got to keep the price reduction clause
7 in place. Yes, the PRC is a 30-year-old term,
8 but it's tried, true, and tested.

9 In the case of Section 803, 803
10 simply won't work. As many of you know, we
11 run schedules for GSA. They have been
12 delegated to us. The reason 803 won't work is
13 we would have to have hundreds more in our
14 workforce to set up competitive BPAs at the
15 delivery order level.

16 We use thousands of products in
17 our business, the healthcare business, off the
18 GSA schedules. For the major products, we do
19 set up competitive instruments, but we simply
20 don't have the workforce nor the wherewithal
21 to do that for every single product.

22 Consequently, we buy off the

1 federal supply schedules. Our prime vendors
2 acquire off our federal supply schedules, and
3 in some cases we may not get the best price,
4 but we know we're getting a fair and
5 reasonable price. We've got to continue down
6 that vein.

7 I heard Mr. Allen say, and it's
8 repeated on the board, that this is a "gotcha"
9 for these firms. I don't believe that for a
10 minute. The firms know exactly what they are
11 getting into. The terms and conditions are
12 clear on these contracts, and it is not a
13 "gotcha". It is if they decide they want to
14 void the terms and conditions of the contract,
15 but other than that, they fully understand
16 before they sign the contracts.

17 Oh, by the way, we haven't seen,
18 at least in the VA, firms who sell products
19 that have decided not to get in the business
20 because of these so-called Draconian terms and
21 conditions. We simply haven't seen it.

22 We've got to do business, conduct

1 business in such a way as to protect the
2 taxpayers, and in terms of products I believe
3 that we must keep the price reduction clause
4 intact.

5 MR. BRANCH: Jan, thank you.

6 Jackie?

7 MS. JONES: Okay, I'm going to
8 have to agree that I oppose removing the price
9 reductions clause from products as well. At
10 the time a contract formation -- normally,
11 products are negotiated as a discount off of
12 a company's commercial price list because they
13 are sold in the commercial marketplace. So
14 that's pretty straightforward. It's a pretty
15 straightforward mechanism for ensuring that
16 GSA gets the best price.

17 I have some concern, though, that
18 we may be looking at the prices at the
19 schedule formation -- or I should say at the
20 contract formation -- as individual buys by
21 ordering activities, and they're not.
22 Basically, at contract formation, we are

1 developing an instrument for other agencies to
2 use based on the best price that we can obtain
3 at the time.

4 I can understand services being
5 looked at in a different light because
6 companies are proposing services based on the
7 labor mix once the requirement is completed,
8 but products are very different, and there are
9 different levels of sellers as well.

10 So my position is I oppose it, and
11 I don't think that we've even visited any data
12 to say how much the prices reduction saves the
13 government money by keeping the prices down,
14 and definitely products are a lot more
15 straightforward in terms of achieving
16 discounts to the government or for the
17 government.

18 MR. BRANCH: Okay, thank you.

19 Larry?

20 MR. ALLEN: Yes, I appreciate the
21 opportunity to come back to this. At the end
22 here, I have what may be a unique suggestion,

1 but just to address some of the issues that
2 have been gotten out here.

3 Some of the panel members have
4 suggested that the price reductions clause is
5 somehow a relevant compliance tool, and I
6 would like to suggest strongly that it's not,
7 for a number of reasons, and I'll get to some
8 of the ones in the VA down the line.

9 But in the GSA world, it's not
10 particularly relevant because what drives the
11 price is the price in the federal marketplace,
12 where there is competition a lot of the time.
13 It's not the price reductions clause that
14 keeps the prices low. I mean certainly
15 companies do try to comply with the price
16 reductions clause, but most of the time when
17 price decreases come in, it is because of
18 overall prices that are going down in the
19 commercial market, not a price reduction that
20 you specifically give to a basis-of-award
21 customer most of the time.

22 That said, it is definitely in GSA

1 land a "gotcha" requirement simply because GSA
2 contracting officers don't always follow GSA's
3 own policy guidance. Simply put, the price
4 reductions clause, the basis of award is
5 supposed to be a customer or a class of
6 customer, but many contracting officers
7 routinely daily -- they have probably done it
8 already today -- give people a contract only
9 if they agree to make the basis-of-award
10 customer all customers.

11 One need look no further than the
12 MAS Express Program, where one of the
13 requirements to getting a MAS Express contract
14 is to agree that the basis-of-award customer
15 will be all customer classes. That sets up
16 from day one a supposition that a company will
17 be in default of its contract no matter what
18 they do. If that's not a "gotcha" mechanism,
19 I don't know what is.

20 It's a great way to keep prices
21 compliant for a government customer because
22 you are guaranteeing that the contractor is

1 going to get itself in trouble from day one,
2 but I would suggest that it is much more of a
3 pay-to-play, some would say extortion, tactic
4 than a fair and reasonable contracting term.

5 So one part of the problem is if GSA
6 would agree to adhere to its own policies and
7 make the basis of award what it should be, and
8 not what contracting officers sometimes think
9 it ought to be, that could be part of the
10 problem right there.

11 I think there are a variety of
12 ways to determine price reasonableness on the
13 schedules program moving forward. One would
14 be to follow the FAR, use market research that
15 can be used to determine price reasonableness.
16 There are advertisements in the paper daily on
17 a number of the items bought off-schedule.
18 There are other web-based mechanisms used to
19 determine price reasonableness that federal
20 agencies already avail themselves of today.
21 To suggest that the price reductions clause is
22 the only tool available to maintain price

1 reasonableness simply does not reflect the
2 reality that many federal buyers already avail
3 themselves of tools readily available in the
4 commercial marketplace that I would daresay
5 come close to transparency in ensuring that
6 those prices are reasonable.

7 As people know, a number of
8 federal agencies really enjoy coming back to
9 GSA and saying, "I got 30 percent better than
10 the schedule price. What's wrong with you?"
11 So that suggests that price reasonableness and
12 price comparison opportunities continue to go
13 on.

14 My second-to-the-last point is I
15 think it is important to note that in terms of
16 the larger VA contracts for pharmaceuticals,
17 they do operate under a special statutory
18 mandate that is unique to the pharmaceutical
19 part of the schedules program. Med/surg items
20 from the VA as well as GSA items operate under
21 more or less the same types of rules but not
22 so in pharmaceutical land, and I think it is

1 important to make that distinction.

2 The Veterans' Healthcare Act,
3 coupled with later amendments, sets a
4 statutorily-mandated minimum discount for
5 pharmaceutical prices, in shorthand referred
6 to as the federal ceiling price. While the VA
7 does, in fact, obtain discounts lower than
8 federal ceiling prices under certain
9 circumstances, many times companies will offer
10 federal ceiling price, and there are annual
11 price redeterminations based on the statutory
12 formulae that ensure that the VA
13 pharmaceutical price stays reasonable.

14 It is simply not true that
15 pharmaceutical companies, most of whom are
16 Coalition members, would continue to
17 participate in the VA schedules. They do so
18 not because they love selling through the
19 schedules, but because part of the reason
20 they're on the schedules is because of the
21 statute. Simply put, they would lose their
22 Medicaid business if they did not put their

1 sole source or innovator drugs on the VA
2 federal supply schedule. So while they would
3 like to sell to the VA, they would like to do
4 the Medicaid business even more because for
5 most of them that represents a larger share of
6 their business.

7 Absent the Veterans' Healthcare
8 Act, it is probable that many, if not most,
9 leading manufacturers of pharmaceuticals would
10 walk off the program, and the price reductions
11 clause is a primary reason why. I have
12 several members of mine that employ legions of
13 in-house and outside counsel simply to try to
14 comply, and even the very best companies, blue
15 chip names that make a huge investment in this
16 compliance arena, regularly end up paying
17 price reductions clause violations, not
18 because they are bad companies, but because of
19 the way the program is constructed relative to
20 the reality of their commercial business that
21 has changed dramatically over the past 30
22 years.

1 So it is the federal pricing
2 mechanism that has not kept up-to-date with
3 the commercial market reality. The commercial
4 market reality is supposed to be the
5 cornerstone upon which schedule contracting is
6 based. So it is time, I think, for the
7 government to catch up to what is going on
8 commercially.

9 All of that said, I think that the
10 point that a couple of people made, probably
11 most eloquently by Mr. Drabkin, is a good one.
12 That is that before we discuss the price
13 reductions clause, it is probably a good idea
14 to come up and discuss some alternatives to
15 what we would do.

16 While I certainly am not a big fan
17 of the price reductions clause, I am, in fact,
18 a big fan of ensuring the integrity of the
19 multiple award schedules program. I think it
20 is a very fair discussion, indeed, to make
21 sure that whatever recommendations this panel
22 comes up with are consistent with retaining

1 the overall respect that this program has in
2 the government, if not enhancing it.

3 So I think that maybe the thing to
4 do now might be to table the initial motion
5 and come back to some discussions of what else
6 we could come up with to ensure price
7 reasonableness along the terms of the
8 schedules program. I've got some ideas that
9 I alluded to here, but I'm sure my other panel
10 members have them as well.

11 MR. BRANCH: Judith, and then
12 David, and then I will exercise the
13 prerogative to insert myself into the queue.

14 MS. NELSON: Thank you, Larry, for
15 your very eloquent and interesting response
16 there.

17 I have a couple of points that I
18 would like to make in response. One was I
19 think it was Jan who made the comment that he
20 has not encountered companies who have decided
21 not to play in the arena because they did not
22 agree to the terms and conditions.

1 In my experience in industry, I
2 came across many companies, or not many but
3 companies who looked over the T's and C's in
4 the contract and decided that, no, they didn't
5 want to sign up to those terms and conditions
6 and backed away and said this is not a
7 contract that I want to sign up and want to
8 play with.

9 But, of course, there is a vast
10 majority of companies that do want to. Right
11 now on the GSA side of things, there are in
12 excess of 17,000 contracts. I don't want to
13 say vendors, but vendors that hold 17,000
14 contracts. So, clearly, there are a great
15 deal who do want to play in that arena.

16 In regard to Larry's statement
17 about the "gotcha" and not following the rules
18 or not wanting to play the fair and
19 reasonable, he alluded to the MAS Express
20 Program and the requirement to use all classes
21 of customers. Those are the rules for MAS
22 Express. They are laid out there.

1 So those that do choose to play in
2 that arena, they either sign up for them or
3 don't, and the few that have chosen to sign up
4 for them, they're clear and they do sign up
5 for them. So it is take it or leave it.

6 Like with any other contract, when
7 you decide to play, you either decide to play
8 or you don't. Companies who don't want to
9 play in that arena and go there, they are
10 welcome to come in through the regular, as we
11 call it, the regular lane, and they are not
12 required to negotiate their terms and
13 conditions and their basis of award through
14 that manner. So there's no "gotcha". You
15 don't have to play that way.

16 I think that is really a
17 discussion of not whether or not there should
18 be a price reduction class, but rather how
19 fair and reasonable is determined and how fair
20 and reasonable is monitored, not whether or
21 not we should have a price reduction clause.

22 I think here also, as Mr. Drabkin

1 discussed, we are not here to discuss
2 companies that are out to slide through
3 monitoring their prices. This panel here is
4 only here -- you know, we're not here to look
5 at companies that are specifically determined
6 to pursue fraud, right. We are assuming that
7 we are looking at companies who are only here
8 to work in the best interest of industry, GSA,
9 and the agencies.

10 I remember at one point we were
11 talking with Mr. Williams about something, and
12 we were looking to name a project. He said,
13 why don't we call those the high-value
14 industry partners? And the contracting
15 officers looked at Mr. Williams and said,
16 "Jim, all of our industry partners are high-
17 value industry partners." And he said,
18 "You're right."

19 We assume that all of our industry
20 partners are high-value industry partners and
21 that all of them are looking to -- right? So
22 that's what we are after right now.

1 I think that, as Mr. Drabkin said,
2 what we need to be looking for, rather than
3 eliminating a price reduction clause, because
4 I do think that there's no way around it
5 because we need to protect the integrity of
6 those prices. The competition simply does not
7 occur the way that it does in services at the
8 task order level. I would love to say it
9 does, but it is not happening at the E-Buy
10 level that it does at services.

11 But, on the other hand, the
12 compliance requirement, I won't question it.
13 The compliance requirements of the price
14 reduction clause for -- and I can't get around
15 the memory or laptops -- you know, to say that
16 it is going to go up on the website, they are
17 not producing hard copy. It is not like the
18 old days, so to speak, where everybody has a
19 500-page produced price list. These are
20 website price lists that are changing.

21 Again, Jim Williams mandated that
22 we go look at industry best practices, of how

1 not just the government and our sister
2 agencies are looking at this, but how is
3 industry maintaining their electronic
4 websites, and how can we work at this.

5 There are some FAR requirements
6 about doing modifications that require -- and
7 I'm sure that the government representatives
8 here are aware -- that there are some current
9 FAR requirements that modifications be either
10 bilateral or unilateral on the part of the
11 contracting officer. That is something that
12 I am looking at, and I am sure that I will
13 have some conversations with Mr. Drabkin about
14 how we can facilitate some price reductions on
15 the part of our industry partners to make
16 price reductions less cumbersome, shall we
17 say, so they can get those done more quickly
18 and alleviate some of the burdens there. But
19 right now, we do have some FAR requirements
20 that are working against us in that.

21 But we do have to look at some
22 industry tools, both industry best practices

1 and government best practices, and how we can
2 work at that, but I am still standing on the
3 price reduction clause perhaps not as it
4 stands right now, but it needs to stay in
5 place.

6 MR. BRANCH: Thank you.

7 David?

8 MR. DRABKIN: You know, it wasn't
9 quite 200 years ago that if you had said the
10 words that you said, Larry, in a public forum,
11 that Mr. Jackson would challenge you to a duel
12 and shoot you dead in front of the White
13 House.

14 (Laughter.)

15 To suggest that it is extortion on
16 the part of the government to negotiate a
17 contract with a vendor is offensive. There is
18 no right to a government contract. No one has
19 to sell to the government. Of course, we want
20 people to sell to us.

21 People walk away from deals and
22 can and do all the time. Now I would not go

1 as far as to say that these contracts are not
2 contracts of adhesion, but adhesion is
3 different than extortion.

4 So, just for the record, since you
5 used the word, I want to make it clear,
6 whoever's word it is, extortion is
7 inappropriate in any context in discussing how
8 we do our contracting.

9 I would agree there are contracts
10 of adhesion. I would be foolish not to. But
11 they, clearly, aren't extortion.

12 And the second point you made
13 about, well, commercial practices and we have
14 to follow commercial practices, that is not
15 true. When FASA was passed in 1984, FASA was
16 very clear about the government's capability
17 to use commercial practices when it serves the
18 government's needs.

19 I had something to do with how FAR
20 Part 12 was actually written and published and
21 implemented. It was never the intention that,
22 just because they do it in industry, we must,

1 because it's a commercial product, do it in
2 government.

3 So the notion that just because
4 companies do business one way or another with
5 each other in a commercial marketplace drives
6 us to behave the same way in the government is
7 a false notion, and it is one that must be
8 gotten rid of, particularly in the context of
9 the schedules themselves.

10 We are buying for the government.
11 We are buying within the constraints that the
12 government puts on us. It is not good enough
13 in the government to say that we ran a
14 competition, we got a price, and we're going
15 to pay whatever that price is just because we
16 ran a competition.

17 It is also not good enough to say
18 that we are going to buy using the same terms
19 and conditions that are used in the private
20 sector because that's what the private sector
21 uses. And by the way, you know and I know,
22 and everybody in the audience that sells and

1 buys commercially knows, there isn't a single
2 set of uniform commercial terms and
3 conditions. Commercial terms and conditions
4 are negotiated based upon the buying power or
5 the selling power of the people involved in
6 the relationships.

7 You and I both know that there is
8 an incredible lengthy exchange of forms in
9 many cases when there is a sale between
10 commercial buyers and sellers, and that in the
11 end, often the UCC was put in place to fill in
12 the terms and conditions that commercial
13 buyers and sellers cannot agree to.

14 So let's not delude ourselves that
15 there is an answer, and the answer is a
16 commercial solution, and that all we have to
17 do is divine it and follow it. Just like
18 performance-based service contracting, which
19 industry told Al Burman in 1990 was the best
20 way to buy stuff, and to date industry has
21 failed to produce for us examples of how they,
22 themselves, use performance-based service

1 contracting so that we can emulate it, but we
2 are now in 2008, some 18 years later, and we
3 have all kinds of edicts because someone
4 believed that industry was using performance-
5 based service contracting and it was a great
6 way to go.

7 Now let's get back to the real
8 topic at hand, which is the price reductions
9 clause. The price reductions clause is not a
10 negotiating tool to establish fair and
11 reasonable prices. It is a safety net, a
12 prophylactic measure to protect the
13 government.

14 One might argue that we should
15 never award a contract to a vendor who is
16 unable to demonstrate at the time of award
17 that they can track all of their prices so
18 that we will be able to ascertain at any given
19 time what their pricing was to the basis-of-
20 award customer they agreed to.

21 One might say that a company who
22 is incapable of doing that is not responsible

1 for purposes of schedule contracts since that
2 is how schedule contracts are priced. We have
3 chosen not to do that.

4 Now we could spend a lot of time
5 arguing about why we chose not to do that.
6 You could argue that GSA was faced with a
7 situation in the mid-nineties that if we
8 didn't start selling stuff and have customers,
9 we would go out of business. That would be a
10 true statement.

11 You could say that we did it that
12 way because it was virtually impossible to do
13 it any other way; we didn't know how to do it
14 any other way. I think that would also be
15 true.

16 You could say that there is no
17 commercial equivalent to provide us
18 transparency so that a contracting officer can
19 truly know what one could sell its products
20 for. Some companies think that is
21 proprietary. They don't want anybody to know
22 what that is. They don't even tell us

1 sometimes.

2 But whatever all of those things
3 are, we have a practical problem. If we want
4 the schedules program to continue in the face
5 of the criticisms that we are regularly
6 getting, not only from our overseers but from
7 the customers who are sitting here on the
8 panel, we need to find a way to price goods so
9 that when folks go to GSA Advantage or they
10 use E-Buy or they do it manually, they can be
11 assured that they are getting at least a fair
12 and reasonable price, not the best price
13 because they may not deserve the best price
14 based on the way they are buying, but a fair
15 and reasonable price.

16 So I appreciate, however, your
17 last comments, which is perhaps we should
18 table this motion and talk about what should
19 the pricing mechanism be, first, when we
20 negotiate the price and then, second, as we
21 administer the contracts, to make sure that
22 the government and industry get fair prices

1 for what they buy and sell each other.

2 MR. BRANCH: Thank you, David.

3 But before I make my remarks, I
4 would just like to welcome Mr. Essig back to
5 the panel. It's good to see you, Tom.

6 If I could ask, Pat, if I could
7 ask you go back to the top of the page, so Tom
8 can see the motion on the table, we are
9 discussing a price reduction clause as it
10 pertains to product. Debra has advanced the
11 motion that we remove that price reductions
12 clause from the schedule and adopt an 803-like
13 approach.

14 It has been interesting sitting
15 here listening to the dialog amongst the panel
16 members, and I guess at a level of
17 abstraction, we are dealing with one of the
18 most difficult issues that one confronts in a
19 democracy as large as ours, which is, what is
20 the role of the state and what is the balance
21 between the state exercising its sovereign
22 power versus its proprietary role in

1 contracting?

2 I think most of our acquisition,
3 our procurement regulations strive to strike
4 that balance, and here's really what we are
5 struggling with: how one strikes that balance
6 within the business model of the schedules for
7 products.

8 I would have to observe that I
9 agree with my colleague Mr. Drabkin that no
10 one is entitled to a government contract, that
11 what we are really striving for is effective
12 competition. Do we have enough people willing
13 to come to the table for a given set of goods
14 to create a competitive environment such that
15 the pricing and other terms result in the best
16 deal for the government, price and other
17 factors considered?

18 I would have to take issue with
19 his term. I think it was perhaps too strong
20 to characterize any government contract as a
21 contract of adhesion simply because the
22 marketplace is broad enough that no vendor who

1 sells to the government would likely risk
2 going out of business for want of other sales
3 opportunities, especially with respect for
4 goods.

5 So I think there are really two
6 questions that we ought to be addressing
7 before we tackle this one. The first one is,
8 is there a way that we can make the
9 administration of the price reductions clause
10 less burdensome both on industry as well as
11 government? If that is not a preferred course
12 of action, is there a substitute mechanism for
13 the price reductions clause in meeting those
14 public policy objectives, of balancing the
15 government's role in acting in a proprietary
16 capacity versus its sovereign role in using
17 the coercive power of the state?

18 So given that, given that there is
19 some energy around perhaps tabling this, I
20 would so move that we table the motion and
21 that we perhaps pursue some of these more
22 foundational issues.

1 Okay, I have a second.

2 All those in favor of tabling the
3 motion raise your hands.

4 (Show of hands.)

5 It looks like we have nine.

6 Anyone opposed to tabling the
7 motion?

8 (Show of hands.)

9 Okay, the motion carries, nine to
10 one.

11 MR. CHVOTKIN: Mr. Chairman?

12 MR. BRANCH: Yes?

13 MR. CHVOTKIN: I just have a
14 question when you said "table". Is it your
15 intent to lay that aside pending further
16 discussion? When I understand a motion is to
17 table, it means we are done discussing it. So
18 I just want to be clear on what the intent is
19 here.

20 MR. BRANCH: No. No, let me
21 clarify. I am moving to table this pending
22 further discussion. I think there are some

1 foundational issues we probably need to
2 address. As we perhaps reach consensus on
3 some of those foundational issues, it might be
4 appropriate at a later time to remove that
5 motion from the table and have a vote on it.

6 Yes, Tom?

7 MR. ESSIG: If I could just ask
8 one thing since I did get in late? I
9 apologize for that.

10 I think you went around the table
11 and got exceptions. I would agree with
12 tabling it as long as I can get my comments in
13 first, very briefly.

14 MR. BRANCH: Absolutely, Tom.

15 MR. ESSIG: Okay. I think I
16 mentioned I was on the record at a prior
17 meeting, too, that I believe the price
18 reduction clause is an archaic tool. I don't
19 think it reflects the pricing methodology in
20 today's marketplace.

21 Fair market prices are driven by a
22 number of variables that fluctuate in the

1 marketplace over a period of time. It is not
2 static. It is not the same thing in January
3 that it is in July or that it is in August.
4 I think the price reduction clause does not
5 reflect that.

6 There's at least two things that I
7 think of significant consequence. One, I
8 think it creates a false sense of security on
9 the government side to believe that we are
10 getting a fair and reasonable price and, as a
11 result of that, we are less likely to do the
12 things that could actually generate such a
13 fair and reasonable price for us.

14 Secondly, I think it creates an
15 unreasonable risk on the part of industry that
16 has to comply with some clause which has at
17 the time they agreed to it unknown
18 consequences.

19 So I am strongly in favor of
20 removing that clause.

21 MR. BRANCH: All right, thank you.

22 Other comments?

1 Is there potentially a way to make
2 the administration of this clause less onerous
3 on both parties?

4 MR. ALLEN: If I may hazard to
5 weigh-in, "hazard" being appropriate I think
6 at this juncture.

7 (Laughter.)

8 I point out I have my human shield
9 right next to me now.

10 (Laughter.)

11 One, and I'm sure and I hope there
12 will be a lot more discussion around this than
13 this, but one potential way to make this a
14 little bit easier, and I think that reflects
15 Judith's comments and some of the desires of
16 the other panel members, notwithstanding the
17 MAS Express Program, I get that. I think it's
18 wrong, but I get it. Notwithstanding the
19 Express Program, perhaps one way to make this
20 a little bit easier is to adhere to the
21 original intent of the clause, which is to
22 negotiate a basis of award that is relatively

1 precise in nature and is not all customers,
2 because you do have contracts that were not
3 negotiated via MAS Express that have the basis
4 of award as all customers.

5 I would venture to say you have
6 hundreds, if not a thousand, contracts,
7 certainly in the hundreds, that were
8 negotiated with the basis-of-award customer
9 being all customer classes. In very, very few
10 of those would that make sense. There may be
11 some exceptions, but I would venture to say in
12 over 98 percent of the cases you ended up with
13 a basis of award being all commercial
14 customers because the contracting officer
15 thought that he or she was doing a good job in
16 terms of really holding the vendor's feet to
17 the fire.

18 In reality, you had a company that
19 really wanted to get a government contract,
20 for whatever reason, and would have turned
21 over their grandmother if that's what they
22 thought they needed to do.

1 So I think maybe one way to come
2 back at this and to simplify it would be to
3 say that your price reductions clause is based
4 on -- the example I always use is American
5 Airlines. Maybe one way to come at this is to
6 say the price reductions clause is based on a
7 specific customer, and that way there is a
8 one-to-one correlation that can be more easily
9 tracked and monitored.

10 As I said, that's just one idea,
11 and I hope there's more discussion around it,
12 but I think we've devolved to the point where
13 more and more prices have to be tracked, and
14 in the dynamics of the commercial market
15 that's becoming a real compliance burden.

16 MR. BRANCH: Debra and then Glenn,
17 and then Jackie.

18 MS. SONDERMAN: I guess on the
19 issue I'm troubled that we are at this point
20 worried more about burdensome, the price
21 reductions clause being burdensome and making
22 it less burdensome, than in trying to make it

1 more effective, which, getting back to Tom's
2 comment about creating a false sense of
3 security, that's what I worry about.

4 What I recall from the testimony
5 we heard from the GSA IG and some other folks,
6 the number of price reduction clause cases was
7 small in any given year, at least that they
8 were tracking, very small in comparison with
9 the total number of contracts that are on the
10 schedules.

11 Jackie pointed out that we haven't
12 gotten a lot of data or maybe haven't gotten
13 any data on how often it is used by a
14 contracting officer and doesn't rise to the
15 level of attention of the Inspector General.
16 But as a customer, I can't tell whether it is
17 being used or not. So I share the concern
18 that it does create this false sense of
19 security that the prices are being maintained
20 or that relationship of the prices is being
21 maintained.

22 As we discuss either altering the

1 clause or altering our procedures, I would
2 hope that we would keep in mind that it's
3 important to improve effectiveness and not
4 just to reduce burden.

5 MR. BRANCH: Glenn?

6 MR. PERRY: As I sit here
7 listening more, I guess, we kind of started
8 off I think putting it out there and saying to
9 remove the clause, to get rid of the clause is
10 a good starting point. However, it also leads
11 us into the trap that we're back to a place
12 that I thought we got ourselves out of on
13 services. That was to go back and look at the
14 way in which the contracts are being formed,
15 how we get the fair and reasonableness
16 determination, and then you tailor this, if it
17 were to stay, you would tailor it to sort of
18 help you during the contract administration
19 part of any particular agreement we have.

20 Not only is the way it is now, the
21 motion probably should have said just throw it
22 out the way it is written today because

1 everything I have heard over the last three
2 months is that, even if it were a good thing,
3 we don't administer it consistently; we don't
4 have any data; we don't collect data to even
5 know that we are administrating it correctly.

6 If I were not only as a customer,
7 but if I were on the industry side, I think I
8 have to listen -- I heard the word "gotcha".
9 I don't know if it's that. I think it's just
10 people don't know when it is going to crop up
11 because we don't know what the basis of award
12 was. We don't know who is administering it.
13 We don't know when they are going to happen to
14 look at it or who, and it is just always
15 sitting out there, and you can't be sure it
16 will be very consistent in the way it is being
17 administered.

18 So for that reason, you just take
19 it off the table, go back to -- that's why I
20 said, although not as eloquently, at the
21 beginning I go back and look at contract
22 formation. Let's talk about how we get the

1 fair and reasonable price onto that schedule
2 for those particular items.

3 Then if it works, to pick up on
4 something that I think was mentioned just
5 previously, in particular circumstances that
6 might be a good tool during contract
7 administration to have on that particular
8 contract if you are willing to stand behind it
9 and provide the resources in order to actually
10 use it in a fair and reasonable way. That is
11 not to be confused with the fair and
12 reasonable price, but in the way we behave
13 both on the industry side and on the
14 government side during the performance of that
15 contract and while orders are being made over
16 whatever the life of that contract was.

17 MR. BRANCH: Thank you.

18 Jackie?

19 MS. JONES: Okay. Glenn, I'm glad
20 you asked that because I am sitting here
21 thinking that there is a little bit of a lack
22 of understanding in terms of at contract

1 formation whether or not the price reductions
2 clause is an issue, and it isn't at contract
3 formation.

4 When the contract is being
5 established, the companies are required to
6 disclose their commercial sales practices in
7 their proposal. It helps the CO to determine
8 the competitiveness of the price that the
9 company is proposing to us based on what they
10 sell it for commercially.

11 So, in other words, they can
12 propose a price for a laptop to us on an offer
13 as \$1600, let's say. Could you determine that
14 price fair and reasonable if you went out
15 there and did market research on all of the
16 laptops that are sold with the same or similar
17 characteristics? Sure you could.

18 But if that company is proposing
19 that laptop to us as \$1600, but to all their
20 other commercial customers they are selling --
21 not say "all", but their best price that they
22 are giving to a customer that buys a lot of

1 volume from them, let's say, is \$800, then we
2 want to look at that price. We want to look
3 at that price to see if the \$1600 that they
4 are proposing to the government based on a
5 customer that is buying similar volumes of the
6 same thing being sold to them at \$800, we want
7 some negotiation leverage in that when we are
8 establishing a GSA schedule price. Okay?

9 So the commercial sales practices
10 lets the CO know, and the disclosure of those
11 lets the CO know where to look at setting a
12 negotiation objective for prices at the
13 schedule level.

14 So the price reductions clause in
15 and of itself it not a negotiation tool at
16 contract formation. It is only in play when
17 the contractor, after award, fails to disclose
18 changes in their sales practices.

19 So if we put it on contract, let's
20 say, for \$800, and maybe two years into that
21 contract the contractor drops that price for
22 that laptop to the basis-of-award customer

1 that we established at the time of the award,
2 let's say, down to \$600, and we are buying at
3 the schedule level. They're reporting sales
4 of similar volume for that item; we want that
5 price, too. We want the price to come down at
6 the schedule level to \$600 as well. Now if
7 the contractor fails to disclose that to us,
8 then we have a price reductions clause issue.

9 So really the price reductions
10 clause isn't a big stick that the government
11 holds over a contractor's head to do a
12 "gotcha". If they're disclosing changes in
13 their selling practices to the CO, so that the
14 CO has information to consider whether or not
15 the price of the schedule level needs to be
16 renegotiated, the price reductions clause
17 never comes into play. So that's how it
18 works.

19 MR. BRANCH: Okay. I think that's
20 helpful in understanding the role of the price
21 reductions clause at contract formation. As I
22 listened to you, though, Jackie, I guess the

1 analogy that I draw is kind of the analogy to
2 cost accounting standards, you know, where
3 with our larger companies, primarily in a
4 sole-source environment, we say, "So what are
5 your accounting practices? You will bid costs
6 the same way you collect costs."

7 We have a mechanism on the CAS
8 side of the house that works fairly well with
9 our large contractors with respect to
10 disclosures of changes in those practices and
11 adjustments.

12 I guess my concern here is we are
13 dealing with a much more heterogeneous
14 population of vendors, a much larger
15 population of vendors, and we are really
16 looking at kind of how they price or how they
17 sell to us on the basis of price rather than
18 cost.

19 So I guess, what's the road we go
20 down? And I don't have a good answer. But
21 what's the road we go down if we are going to
22 a contract formation to say this is the

1 tracking customer, so that we have a high
2 degree of confidence as those market dynamics
3 change and those pricing dynamics change, that
4 the prices we get are faithful with the prices
5 given to that tracking customer.

6 Having listened to the testimony
7 across all of our meetings, I guess the
8 conclusion I have come to is that no one has
9 enough resources, either inside the government
10 or outside the government, to do that
11 faithfully.

12 So I guess I am kind of conflicted
13 like David is. I think there is a need to
14 ensure that there is some integrity in the
15 process, and I will withdraw the word
16 "burdensome". I appreciate the substitution
17 of "effective". But how we do that
18 effectively is, I think, what's on the table
19 today.

20 How do we create an effective
21 mechanism to make sure that the prices we have
22 on schedule are faithful with the prices sold

1 in the commercial marketplace? My thinking
2 is, and I say this with some hesitation, but
3 you shorten the term of the average GSA
4 contract. I mean it is absurd that we have a
5 five-year contract with two sets of five-year
6 options, three sets, some of these going to 20
7 years.

8 There is absolutely no way over a
9 period of 20 years that you can maintain
10 faithfulness of pricing as not only markets
11 change, but the very complexion of the
12 companies who sell to us change.

13 Now IBM is an excellent example.
14 If you roll IBM back 20 years ago, 20 years
15 ago there was some question as to whether IBM
16 was going to survive as a company because they
17 had bet heavily on what is now a commodity,
18 and they had to reinvent themselves
19 significantly into a services and solutions
20 advisor to even be in existence today.

21 So the idea that we could have
22 gotten pricing 20 years ago from that company,

1 which was in a very, very economic condition,
2 that would retain some faithfulness to that to
3 this day is absurd.

4 On the other hand, in order to
5 shorten the cycle of those contract awards, we
6 would have to provide or GSA would have to go
7 out, I think, and hire a significantly larger
8 workforce of acquisition professionals who,
9 frankly, are not there today, and even if they
10 were there today, it would probably raise
11 significantly the size of the industrial
12 funding fee. So there are tradeoffs to be
13 made here.

14 But I think one of the first
15 places we may want to start this discussion
16 is, are GSA schedule contracts, the length of
17 GSA schedule contracts, consistent with the
18 market dynamics we have today?

19 MS. JONES: Can I comment on that?

20 MR. BRANCH: Absolutely.

21 MS. JONES: Yes, at the time of
22 the option periods, before the option periods

1 are exercised, companies are required to
2 resubmit commercial sales practices
3 information. So we gather that at every
4 option period.

5 However, in between the option
6 periods, if there are changes, then they are
7 required to disclose those. So we don't try
8 to carry out the same basis-of-award customer
9 or relationship through the life of a 20-year
10 contract unless the contractor says that there
11 have been no changes in their sales practices.

12 Another comment that I wanted to
13 make about Larry's concern with contracts
14 being formed with a basis-of-award customer as
15 all commercial customers, usually, Larry, that
16 happens because we get a lot of contractors
17 who come in and say, "I only sell to the
18 government. I don't have any other customers
19 but government customers."

20 Then what the COs are doing, they
21 are establishing a basis-of-award customer to
22 say that, if you ever make a sale, a

1 commercial sale out in the commercial
2 marketplace, we are going to want you to track
3 our prices with the commercial customer that
4 you would form a contract with in the future.

5 MR. BRANCH: Alan and then Judith.

6 MR. CHVOTKIN: Mr. Chairman, I
7 think Glenn gave us a construct for a way
8 forward, and it is sort of how we got to the
9 same place, the discussion of services. We
10 started in the September meetings on services
11 with a discussion of the price objectives,
12 then went to a discussion of fair and
13 reasonable prices, then went to a discussion
14 of the contract administration. I think if we
15 do that here, we will advance considerably.

16 In fact, I will point out to my
17 colleagues that we actually adopted two
18 motions in the discussion of service on both
19 of those and happened to take a break and
20 decided, when we come back, to revisit those
21 as Motion 10, Alternative 2, that we adapted
22 with respect to the price objective, and then

1 Motion No. 3 with respect to the determination
2 of fair and reasonable price. It is not how
3 they got it, but merely for the disclosure.
4 So I will put those on the table and look for
5 an appropriate place to raise them.

6 MR. BRANCH: Judith?

7 MS. NELSON: Elliott, it's
8 interesting that you raised the option, so to
9 speak, that GSA look at the length of the
10 contracts and the options because at this
11 point in time we have many contractors or we
12 are starting to see our contractors enter into
13 their 17th year, their GSA schedules. So now
14 is the time that we are beginning to look at
15 what happens when we hit our 20th year and how
16 we deal with that, as well as the Evergreen
17 clause, which is that clause that calls for
18 the potential of three five-year options.

19 To begin to gather some empirical
20 data, as opposed to thoughts, on what that
21 would take and whether or not it's correct and
22 a good practice to have the length of

1 contracts that we do, whether or not five
2 years is the right thing, three five-year
3 options is the right thing, and I'm not 100
4 percent sure -- actually, I will be leading up
5 that project -- whether or not it would take
6 an enormous acquisition workforce,
7 particularly since we are now cycling into
8 that. We are at the time for that to happen.
9 So it may be apropos for us to actually look
10 at that.

11 As far as ways to look at more
12 effective things, I will come back to two
13 things, which is two practices. One as to
14 whether or not it would be more effective,
15 first of all, to develop the electronic tools
16 to manage the price discount relationships,
17 whatever they are, when the government, when
18 GSA enters into a relationship with the
19 industry partner negotiated on the contract,
20 that those be captured electronically. So
21 that when they are submitted for price
22 discounts, or for new additions, but in this

1 case for price reductions, that they can be
2 done more effectively and more quickly.

3 I think that both for the industry
4 partner and for GSA to have them done more
5 effectively, more quickly, and actually more
6 accurately, because they can be checked
7 electronically, that I think is one of the
8 things that can be done. It would take an
9 investment, and it would take bringing
10 everything over to an electronic format. So
11 it would take some time, but that is the best
12 practice that I have, along with a colleague,
13 found that needs to happen.

14 I also strongly believe that the
15 price reductions, the modifications need to be
16 unilateral with a notification to the
17 contracting officer, as opposed to bilateral,
18 so that they can happen more quickly as well
19 and checked behind, so that they can go up on
20 GSA Advantage more quickly and they can be
21 made available to the agencies more quickly,
22 as opposed to going into the queue that our

1 contracting officers have.

2 So those are two of the
3 suggestions that I have as far as making them
4 more effective, but I think that your
5 suggestion regarding the length of the
6 contracts is very apropos, particularly at
7 this time.

8 MR. BRANCH: Thank you.

9 We'll go to Mr. Drabkin, and then
10 we'll take a 15-minute break.

11 MR. DRABKIN: You mean I'm
12 standing between everybody and the 15-minute
13 break?

14 (Laughter.)

15 I'll wait until after the 15
16 minutes.

17 MR. BRANCH: Well, I'll allow
18 David to collect his considerable thoughts for
19 another 15 minutes. I have 10:35. So why
20 don't we take a break until 10:50?

21 (Whereupon, the foregoing matter
22 went off the record at 10:38 a.m. and went

1 back on the record at 10:57 a.m.)

2 MR. DRABKIN: Actually, this is
3 not as dangerous as one might think, because
4 I forgot everything I was going to say.

5 (Laughter.)

6 No, you're not that lucky.

7 Might I propose at this point that
8 we begin building something that becomes a
9 motion to address how one structures pricing
10 for goods on the schedules as a recommendation
11 to the Administrator?

12 Given the conversations that have
13 gone on just this morning, excluding my threat
14 to challenge Larry to a duel in front of the
15 White House 200 years ago, which I hope was
16 taken as I meant it, very seriously --
17 (laughter) -- given the District's gun control
18 laws, we don't have to worry; we would be
19 arrested.

20 MS. SONDERMAN: You would have had
21 to go to the dueling grounds at Bladensburg
22 anyway.

1 MR. DRABKIN: Oh, okay.

2 MS. SONDERMAN: That's where they
3 actually took place.

4 MR. DRABKIN: Is that where they
5 did it?

6 MS. SONDERMAN: Yes.

7 MR. DRABKIN: I thought he shot
8 somebody right there at the White House.
9 Okay.

10 This really shouldn't be on the
11 record.

12 (Laughter.)

13 It is now. God forbid anything
14 happens to you, Larry; the police are coming
15 to my house.

16 (Laughter.)

17 Anyway, I think there are at least
18 two points, one point that I heard and one
19 point I think I tried to make, that I would
20 like to offer into this mix as we start kind
21 of identifying those things that should go
22 into the contract award price negotiation.

1 One, I think I heard someone say
2 that it, in fact, has become more and more of
3 a practice to identify all commercial
4 customers as the basis for award.

5 I heard something of an
6 explanation that suggested, well, that's only
7 when they don't have any commercial customers.
8 That very answer somehow worries me a great
9 deal, that we have someone on the schedule,
10 which is supposed to be a commercial schedule,
11 that has no commercial sales.

12 So, at the very least, my first
13 recommendation would be that no longer in the
14 price negotiations part of the award of a
15 schedule or in the subsequent award of an
16 option would we use all commercial customers.
17 If we can't find a customer for basis of
18 award, then that's a contract that doesn't get
19 awarded.

20 Secondly, I would like to suggest
21 that, as I mentioned, if a company is
22 incapable of demonstrating that they can track

1 at the company level all of their sales, so at
2 least they can identify those which would
3 affect the basis-of-award customer, that that
4 would be the end of the negotiation as well.
5 I mean if you can't track them, if you can't
6 keep track of your sales, quite frankly, I am
7 not sure you're a very responsible company
8 from the perspective of the schedules program
9 -- you may be very responsible anywhere else
10 -- but since we use that as a basis for making
11 award decisions.

12 Then, third, we haven't talked
13 about this yet this morning, but one of the
14 things that has always troubled me in the
15 schedules program, and most recently when I,
16 myself, went onto GSA Advantage and then used
17 E-Buy to try to buy something for our office
18 personally, as an exercise to see how it
19 actually works, I was actually distraught to
20 find that we listed products, the same exact
21 products being offered by different companies
22 with a price variance in one case of almost

1 100 percent.

2 So I think the third thing I would
3 add is not only is there an issue about what
4 your basis-of-award customer is and whether
5 you contract your prices, but in the award
6 process we do some comparative pricing, and
7 that the pricing not be limited to the
8 company's pricing, but to the marketplace's
9 pricing.

10 Don't misunderstand what I am
11 about to say. I still believe what I have
12 just said. I do not believe that competition,
13 given the nature of an ID/IQ contract, the
14 final competition, the best competition, is
15 going to occur when we award the basic
16 contract. But if we don't start out with a
17 price that at least is competitive in that
18 particular marketplace, how do we get to a
19 price that is really competitive at the order
20 level?

21 So I would suggest at least these
22 three things as part of a beginning of a way

1 to look at how one might price a schedule
2 contract.

3 By the way, this is more work for
4 both us and for the company. It would affect
5 our ability, I think, to speed up getting
6 people on schedule, which is something we're
7 constantly pressured to do. But I think the
8 results that these three things offer would
9 address much of our concerns so far, and I am
10 sure there are other things to add.

11 So I offer this as the beginning
12 of our discussion about how to make a
13 recommendation to the Administrator to improve
14 the way in which we improve pricing for goods
15 on the schedule.

16 MR. BRANCH: Okay. David, I have
17 just a couple of questions of you for
18 clarification.

19 So if I accept Jackie's
20 explanation that we use all customers as a
21 basis of award, generally when a firm has no
22 commercial customers but is dealing solely in

1 the federal market space, is it your
2 suggestion that if you have no commercial
3 customers, then you are not eligible for a GSA
4 schedule award?

5 MR. DRABKIN: That would be the
6 outcome of what I just said.

7 MR. BRANCH: Okay.

8 MR. DRABKIN: By the way, I don't
9 like that outcome because there are lots of
10 companies who operate only in the federal
11 space or only in the government space,
12 federal, let's say, and state and local, which
13 are very good companies and do very good work.
14 But if this is truly going to be a commercial
15 products and services group, then I think
16 they've got to sell in the commercial
17 marketplace.

18 MR. BRANCH: Okay. I'll get to
19 Debra in one minute.

20 And I will go further than that.
21 If you are a vendor who sells exclusively to
22 the government, then perhaps the schedules

1 program is not the venue through which you
2 should sell. If there is a compelling reason
3 for those of us in agencies to buy from those
4 companies, quality of the work, understanding
5 of our agency needs to a level that the
6 commercial market does not have a better
7 quality or a better price, then I would
8 suggest we as responsible buyers in the agency
9 would find a way to do business with those
10 folks, if not through our own ID/IQs, through
11 a more traditional basis. That is a tradeoff
12 that we should be making as user agencies:
13 what is the compelling reason to go to
14 somebody who exists only in the federal
15 marketplace?

16 I will add one thing, and then I
17 will turn the mike over to Debra.

18 I guess I pretty much endorse the
19 three concepts that you have advanced.

20 Although I do not believe that a firm
21 necessarily will be able to track all of its
22 sales, I think it would be sufficient if a

1 firm could track those sales of its basis-of-
2 award partner. I would suggest that that has
3 to be done through some sort of a pre-award
4 compliance review, so that GSA is satisfied
5 that the company, indeed, does have a
6 mechanism to trace the pricing for that basis-
7 of-award customer.

8 Debra?

9 MS. SONDERMAN: I was going to ask
10 Mr. Drabkin to clarify whether you intend that
11 prohibition to apply to both products and
12 services. We are having this discussion in
13 the context of setting prices for products
14 because we had other discussions about
15 determining fair and reasonable price for
16 services.

17 MR. DRABKIN: And there are plenty
18 of people who testify to my schizophrenic
19 nature, and the answer is no. As I mentioned
20 at the very beginning of our discussion this
21 morning, I think there is a very big
22 difference between products and services. For

1 that reason, I am not prepared to go the
2 distance with services that I am prepared to
3 go with products.

4 I could give you a much longer
5 explanation, but we need to get out of here
6 sometime today.

7 MS. SONDERMAN: So for the
8 purposes of clarifying the record, this
9 recommendation or these three recommendations
10 are focused toward determining pricing for
11 products schedule contracts?

12 MR. DRABKIN: Correct. My motion
13 which failed before, not that I want to remind
14 you it failed, would have addressed the
15 services issue, I think, much better, but this
16 does not apply to services, only to products.

17 MR. BRANCH: Okay, Jackie and then
18 Tom.

19 MS. JONES: Yes, I would like to
20 add an afterthought, too, regarding the basis-
21 of-award customer being used as all
22 commercial. Another circumstance surrounding

1 that, when a CO would establish that
2 relationship, is also when companies come in
3 and they say, "Yes, we do have commercial
4 customers, but we don't give discounts to
5 anybody. We never discount our prices under
6 any circumstances."

7 Then a CO would establish that
8 price relationship to say that, "But if you do
9 in the future, Contractor, ever reduce your
10 prices to any of your commercial customers,
11 saying that you never discount to anyone, then
12 we want that same discounting relationship."

13 MR. BRANCH: Tom and then Judith.

14 MR. ESSIG: I believe that any
15 scenario that excludes companies that only do
16 business with federal customers is
17 inconsistent with the concept of full and open
18 competition to begin with and gives us a
19 scenario where we exclude some parties from
20 consideration that may actually provide the
21 greatest value to us just because of the way
22 they are structured.

1 I think that is a mistake. I also
2 think it is an unintended consequence of
3 trying to find some way of fixing a defective
4 clause rather than something which provides
5 greater value to the government.

6 MR. DRABKIN: If I might, Elliott?
7 Tom, you make an excellent point, but when we
8 first developed FASA and when we talked about
9 the commercial item of both the statutory
10 language and then the rule, the idea was to
11 give us access to commercial companies,
12 specifically because commercial companies,
13 one, were turning intellectual property around
14 faster and cheaper than those companies who
15 traditionally did business with the
16 government.

17 Two, their products and the prices
18 for their products were being tested in the
19 commercial marketplace, whereas companies who
20 only sold to the federal government had no
21 similar test for the most part.

22 So not picking on any particular

1 company, but if you take a Lockheed or you
2 take a Northrup or you take a Boeing, although
3 all of them have commercial sales today of
4 some substance, those things which they sell
5 predominantly to the government really don't
6 have a true commercial market where true
7 commercial market pressures test the price.
8 And on the 1423 panel, Ty Hughes continually
9 pointed this out as one of the big fallacies
10 in the commercial items definition.

11 So while I understand fully what
12 you said and I have no desire to exclude any
13 company from the marketplace, I think the
14 schedules program can't in the future be all
15 things to all people. It either is truly a
16 commercial marketplace for the government or
17 it's not, and I'll let it go.

18 MR. BRANCH: Judith?

19 MS. JONES: I have a couple of
20 comments and then a little bit of
21 clarification to ask of David.

22 I also had the same question as to

1 whether or not he meant just for products or
2 services because I strongly agree, actually,
3 with him that this should just be for products
4 and not extend to the market for services.

5 The other thing is I do agree that
6 companies who have gone into the business,
7 particularly for products and not for
8 services, who only sell to the government
9 market should not be awarded under the
10 schedules program. So if that were to be its
11 own clause, if I were to amend it, I would say
12 first that all, suggest that all commercial
13 customers is not the basis of award, assuming
14 that there were -- and I'm not asking that it
15 be amended at this time, but I would say that
16 the basis of award should not be all
17 commercial customers because it is too broad
18 of a basis of award to be accurately monitored
19 by either GSA or by an industry partner, or
20 even to guarantee that the government is
21 getting the best price.

22 The other thing is, as Elliott

1 said, in No. 2, I would also suggest that
2 where it says, if a firm can't track, then
3 that's an issue of responsibility for the
4 firm, I would suggest that the firm be able to
5 show evidence that they can track the basis-
6 of-award class of customer. So if they enter
7 into a price discount relationship and that be
8 the trigger for a price reduction clause, that
9 they be able to show it, but not at the time
10 of award actually, because at the time of
11 award they have negotiated that they may not
12 -- I mean, functionally, in reality, they may
13 not actually have an accounting system set up
14 to do that, right? That day they are not
15 going to have it.

16 The glory of a GSA schedule
17 contract is there is a unilateral 30-day
18 cancellation clause. So if we were to say,
19 for instance, it says you have six months to
20 get on GSA Advantage, so not trying to create
21 the solution right now, but if you were to say
22 you have "X" amount of days, "X" amount of

1 months to create a tracking system by which
2 you must show evidence that you can track your
3 basis of award, and otherwise, the contract is
4 canceled, and that were to be monitored,
5 something like that.

6 Then the clarification that I
7 wanted to ask Mr. Drabkin was, in his third
8 point, to do a comparative pricing to the
9 marketplace rather than just the respective
10 firm's prices. When we talk about the
11 marketplace, are you talking about the full
12 commercial marketplace or to that which has
13 already been awarded on schedule?

14 MR. DRABKIN: I would propose
15 both. I don't think we are serving our
16 customers well to put a vendor on the schedule
17 whose price is 50 percent higher than anybody
18 else on the schedule or, for that matter, 50
19 percent higher than whatever the pricing in
20 the marketplace may be.

21 Of course, there are then things
22 that go along with it. I mean if it's a

1 product that comes with a service, that is a
2 whole different thing. I am talking just
3 about pure product.

4 MS. NELSON: Right.

5 MR. DRABKIN: So you can compare
6 apples to apples in the price comparison.

7 MS. NELSON: Okay.

8 MR. DRABKIN: And I do want to
9 make it clear for the record, since I notice
10 there are people here from the press, I'm
11 talking only from my own opinion. This is not
12 the opinion of the Senior Procurement
13 Executive of GSA. So, Matthew, please, I
14 don't want to read tomorrow that I challenged
15 Larry to a duel on behalf of GSA.

16 (Laughter.)

17 MS. NELSON: Okay. I, personally,
18 fully agree with David. There are two
19 functional difficulties that I see with it.
20 I know that it is being done. In the reviews
21 that I have done on the modification project,
22 having looked at greater than 30 percent of

1 the modifications that were done over a seven-
2 month period of time, I looked at a
3 statistical amount of those across all of the
4 acquisition centers. In reviewing that, we
5 found that market research was being done on
6 a great deal of those to determine fair and
7 reasonable pricing.

8 So what do we understand from
9 this? We understand that when products are
10 being added onto schedule, first of all, a lot
11 of those modifications contain upwards of a
12 thousand products. So how do you do market
13 research when it's a thousand, five thousand
14 products? You pull a few. So that's one
15 functional difficulty.

16 You do a couple. So you know a
17 few, but you don't know all of them. You
18 know, there's no feasible way to do market
19 research on 5,000 products.

20 Then the second thing that we
21 found was that, when you find these vast
22 differences in prices on GSA Advantage, a lot

1 of those prices where there's a great gap in
2 pricing is some of those high prices are for
3 companies that are no longer doing business on
4 a regular basis, and they are not updating and
5 they haven't pulled their old pricing off of
6 GSA Advantage. So that is an administrative
7 problem or an administrative issue that has to
8 be dealt with on contracts that are not
9 active.

10 The pricing tends to be very
11 current for contracts that are very active.
12 So you have these low prices, but those high
13 prices, where David, for instance, would find
14 something that was 100 percent higher, was
15 perhaps on a contract that hadn't been
16 modified over a period of weeks or perhaps
17 months.

18 So there are some functional
19 difficulties, not that the suggestion isn't
20 great and not that it isn't the absolute right
21 suggestion. I would say that probably in 75
22 percent of the time that I looked at

1 empirically, of those for the seven-month
2 period that we downloaded, market research was
3 actually being done.

4 MR. DRABKIN: Mr. Chairman, I'm
5 sorry, I just have to -- if we can't check the
6 prices, then we shouldn't be doing the
7 business.

8 Let me promise you Wal-Mart that
9 sells thousands and thousands of things checks
10 the prices on everything. We make money on
11 the schedules. In fact, we make good money on
12 the schedules. If we need to do the work, we
13 should. It's not an excuse that there's a
14 thousand items and we can't check them all,
15 and our customers don't know which ones we've
16 checked or not checked. I'm sorry, I can't
17 accept that.

18 MR. BRANCH: Glenn and then Tom.

19 MR. PERRY: I guess I wanted to
20 say something about that I like Dave's
21 suggestion on including the commercial
22 customers only. I understand the today issue

1 about the marketplace we've created with
2 potentially -- well, we have created with
3 federal-only businesses and some large
4 corporations who have split apart their
5 federal business from their commercial
6 business.

7 The part I like about all
8 commercial customers is for the product side
9 I can't think of any right off the top of my
10 head, and granted, there's thousands of items,
11 as has been said. But in today's world, I
12 don't know that we're creating any government-
13 specific spec products to be put on the
14 schedules. That is not our objective anyway.

15 So what that means is that the
16 products that are on the schedule, and since
17 we are trying to find an alternative to some
18 of these other sort of artificial ways of
19 trying to keep the price down, I like the
20 power of someone coming to me and saying a
21 taxpayer has made a decision to buy my product
22 using their own money, rather than coming to

1 me and saying somebody who is spending the
2 taxpayers' money has made a decision to buy
3 that product, as the basis for determining
4 that's a fair and reasonable price that we
5 should be buying at, because it is at the
6 taxpayers' level this was about as far as
7 making this a commercial schedule. If you
8 can't meet that test, then I am not sure why
9 we are creating some other marketplace.

10 That is my sort of a little bit of
11 ivory tower here as far as what we should be
12 trying to accomplish here, but I don't think
13 it is just to accommodate. I am sure that
14 wasn't what was meant, but I think we are in
15 a position that we don't have to take whatever
16 the circumstances we have created today and
17 try to find a way to keep them. I think we
18 ought to go back to some of the basics as to
19 why these were commercial schedules, schedules
20 for commercial items for products.

21 MR. BRANCH: Yes, I will pass the
22 mike to Tom in just a second.

1 Just to build on Glenn's comment,
2 and the fact that GSA has created options for
3 many of these contracts, and an option is
4 defined as a unilateral right on the part of
5 the buyer to extend the period of performance
6 or buy additional services, I think gives us
7 a good migration path to taking out those
8 vendors who may well only do business with the
9 government, without needlessly disrupting the
10 business model that is in place today.

11 Tom?

12 MR. ESSIG: Three quick points:
13 first, I would like to get the notes corrected
14 where it says, "Tom E.", to reflect what my
15 comment was. That is that I believe that the
16 exclusion of sources that do only federal
17 business is inconsistent with the concept of
18 full and open competition.

19 The second point, if we explore
20 the recommendation to exclude those sources a
21 little further, I think I need to understand
22 the impact on our resellers. These are

1 companies, basically. They are not
2 manufacturers of the products, but basically
3 provide them to the government.

4 At Homeland Security we have an IT
5 hardware contract called First Source that is
6 100 percent setaside for small businesses.
7 None of them manufacturers the PCs we are
8 buying; they are resellers.

9 The exclusion of those sources
10 that are set up to provide that service to us,
11 but for products, okay, has a potential of
12 negatively impacting a lot of small business
13 firms. I think we really need to understand
14 what that is before we pursue it.

15 The third point, in the
16 recommendations we are coming up with, I
17 think, again, we have continued to lock into
18 the way we have done business historically,
19 where we issue paper contracts; we do paper an
20 analyses of the marketplace and we do paper
21 contracting.

22 I think we really need to explore

1 alternative solutions available through
2 technological changes, things like if you go
3 on the internet, when I do shopping for a TV
4 set, I just don't run to Best Buy anymore. I
5 go online. I type in what I want to buy, make
6 and model, and I go to shopping.com or Yahoo
7 marketplace, to any of a number of services
8 out there that can give me current, today's
9 pricing, including shipping to my house, from
10 multiple commercial sources.

11 There are other techniques out
12 there to help us assure that the pricing is
13 reasonable other than putting something in a
14 contract which lasts for a year or longer or
15 trying to basically do an independent analysis
16 of the marketplace. We can let the technology
17 do that for us.

18 MR. BRANCH: Okay. Since I was
19 the one that extended David's concept that
20 perhaps firms that did business with the
21 government do not belong on schedule, let me
22 I guess extend those remarks.

1 I do not suggest that we stop
2 doing business with those firms altogether.
3 What I do suggest, however, is that perhaps
4 the schedules are not the right vehicle to do
5 business with those vendors, that if we
6 believe there's a compelling reason to do
7 business with those vendors -- and I think,
8 Tom, you make a very good point -- to meet our
9 small business goals, to use that reseller
10 market, that we in the agencies perhaps have
11 an obligation to put those kinds of vehicles
12 in place in the form of GWACs, in the forms of
13 ID/IQ contracts.

14 I just go back to the conceptual
15 model that the schedule program lays down,
16 which says that we are dealing with the
17 commercial marketplace, that to some degree we
18 are leveraging what buying power we believe we
19 in government have overall for commercial
20 items.

21 If we have a network of folks
22 whose business model says we only sell to the

1 government, yes, there may well be compelling
2 reasons to get through them. I believe we
3 have other vehicles to get through them. The
4 only question I raise is whether the schedules
5 are the proper vehicle to get to them.

6 MR. ALLEN: Mr. Chairman, if I may
7 follow along that line, I think even on the
8 schedules program there is a case to be made
9 for having those types of businesses.

10 First of all, probably two-thirds,
11 better than two-thirds, 70 percent, of the
12 companies on schedule today are small
13 businesses. Most of them are small business
14 resellers. A third of the sales on the
15 schedules program go to small businesses.
16 Generally, again, most of those are going to
17 be resellers.

18 I think that a panel
19 recommendation is that we somehow get at
20 companies that are selling mostly, if not
21 exclusively, in the current market. We are
22 going to run up with some very frustrated

1 Members of Congress, not to mention the Small
2 Business Administration, who would be
3 wondering what the genesis of that
4 recommendation would be.

5 These are also companies that are,
6 in fact, supplying inherently-commercial items
7 in the reseller environment, anyway, and GSA
8 has mechanisms that allow them to determine
9 price reasonableness even for those companies.
10 Most of the time, that is done on a markup
11 over manufacturer sales prices.

12 GSA, I think in most of those
13 cases, does a very, very good job, indeed, in
14 ensuring that the prices at which those
15 resellers buy is very, very competitive, in
16 most cases I think probably the most
17 competitive price that that manufacturer sells
18 it for to its reseller network.

19 So I would echo Tom's comments and
20 say let's be careful about that because I
21 think it could have some ramifications down
22 the line.

1 The other thing I will talk about
2 is I'm all in favor of apples-to-apples
3 comparisons. My concern is that not always
4 are you looking at apples-to-apples
5 comparisons. By that, I mean when we are
6 thinking about this -- and sometimes you are,
7 and I don't mean to suggest that we're not,
8 but when we are talking about this line of
9 reasoning, it is important to note that a lot
10 of the products today that you find are
11 configurable products.

12 There is, for example, no laptop
13 really, no standard laptop. I would venture
14 to say that the laptop on the right side of
15 our room has a different configuration from
16 the laptop on the left side of our room.

17 You can find things that look
18 alike, but I think we have to understand that
19 when you get into areas, especially in the IT
20 realm, but also with things like photocopiers
21 and things of that nature, there are options;
22 there are different chip sets, motherboards,

1 RAM, all kinds of other things that you can
2 get into that make a product. Although it is
3 inherently commercial in nature, they are
4 highly specialized and customized products.

5 That is just as true in the
6 commercial market as it is in the government
7 market. How I buy my PC online is very
8 different from how somebody else would buy
9 theirs online, and different again from how
10 the government would buy it. Yet, it is all
11 under the configuration of a specific brand of
12 laptop computer.

13 Not to say that we shouldn't go
14 down this path, I'm not suggesting that at
15 all. I just want to make sure that when we
16 are having this type of discussion, that we
17 are keeping those types of things in mind.

18 MR. BRANCH: Jan?

19 MR. FRYE: I would like to address
20 the issue of resellers that Tom brought up and
21 Larry continued with. I think resellers
22 absolutely have a place in the multiple award

1 schedules.

2 With the schedules, the VA awards,
3 we deal with hundreds of resellers every week,
4 but there's a difference between a reseller
5 and a front company. I want to bring to your
6 attention that we are seeing more and more of
7 these fronts, as I'll call them. Let me give
8 you an example.

9 We have a large business, for
10 instance, who would like to sell to the
11 government, but they don't want us to see
12 their prices. So they find a small and
13 disadvantaged business or a veteran-owned
14 servicable business, a woman-owned business,
15 and they set them up as a front. This
16 business doesn't have commercial sales, and
17 yet they insist that we should put them on
18 schedules, even though we can't use the normal
19 procedures. That is what we are running into
20 more and more as we go down the road.

21 I think what that is going to lead
22 to is the government paying 6, 8, 10, 12

1 percent more for products -- and I want to say
2 again "products" -- than we should be paying.

3 So while I am very, very
4 sympathetic to resellers, and I believe they
5 belong in the marketplace, because of the
6 rules of multiple award schedules, they need
7 to have commercial sales.

8 MR. BRANCH: Any other comments?

9 MR. DRABKIN: I just want to make
10 sure everybody is clear that, while I agree
11 with Elliott's language extending my thoughts
12 on this matter, it was not my intention that
13 resellers would, by nature of this approach,
14 be excluded. There are many resellers who
15 have commercial customers who can demonstrate
16 commercial sales.

17 We could spend some time talking
18 about the small business program and what it
19 was set up to do, and whether or not we are
20 truly meeting the needs of the small business
21 program by providing companies with only a
22 single market to do business in, which, by the

1 way, we all know is going to dry up here in
2 the next few years, when the wars get over or
3 the Congress decides it can't pay for the
4 trillion dollar bailout and everything else.
5 These companies I'm afraid we have not done
6 any service to at all because when their
7 federal customers go away, what's left for
8 them to do?

9 In fact, I think we are doing them
10 a service by insisting that, as part of being
11 in this program, they have a commercial sales
12 program. We are getting a service in return
13 by having the commercial market be the tester
14 or the setter of the price, which again has
15 been the complaint from a number of people
16 over the last couple of years, certainly
17 people on the Hill who are attacking the whole
18 definition of a commercial item and
19 commercial services, and they are concerned
20 that there really is no competition to set the
21 price.

22 But no one should walk away with

1 the idea that, as a result of adopting the
2 approach I suggest, ipso facto small
3 businesses are out of the mix. Quite the
4 contrary, quite a few of those businesses do
5 have commercial sales, would qualify under the
6 definition. The only ones that would have
7 difficulty would be those who only have a
8 single market, and that is us. Perhaps that
9 is more consistent with an overall good small
10 business policy to force them to seek and get
11 a commercial market as well.

12 MR. BRANCH: Pat, when you finish
13 that comment, could I ask you to go back to
14 David's three original premises? Thank you.

15 We have heard a lot of discussion,
16 and I think maybe it would be useful to form
17 conceptually what David has into a motion. So
18 I will take the first piece of that, and I
19 will move that we make a recommendation to the
20 Administrator that all commercial customers
21 not constitute a basis-of-award customer for
22 purpose of awarding a GSA schedule contract.

1 All right, let me recast that. So
2 I move that the panel recommend to the
3 Administrator that, for GSA contracts covering
4 the sale of products, or schedule of contracts
5 covering the sale of products, that all
6 commercial customers no longer be allowed as
7 the basis of award --

8 MR. PERRY: I'll second that.

9 MR. BRANCH: All right.

10 MS. JONES: Wait. Wait just a
11 second. I have a comment before we make
12 that --

13 MR. BRANCH: Well, I have got a
14 motion and a second on the table. So I will
15 be happy to entertain friendly amendments to
16 that to work the words.

17 MR. ESSIG: I just ask for
18 clarification. I'm not sure I understand what
19 that means.

20 MR. BRANCH: Okay. What that
21 basically means is when a contracting officer
22 picks the basis of award of a GSA schedule

1 contract for products, that he not be allowed
2 to make that award if the company asserts that
3 the basis of award, that is to say, the
4 tracking customer, be all commercial
5 customers; that he's got to go down a level of
6 granularity and pick the class of customers
7 that is most like the government in terms of
8 its buying habits.

9 So, Jackie, do you want to amend
10 those words?

11 MS. JONES: Yes.

12 MR. BRANCH: So the Chair will
13 entertain a friendly amendment to the motion.

14 MS. JONES: Well, I thought the
15 discussion was surrounding the fact that the
16 contractor had to have commercial sales in the
17 marketplace. I think making a motion
18 regarding the basis of award that a CO selects
19 in the negotiation process is a CO
20 determination, because I said earlier another
21 instance when a CO may use that category of
22 customers is when a company says, "We don't

1 give discounts to anybody under any
2 circumstances." So that is still a point of
3 negotiation in terms of selecting a basis-of-
4 award customer.

5 So I would amend that by going
6 back to the discussion that we had about
7 commercial sales.

8 MR. BRANCH: So just hearing your
9 thoughts, after the word "customer", instead
10 of a period, we would put a comma at the end
11 and perhaps add the words "unless the vendor
12 offers discounts to none of its commercial
13 customers". Would that satisfy your concerns?

14 MS. JONES: Yes, that's more
15 accurate.

16 MR. BRANCH: Okay, I'll certainly
17 entertain that as a friendly amendment.

18 Discussion on the motion? Alan?

19 MR. CHVOTKIN: I'm not sure I have
20 an objection to this, but I am still concerned
21 that we are into the negotiation part of the
22 contract formation before we set the price

1 objectives and the explanation of what is a
2 fair and reasonable price. So this may be
3 coming third or fourth or fifth down that
4 priority list that Glenn laid out earlier at
5 the break. So this will make sense to me only
6 if there's clarity around the pricing
7 objective of the schedules program for
8 products and determination of the methodology
9 for establishing fair and reasonable pricing
10 for the schedules program for products.

11 MR. BRANCH: Tom?

12 MR. ESSIG: I concur with that. I
13 think this motion actually presupposes some
14 other decisions we have yet to make.

15 MS. JONES: I third that.

16 MS. SONDERMAN: Would you
17 entertain tabling the motion?

18 (Laughter.)

19 MR. BRANCH: I would certainly
20 entertain doing that.

21 All right, we have a motion to
22 table this motion. All those in favor raise

1 their hands.

2 (Show of hands.)

3 Those opposed?

4 The ayes have it. The motion is
5 tabled.

6 So I will ask the question. So
7 the Chair will entertain, I guess, the
8 predecessor motions.

9 Alan?

10 MR. CHVOTKIN: Mr. Chairman? Ms.
11 Brooks, if I could ask you at the appropriate
12 time to scroll down to that Amendment No. 10,
13 Alternate 2, that we talked about at the
14 break, did you put that one together? Could
15 you put that on the screen?

16 MS. NELSON: Can I just see what
17 it is we have tabled at this point?

18 MS. BROOKS: I would just like one
19 clarification. As we said before, is this
20 motion tabled completely or it is tabled until
21 further discussion?

22 MR. BRANCH: All motions are

1 tabled, I guess, pending further discussion.

2 Then the question becomes, Do we wish to
3 remove them from the table or not?

4 I believe Mr. Chvotkin has a
5 motion that is in order.

6 MR. CHVOTKIN: Mr. Chairman, I ask
7 Ms. Brooks to put on the screen here -- these
8 are the two motions that we adapted last month
9 with respect to services.

10 Motion No. 10, Alternate 2, Ms.
11 Brooks, if you could just put the bracket
12 around the phrase "for services" there. Right
13 in that first line it says, "for GSA
14 schedules", and just bracket the words "for
15 services" because we are only talking
16 products.

17 This is to try to get at the
18 discussion of the pricing objective for the
19 schedules program. So I would move that we
20 adopt for products this same Motion 10,
21 Alternate 2, by substituting the words "for
22 products", this statement that we adopted for

1 services.

2 It lays out the price objective
3 for the schedules program for products, and it
4 relies on the statutory definition that we
5 discussed at some length last month.

6 We know that the discussion in
7 September was clear that the statutory
8 definition of lowest overall cost alternative
9 was really put into place at the time when
10 products predominated and we have morphed into
11 services. I think we ought to re-establish
12 that price objective for products before we go
13 forward.

14 MR. BRANCH: So just for
15 clarification, Alan, are you moving that we
16 adopt Motion 10, Alternative 2, as amended, to
17 substitute the words "for products" "for
18 services" and Motion No. 3 or just Motion 10,
19 Alternative 2?

20 MR. CHVOTKIN: Well, Motion No.
21 10, Alternate 2, was addressing the pricing
22 objectives of the GSA schedules program for

1 products. Motion No. 3 is the second of the
2 tiering or waterfall approach because that one
3 goes to the determination of fair and
4 reasonable pricing. I am happy to put both of
5 them on the table, to offer them in
6 combination or separately. If there is no
7 discussion about 10, Alternate 2, for
8 products, then we can talk about them together
9 or separately. My goal would be to introduce
10 both of them with respect to products.

11 MR. BRANCH: Tom?

12 MR. ESSIG: Actually, I have two
13 questions on Motion 10, Alternative 2.

14 Can you tell me what is meant by
15 contract formation? Is that the schedule or
16 the resulting order?

17 Secondly, when we talk about
18 lowest overall cost alternative, does that
19 include best value or are we really talking
20 about low price?

21 MR. CHVOTKIN: It was my intent
22 here, Tom, and my recollection of the

1 discussion in September, that contract
2 formation was at the schedule creation and not
3 at the task order level, and the phrase
4 "lowest overall cost alternative" was designed
5 to be a standard different from lowest price.

6 I think in practice it has worked
7 as a best value, but that is not a term that
8 we have used. So I know it is more than just
9 lowest price.

10 MR. BRANCH: Yes, Debra?

11 MS. SONDERMAN: Well, my
12 recollection of the very lively discussion
13 around this point at our last meeting was that
14 there was considerable disagreement about what
15 lowest overall cost alternative to the
16 government means. We fell back to that
17 because that is the language in the statute,
18 and our counsel, who would be sitting here if
19 she were here today, gave us strong advice
20 that we needed to follow the language of the
21 statute, and that only GSA has the authority
22 to interpret the statute or the GSA

1 Administrator has the authority to interpret
2 the statute.

3 Because part of the discussion was
4 that the preceding language to that clause
5 says, "contracts and orders". So some of us
6 said, well, we need to look at them together.
7 There's the schedule contract and then there's
8 the placement of the order, at which you do
9 things like best value and further competition
10 among the schedule-holders to get to the
11 lowest price.

12 So I offer that just in the
13 context of recollection of the lively
14 discussion, because we have now changed the
15 motion to say, "contract formation at the
16 schedule level". I think we carefully crafted
17 the motion not to be, in September, not to
18 eliminate what happens at the order level.

19 MR. BRANCH: I'll go to David, and
20 I'll go to Jackie, but could we put the words
21 "at the schedule level" in brackets? I don't
22 want to leave the impression that the panel

1 passed the motion with those words in it
2 because we, indeed, did not.

3 We really ought to entertain an
4 amendment to Alan's motion to put the words
5 "at the schedule level" in there. So let's
6 bracket or somehow denote that that is not
7 part of the record of the panel at this point.

8 David, and then Jackie.

9 MR. DRABKIN: I am sorry that I
10 missed the day of lively discussion --
11 mission/duties required me elsewhere --
12 because counsel and I would have had a dispute
13 between us.

14 There is nothing in our charter
15 that prevents us from recommending to the
16 Administrator that he seek a change to the
17 statute if a change to the statute is
18 appropriate. I don't know whether it is or
19 not.

20 But in answer to Tom's question,
21 this language in the statute preceded the
22 government's movement toward the use of best

1 value. As you may recall, that is something
2 that then-Secretary Perry announced in 1995,
3 that he would move the Department to, and then
4 the rest of the government moved along with
5 him, officially moving to best value. I
6 believe the language in this statute was
7 drafted sometime or passed sometime in the
8 seventies or eighties first.

9 So I am not at all concerned that
10 if in the part of our discussion on goods, or
11 if we want to go back and revisit services, if
12 we believe the statute should be amended to
13 reflect today's marketplace and today's
14 practices, that it would be out of order for
15 us to recommend to the Administrator that he
16 or she seek an amendment to the statute to
17 allow him to operate in a manner more
18 consistent with the marketplace we live in.

19 Secondly, then, in our earlier
20 discussion, I think the point I was trying to
21 make is what I heard from a number of you and
22 from the witnesses over the time we have been

1 engaged in the panel, is that the prices that
2 have been negotiated on the GSA schedule at
3 the time the schedule is awarded are
4 meaningless. I have heard a number of people
5 say words to that effect, if they didn't use
6 those exact words. I tend to agree with them.

7 We discussed, in fact, after
8 hearing much of this testimony, amongst
9 ourselves the fact that really the competition
10 takes place at the order level, because that's
11 where you get head-to-head competition for the
12 first time in the schedules program.

13 Earlier this morning when I was
14 talking about how we might change our approach
15 to the schedules program, I suggested that
16 there should be some head-to-head look at
17 pricing at the time of schedule award. So
18 that is not just an internal view of how the
19 vendor prices, but also an external view about
20 how that price marries up with the market in
21 terms of market pricing for that item.

22 I am not proposing in that regard,

1 as you would in traditional contracting, that
2 you would have a head-to-head competition, you
3 would have a winner, and if you didn't win,
4 you were out. But I am suggesting that some
5 policy guidance would need to be developed
6 that would say, if you are within 20 percent
7 -- or I don't know what the right number is,
8 but some percentage point of the market price
9 or what that item is selling for in the
10 market, that you can get the contract and then
11 we'll let the actual orders drive the prices
12 further.

13 But I would think that we are
14 doing a tremendous disservice by not making
15 this next generational step in the schedules
16 program to address, if nothing else, the
17 concerns of the members of this very panel.

18 I mean I think, Tom, you said the
19 schedule prices were worthless one day in your
20 observation of how they were being set. I
21 know that Jan is concerned about how prices
22 get set at the VA, and I heard Tom Sharp say

1 the same things. I am sure Debra and Glenn
2 also spoke to it and, quite frankly, I agree
3 with them.

4 So as we look at Motion No. 10,
5 Alternate 2, first of all, I would
6 recharacterize it and take Motion No. 10,
7 Alternate 2, out and make it Motion No. --
8 whatever the current motion is.

9 I think that for GSA schedules for
10 goods the price objective is to obtain fair
11 and reasonable prices at the time of contract
12 formation. If someone needs to understand
13 that, that means at the time we award the
14 schedules, then at the time the schedule is
15 awarded, and I think I would make that a
16 period.

17 I would leave out the language of
18 the statute because the Administrator may need
19 to go back and get statutory authority or a
20 statutory fix.

21 Then I think the next sentence
22 would include the concept that the price has

1 to be fair and reasonable or competitive not
2 only with regard to the basis-of-award
3 customer, but also with regard to other
4 schedule vendors in the same market space, or
5 words to that effect.

6 MS. SONDERMAN: I'll second that
7 if you offer a motion.

8 MR. BRANCH: Well, whoa, let's
9 slow down.

10 MR. DRABKIN: I don't think I can
11 make a motion at this time.

12 MR. BRANCH: Right. Well, two
13 things: just for the record, Mr. Chvotkin has
14 brought to my attention that there was a
15 motion made that GSA pursue a legislative
16 proposal to change the statute language, and
17 it failed for lack of a second.

18 MR. DRABKIN: Right. Well, there
19 would be a second today.

20 MR. BRANCH: Well, if anybody
21 wants to so move, when the pattern is cleared,
22 the Chair will certainly entertain a motion to

1 do so.

2 Just procedurally, we have a
3 motion on the table. So where we need to go
4 at this point is down one of two paths.

5 MR. PERRY: Can I correct your --
6 for Mr. Chvotkin, the motion that was made and
7 we didn't get a second was to remove pricing
8 completely, legislative, remove pricing --

9 MR. BRANCH: Well -- no.

10 MR. PERRY: And it's different
11 than you just said.

12 MR. BRANCH: Okay, yes, I sit
13 corrected.

14 Procedurally, here's where we are:
15 We have a motion on the table at this point.
16 There is certainly an option, if Mr. Chvotkin
17 so chooses to accept a recasted motion in the
18 nature of a friendly amendment; if he does
19 not, we have the option of calling the
20 question and voting on the motion as stated,
21 which will clear the pattern for an
22 alternative set of language addressing this

1 topic.

2 So I think, Tom, you wanted the
3 mike?

4 MR. ESSIG: Just as a follow-on to
5 whether or not we opened it up to a
6 recommendation that the statutory language be
7 changed. I read this for the first time after
8 the meeting since I was unable to attend. I
9 looked and the keywords I saw there were the
10 ones which said, "We recommend that the GSA
11 Administrator issue clear and consistent
12 guidelines to implement this pricing
13 objective."

14 I viewed that as the opening to
15 what do the words, in today's environment,
16 "the lowest overall cost alternative" mean?
17 We can handle that by policy. We don't need
18 to do that by legislation.

19 I would be comfortable with a
20 policy interpretation from GSA that allowed
21 for best value in that.

22 MR. DRABKIN: I'm certainly open

1 to it, but I'm told that I missed my counsel
2 telling you that wasn't happening.

3 MR. BRANCH: Well, what counsel
4 said was that it was not within the scope of
5 this panel to interpret the statutory
6 language, that the Administrator was the only
7 one with the authority to do so. I don't want
8 to put words in counsel's mouth, especially
9 since she's not here.

10 MR. DRABKIN: Oh, let's do it.

11 (Laughter.)

12 MR. BRANCH: But what I believe I
13 heard was that the Administrator has some
14 flexibility in interpreting what that rather
15 ambiguous statement means with respect to
16 operation of the schedule.

17 MR. DRABKIN: And I think it is
18 entirely appropriate for this panel to
19 recommend an interpretation that would address
20 our concerns to the Administrator. Obviously,
21 the Administrator can accept or reject any of
22 our recommendations, but to suggest that it is

1 not within the scope sends -- well, let me
2 just say that I believe it is within the scope
3 to make such a recommendation. Whether or not
4 the Administrator accepts it is another matter
5 altogether.

6 MR. BRANCH: Yes. In fairness to
7 counsel, I am not sure that is what she said.
8 She said that it wasn't within the scope for
9 us to make that interpretation. When the
10 pattern is clear, I think we could certainly
11 entertain a motion to suggest to the
12 Administrator what that should be.

13 So I think Judith is next and then
14 Jackie.

15 MS. NELSON: I'm a bit confused,
16 Mr. Chairman, about what I am allowed to talk
17 about and what I am not allowed to talk about
18 at this point.

19 MR. BRANCH: Then don't talk.

20 (Laughter.)

21 No one is curtailing your right to
22 freedom of speech, simply your freedom to make

1 any motions at this point.

2 (Laughter.)

3 MS. NELSON: Okay, I have no
4 motions at this point in time.

5 Since I was one in the wild
6 conversation on this who actually did not
7 support this motion and had a great deal to
8 say about making the price determination on
9 the lowest overall cost alternative, and
10 unfortunately, was not here to vote, based on
11 other duties for my office, if we are moving
12 toward a -- the basis of this, and just for
13 those who weren't here, I had asked that the
14 panel take a look at 538.70, which does talk
15 about the determination for award and most
16 favored customer.

17 Basically, the first sentence of
18 538.70 says you should look at most favored
19 customer and then everything after that
20 essentially says, "but...." and defines why
21 not most favored customer in a multitude of
22 situations, and that that is not very clear.

1 It does, to a large degree, really
2 address products. In this instance when we
3 were talking about services, there needed to
4 be something else.

5 I do believe that that clause does
6 largely address products, but it is not clear,
7 although I think that those who wrote it did
8 a pretty good job extending much of what
9 covers in products, and it should be looked
10 at.

11 I agree with Mr. Drabkin that the
12 lowest overall cost alternative is very out-
13 of-date. It was written at a time when we
14 weren't looking at best value.

15 Certainly, going back to what
16 Larry said, if I am selling -- and not even
17 looking at the configuration of laptops
18 because I can come up with a million ways to
19 make those apples to apples. But I can
20 remember looking at a small business that was
21 selling cabling, and he was at a small
22 business conference with at the time the

1 Deputy Commissioner. I was negotiating a
2 contract for him, and he couldn't get a
3 contract because he was trying to sell cabling
4 with installation, and the contracting officer
5 wouldn't award it because he wouldn't come
6 down in price to another contractor who sold
7 it without installation. He said, "But it's
8 not apples to apples; it's apples to oranges
9 because I'm including installation with mine."
10 So it wasn't apples to apples, right? So it
11 is not always apples to apples.

12 I'm not sure how much we need to
13 go away from the guidance that already exists.
14 That was one of the reasons why we decided to
15 break products and services.

16 So I would like to remind the
17 panel that there does exist guidance already
18 within GSA's policy for the price negotiation
19 and basis for products, and to take a look at
20 that. We knew at the time that we had the
21 discussion on services that we didn't like
22 that and it wasn't addressing it, but to

1 revisit that for the products and not say we
2 are just going to throw that out.

3 I vehemently -- and I know that I
4 don't have the ability to bring it back up
5 because, well, I didn't vote yea or nay; I
6 wasn't here, so I can't -- this notion of
7 basing it on the statute, because I don't
8 believe that the statute is any longer
9 relevant to what is happening in the market or
10 on schedules.

11 MR. BRANCH: Jackie?

12 MS. JONES: Okay. First of all, I
13 thought we had a motion on the table. It is
14 my understanding that this price objective was
15 developed for the services as a result of
16 voting to eliminate the price reductions
17 clause for services, and therefore, we needed
18 to have some type of pricing objectives.

19 So I am not sure that this is also
20 applicable to products or that we would need
21 to apply this to products as well, because we
22 haven't decided whether or not we were going

1 to vote to leave the price reductions clause
2 in for products or to vote it out. We haven't
3 decided that yet. This came after we had
4 decided to vote the price reductions clause
5 out for the services.

6 Then, secondly, after the
7 explaining that I did this morning and how the
8 COs negotiate prices at the contract formation
9 level based on comparisons with the
10 competitiveness of the contractor's price and
11 in the marketplace, I am going to go on the
12 record and say that I would have to disagree
13 that the prices on schedule are meaningless
14 because there's a lot of work that is put into
15 trying to determine our position as it relates
16 to the contractor's sales practices.

17 MR. BRANCH: Debra?

18 MS. SONDERMAN: I think Mr.
19 Perry's suggestion about a progression of or,
20 using Alan's suggestion, a waterfall approach,
21 to developing the motions was based on the
22 experience that we had at the September

1 discussions about services, after which when
2 we approved the motion to eliminate the price
3 reduction clause, you, I believe, informed us
4 that we had just thrown contract formation in
5 the ditch, because apparently in the services
6 area you do rely on the price reduction clause
7 at the time of contract formation.

8 Then we went through a series of
9 developing other motions, including the one
10 that Alan has based a slight revision on. So
11 just a little more context.

12 MR. BRANCH: We have a motion
13 -- Jackie?

14 MS. JONES: Just one more thing.
15 It is the same for services, Debra, that it is
16 for products, and what I was explaining this
17 morning. The price reductions clause is not
18 a consideration in developing a price at
19 contract formation. It is the commercial
20 sales practices that is.

21 MR. BRANCH: Okay. We have a
22 motion on the table, and I would like to kind

1 of move this discussion forward. So I guess
2 the question that I have is, does anyone have
3 a friendly amendment to the motion as it is on
4 the table?

5 Mr. Drabkin?

6 MR. DRABKIN: Mr. Chairman, I
7 would like to move that we amend the motion as
8 it is on the table to read, "For GSA schedules
9 for products, the price objective is to obtain
10 fair and reasonable prices at the time of
11 contract formation at the schedule level",
12 period. Then I would delete the next -- yes,
13 I would pull up the price has to be reasonable
14 not only as to the basis-of-award customer,
15 but to --

16 MR. BRANCH: The commercial
17 marketplace.

18 MR. DRABKIN: Competitors, but to
19 the commercial marketplace instead of
20 competitors as well.

21 Then I would bring the last
22 sentence back. We recommend -- the last

1 sentence, right, beginning with "we".

2 That would be my friendly
3 amendment, Mr. Chvotkin.

4 MR. BRANCH: Is that acceptable to
5 you, Mr. Chvotkin?

6 MR. CHVOTKIN: I'll accept my
7 friend's amendment.

8 MR. BRANCH: Tom?

9 MR. ESSIG: Yes, I have a
10 question. Is this intended to apply to orders
11 of any potential value, any potential size?
12 Or do we want to limit this to fair and
13 reasonable within certain constraints?

14 MR. DRABKIN: The amendment that I
15 have offered applies to the schedule contract
16 only and not to the orders. This does not
17 address orders at all. If orders need to be
18 addressed, I would propose we have another
19 amendment to deal with that, another
20 recommendation to deal with that, following
21 either the up-or-down vote on this one.

22 MS. NELSON: Yes, I would say that

1 it could be within our scope of the panel to
2 recommend guidance at the ordering procedure
3 level. We have guidance at orders for
4 services, but we could recommend guidance at
5 ordering procedures for products as well.

6 MR. ESSIG: Again, I just don't
7 understand what this gets us. As I read this,
8 it says that the prices in the schedule are
9 fair and reasonable when all the discussion we
10 have had over the last couple of months
11 indicates otherwise.

12 MR. DRABKIN: Right. The purpose
13 of this motion, Tom, is to fix what we have
14 talked about; that is, that people didn't
15 perceive that the prices were fair and
16 reasonable because they didn't meet anything.

17 I think the addition of the second
18 sentence, that it has to be reasonable not
19 only based on the basis-of-award customer, but
20 also based upon the market, it gives you --
21 well, it is what you would do anyway in a full
22 and open, non-schedules contract.

1 MR. CHVOTKIN: Mr. Chairman?

2 MR. BRANCH: Yes, Alan.

3 MR. CHVOTKIN: I'll move this
4 motion denominated No. 3 as modified.

5 MR. BRANCH: Okay, second.

6 Discussion on this? Further
7 discussion?

8 MS. JONES: Well, I have a
9 question. Where the motion says not only,
10 let's see, price has to be reasonable not only
11 to the basis-of-award customers -- so that
12 relates back to the price reductions clause.
13 So what's going on with the price reductions
14 clause?

15 MR. DRABKIN: I'm sorry, if I may,
16 it does not relate to the price reductions
17 clause at this point in time. All it does is
18 talk about, at the time we negotiate the
19 original award, this is what has to take
20 place. We have yet to address the price
21 reduction clause.

22 As you may remember, we started

1 this morning with a movement to get rid of the
2 price reductions clause, and I suggested that
3 before we get rid of -- answer the question,
4 whether we should get rid of the price
5 reductions clause, we ought to talk about how
6 we price the contracts first.

7 So now we are talking about that
8 which any good contracting officer would have
9 to do first, figure out how to price it.

10 Next, we can talk about, if you
11 wish, whether we should keep the price
12 reductions clause after we have done this or
13 not done this.

14 MR. PERRY: Just one comment, and
15 I don't know how this fits in really. The
16 fact that we did take out that other sentence,
17 which I believe based on context of the last
18 meeting, I think just somehow can we capture
19 that leaves open the issue of how we use the
20 orders to balance the -- to get either
21 further -- I think my memory of that
22 conversation about the thing that we took out

1 was left in a gray area, so that we would
2 address the balance between orders and the
3 contract pricing. So somewhere we are going
4 to have to reintroduce that in a subsequent
5 motion. Okay?

6 MR. BRANCH: Yes.

7 MR. PERRY: I just don't want to
8 lose that, what's going on there.

9 MR. BRANCH: Yes.

10 Tom?

11 MR. ESSIG: Okay, I think people
12 understand what they intend by the words that
13 are up there. I am not sure the words say
14 that.

15 The concern I have is, looking at
16 those words again, you could interpret, okay,
17 as a contracting officer who wasn't privy to
18 this discussion, that we are once again saying
19 that the prices in those schedules are fair
20 and reasonable.

21 MR. ALLEN: What I would suggest
22 is I think this really gets away from most

1 favored customer pricing, which had been, I
2 think, the element of confusion. With the way
3 that it is set now and based on our earlier
4 discussions, certainly there was ample
5 evidence to suggest that most favored customer
6 may be the objective, but it is not what is
7 ended up with.

8 This essentially, in my mind
9 anyway, gets us away from MFC pricing and
10 calls pricing negotiations at the contract
11 level something more accurate that reflects
12 what is, in fact, taking place.

13 MR. DRABKIN: But to be more
14 direct, Tom, yes, now we're going to be able
15 to say that the prices are fair and reasonable
16 because we have had a competition, we've had
17 something of a competition which we didn't
18 have before.

19 Before we only looked at prices
20 vertically within the organization. Now we
21 are going to require both a vertical and then
22 a horizontal view across the market, so that

1 we can assure that the maximum price laid out
2 in the schedule is fair and reasonable.

3 I mean it is still not the result
4 of a competition because the competition is
5 going to take place at the order level, and it
6 may get even more fair and reasonable.

7 MR. ESSIG: Do you need to add
8 then words "at the maximum price level" or "as
9 a maximum price"?

10 MR. BRANCH: Well, let me talk
11 to -- we have tried to do this a little bit
12 today, but let me come back and reiterate how
13 we got to this motion with respect to
14 services, because I think that is really
15 important, and Judith talked about it.

16 So when you pull out the GSAM that
17 talks about price objectives -- so this is the
18 guidance to the contracting officer -- in
19 deference to my colleagues who draft policy,
20 and I have walked in your shoes, but, frankly,
21 the language was scary because what it told
22 GSA contracting officers to go do, it says you

1 go take that hill, you go get the most favored
2 customer pricing. And it said that in the
3 first sentence.

4 Then it carried on for two or
5 three paragraphs and said we didn't really
6 mean what we said in the first sentence; go
7 look at the basis-of-award customer and then
8 go look at the basis-of-award customer and
9 look at the features in terms of the entire
10 business deal that the basis-of-award customer
11 may provide to the commercial marketplace that
12 it doesn't provide to the government, and take
13 that into account and determine the price fair
14 and reasonable, and if you can't do that, then
15 determine that the price isn't fair and
16 reasonable, but there may be another reason
17 you really want to give the guy this contract.

18 So when we looked at that
19 language, our concern was you were not sending
20 a clear signal to the GSA contracting officer
21 as to what you were really trying to get. So
22 the purpose of this motion with respect to

1 services contracting, and I think our intent
2 here today with respect to products, is to ask
3 the Administrator to go back into the
4 regulation and say, "Tell your contracting
5 officers exactly what you want them to do, and
6 what you should want them to do is obtain a
7 fair and reasonable price as best you can at
8 the time of contract formation."

9 I think what David has done in his
10 friendly amendments is to say, "And in order
11 to do this, we expect that to be a reasonable
12 price in terms of the basis-of-award
13 customer." In other words, however you do it,
14 whether it is discount, whether it is a price
15 list, it ought to look good in terms of that
16 basis-of-award customer.

17 And additionally, Contracting
18 Officer, you ought to go out and look at the
19 marketplace, and after you have made the
20 determination that that is a good price, that
21 it is a rational price or a valid price in
22 terms of the basis-of-award customer, whether

1 it is rational within the context of the
2 marketplace as a whole -- in other words, a
3 price analysis.

4 So a little bit of kind of the
5 history of where that motion really came from.

6 Tom?

7 MR. ESSIG: Thank you. That was
8 helpful, but it leads me to conclude that I am
9 in disagreement with the presumption that at
10 the time of schedule the contracting officer
11 should be attempting to determine fair and
12 reasonable price, rather than setting up a
13 process that will streamline the ability of
14 ordering activities to determine fair and
15 reasonable price, make it easier for the
16 ordering activity; don't try to do that.

17 That is a heck of a lot of effort
18 upfront to try to determine fair and
19 reasonable price that offers absolutely
20 nothing, or close to nothing, of advantage to
21 the ordering activity. So it doesn't pass the
22 cost-benefit test. Okay?

1 What does pass the cost-benefit
2 test is to have a GSA schedule, again, that
3 streamlines the process for the ordering
4 activity, that makes it easy for them, that
5 puts a lot of things in place, and makes it
6 relatively faster and simpler for an ordering
7 activity to place those orders at a fair and
8 reasonable price.

9 MR. BRANCH: Yes, David?

10 MR. DRABKIN: If I might, and now
11 I wish DeeDee were here, but the statute
12 requires us to come up with something called
13 the lowest overall cost alternative. So would
14 it make you feel more comfortable, Tom, if
15 rather than saying fair and reasonable prices,
16 we say the objective is to obtain the lowest
17 overall cost alternative and leave the rest of
18 the language?

19 MR. ESSIG: Actually, it makes it
20 worse.

21 MR. DRABKIN: In that case, never
22 mind.

1 MR. CHVOTKIN: I'll remind folks
2 that that is where we started with this
3 discussion. We moved on beyond that.

4 I don't think this motion trashes
5 the statutory definition. If the
6 Administrator in his or her infinite wisdom
7 can issue that clear and consistent guidance
8 prospectively, I think it will go a long way
9 to answering the legitimate objectives that
10 many of you who are on the ordering
11 activities, and I can assure you that many of
12 the folks on the industry side who are
13 offering, have concerns about.

14 This is sort of step one of a
15 multi-step process. We will get to the next
16 motion, which is the disclosure, and then we
17 do have to address the activity at the
18 ordering level, but I don't think we can skip
19 this phase, Tom, and go right to the order,
20 for a lot of reasons that we have talked about
21 over the life of this panel.

22 MR. BRANCH: Yes, Tom?

1 MR. ESSIG: Yes, if I could, I
2 think what I would like to do as a
3 recommendation is identify the end-state we
4 would like to see, but let the Administrator
5 know, in order to get there, what obstacles
6 are in the way. If the obstacle is a current
7 statutory requirement, that's a pretty big
8 obstacle and it may be difficult to reach that
9 end-state. So you may need an alternative, if
10 you can't.

11 But my concern is that this reads
12 that this is the end-state we are desiring,
13 and I don't really think it is one that I
14 support.

15 MR. BRANCH: Well, I am going to
16 weigh-in on this because I guess I have to
17 disagree with your fundamental premise about
18 pricing for products at least.

19 Where we do services, we've got a
20 statement of work, where the approach to the
21 work, the skill mix, the amount, and the rates
22 all figure in. I think you put it very

1 eloquently: it's about quantity, quality, and
2 price; you're absolutely right.

3 On products, I think we are in a
4 slightly different place because a number of
5 the things we buy on GSA schedule in the
6 products are somewhat fungible.

7 The other thing is I will go back
8 to this theme. From an economic standpoint,
9 price sends a signal to the marketplace. Now
10 while I agree with you that in any given
11 circumstance that price on GSA schedule may
12 not be a fair and reasonable price for that
13 context because fair and reasonable is highly
14 contextual, both in an acquisition sense and
15 an economic sense, I think there is a certain
16 amount of usefulness there in the price in
17 that it sends for market research purposes, if
18 nothing else, a signal.

19 It is one of the reasons that the
20 motion below it from our last week was a
21 companion motion because what it really tried
22 to do is to say, "GSA contracting officer, do

1 your level best to get the best pricing you
2 can to send that signal. Tell us how you got
3 that," which then allowed the agencies to make
4 a good business decision.

5 Tom?

6 MR. ESSIG: Actually, I agree with
7 what you just said. It actually gets back to
8 my first question about this: is there a
9 dollar range which it applies to?

10 A suggestion, something to add, in
11 the recommendation to develop clear and
12 consistent guidance, I would propose that that
13 guidance should include pricing thresholds.
14 For example, things that are less than or
15 equal to the simplified acquisition threshold,
16 the prices on schedule are predetermined to be
17 fair and reasonable. Prices over and above
18 that, you will use a different technique.

19 Some guidance, just ask the
20 Administrator to provide guidance: is there
21 a threshold, first off? And if so, what is
22 the threshold where pricing on that schedule

1 is predetermined to be fair and reasonable?

2 MR. BRANCH: And I think that is a
3 fair comment. I guess my question would be,
4 is that something we really ought to leave to
5 the discretion of the Administrator?

6 I don't want to necessarily
7 engineer GSA's solution. Although as a
8 customer agency I am sure you and I have some
9 fairly strong views on what that solution
10 ought to look like, absent you and I changing
11 jobs, maybe we ought to leave that to the
12 incumbent.

13 MR. CHVOTKIN: Mr. Chairman, if we
14 wanted to suggest that the guidance should
15 include some thresholds, I would agree with
16 that. I am very concerned about adding it in
17 and making a conclusion that only at above
18 those thresholds do we have fair and
19 reasonable pricing.

20 The whole idea behind the contract
21 formation, whether there's schedules or
22 otherwise, is that at the time of contract

1 formation the contracting officer has an
2 affirmative obligation to decide that the
3 price is fair and reasonable.

4 So I am just concerned that we are
5 creating a dichotomy here, Tom, that I don't
6 think you intended. So if I could suggest
7 that we recommend the GSA Administrator issue
8 clear and consistent guidance, including
9 thresholds, then I think that might work. I
10 would encourage you to write the part of the
11 statement or report on that element.

12 MR. BRANCH: I'll go to David, who
13 is waiting patiently.

14 When we say, "including
15 thresholds", I think simply from a clarity
16 standpoint we need to say thresholds related
17 to what though. Related to order values?
18 Related to order price or quantity? Or I
19 don't know.

20 Judith, I think, and then Dave,
21 and then back to Glenn.

22 MS. NELSON: There is clearly, in

1 the FAR, guidance regarding placing orders and
2 requesting price reductions right now for
3 customers to buy off of the schedule. I don't
4 believe that the guidance within this motion
5 should contain -- I don't agree with this
6 amendment part, including thresholds relating
7 to order value. I don't think that it should
8 be in there.

9 I think that the guidance in the
10 FAR maybe needs to be clarified or improved or
11 the training -- we have gone through this --
12 should be improved or perhaps instructions to
13 customers or policy that GSA could put out for
14 ordering activities or ordering instructions
15 for products as we do have for ordering
16 instructions for services, but I couldn't
17 support adding in thresholds relating to order
18 values within this motion.

19 MR. DRABKIN: Mr. Chairman, I find
20 myself in the marvelous position of being able
21 to suggest to you that we have been at this
22 now for several hours. It has been at least

1 an hour or two hours since our last break.
2 Perhaps it would be time to take a short break
3 for lunch, let us cogitate over this, and come
4 back and dispose of the motion.

5 MR. BRANCH: Probably the most
6 intelligent suggestion you've made all day,
7 Mr. Drabkin.

8 (Laughter.)

9 MR. DRABKIN: I would be wounded,
10 but I'm hungry.

11 (Laughter.)

12 MR. BRANCH: It's 12:23 by the
13 clock on Pat's computer. So why don't we
14 break until 1:30? People can kind of turn
15 this over in their mind and perhaps we can
16 come up with a set of words that we can vote
17 on. Let's be back at 1:30.

18 (Whereupon, the foregoing matter
19 went off the record for lunch at 12:24 p.m.
20 and went back on the record at 1:33 p.m.)

21

22

1 A-F-T-E-R-N-O-O-N S-E-S-S-I-O-N

2 1:33 p.m.

3 MR. BRANCH: On our discussions
4 this morning in creating a framework, I will
5 entertain any discussion of what folks may
6 have come to at lunchtime.

7 Mr. Drabkin?

8 MR. DRABKIN: It occurs to me that
9 we need to look at this perhaps in a little
10 bigger picture, then break it back down to the
11 motions and dispose of it piece by piece.

12 I can understand the concern that
13 some people have with the motion that was
14 tabled recently by itself. So I have drafted
15 something.

16 Pat, go down to the bar where it
17 says, "W3". There you go. And then "Draft
18 David". There you go.

19 For consideration, I think I have
20 tried to put some things in as what might
21 follow. Maybe this answers or addresses
22 perhaps concerns raised by a number of people.

1 The first thing I would suggest
2 that would follow the motion that we were
3 discussing most of the morning is that the
4 Administrator implement the requirements of
5 Section 803 as mandatory for use of the MAS
6 Program for all users governmentwide at the
7 order level.

8 We all know, or should know, that
9 that is part of the NDAA, although it has not
10 yet been signed. When it is signed, it will
11 require the civilian agencies to comply with
12 the same competition regimen that DoD is
13 currently required to do, which means that,
14 among other things, the use of E-Buy would
15 satisfy the requirements of Section 803, which
16 are advertised to everybody or get three bids
17 or do a justification as to why you got
18 satisfactory competition.

19 The third motion here that I
20 thought might kind of go as a package deal
21 would be to recommend that the Administrator
22 develop a solution that captures pricing both

1 at the order level and at the contract level
2 to provide transparency, so that people, when
3 they look back or as they are considering
4 moving forward in doing their market research,
5 they could get some sense of what fair and
6 reasonable and competitive prices are.

7 It occurred to me, as I was
8 thinking about this, that there really is a
9 difference between fair and reasonable pricing
10 and competitive pricing, and maybe we should
11 make a distinction.

12 Then I have some words that follow
13 that kind of address the schema that these
14 three things put together.

15 First, we would change pricing at
16 the schedule contract level, requiring that
17 the pricing not only be baseline vertically
18 with a customer's appropriate base award
19 customer, but it also requires benchmarking
20 horizontally, making sure that the prices are
21 competitive within that marketplace.

22 I believe, based upon the

1 definition of fair and reasonable in the FAR,
2 that that would satisfy the definition of fair
3 and reasonable pricing.

4 Second, what it does at the order
5 level is ensure that we get competition. By
6 the way, for those of you who are not familiar
7 with it, the schedules have always required
8 competition. They have always required a
9 minimum of three vendors be considered, and if
10 you are over the maximum order limit, then
11 sufficient vendors in excess of three to get
12 competition.

13 803 changes that dynamic to
14 require competition from all of the vendors
15 capable of providing it. While we initially
16 objected, all of us in government, to 803, we
17 have discovered in its implementation that it
18 is not terribly burdensome. It is not
19 resulting in tens of millions of bids. In
20 fact, I think the average number of bids
21 received through the E-Buy program at GSA is
22 about -- Judy is saying six; I thought it was

1 three, but it is not an unmanageable number
2 for any customer to deal with.

3 Third, the last motion provides a
4 transparency that we were talking about. At
5 our very first meeting, I think Chris Yukins,
6 or our second meeting, Chris Yukins talked
7 about all the data that the government has and
8 the fact that you can't see it. This would
9 help us capture that data on pricing for use
10 internally.

11 For those in industry who are
12 worried that somehow this translates into
13 we'll disclose your prices to people outside
14 of industry, not at all. It would be treated
15 under the schema that I suggest as proprietary
16 and protected, but available to buyers, as it
17 is today available to buyers, if they could
18 get it somehow, to use in making their
19 determinations as to what vehicle to use or
20 what contracting method to use or how to
21 structure their requirement to get a best
22 value price.

1 The benefit to GSA's customers,
2 that we've already gotten the vertical and
3 horizontal pricing issue, we have made the
4 fair and reasonable determination consistent
5 with the FAR. The customer plays his or her
6 role by getting competition through the
7 system. We already have an electronic system,
8 so there is no real burden to the customer.

9 In fact, as I think I mentioned
10 earlier this morning, I actually in September
11 used both GSA Advantage and E-Buy, and I was
12 able to get competition from all available
13 small businesses that were selling what I
14 wanted. I was able to do it within a matter
15 literally of like 30 minutes.

16 That is the work I had to do. So
17 it is not burdensome to be done.

18 Then the final outcome is that we
19 wind up with pricing that is both fair and
20 reasonable and competitive, which I think,
21 Tom, I heard, I think I understood that is
22 where you particularly were concerned we would

1 go.

2 Now I don't know if this schema,
3 beginning with the motion we discussed and
4 then adding these other two motions, gets us
5 to where we go, but I don't see it as being
6 particularly burdensome on the government,
7 except for creating the transparency in the
8 pricing. That is going to be a challenge.

9 It doesn't have to be done right
10 away. I don't recommend we tell them how to
11 do it, but, clearly, it is data that is
12 available to us. It is just a question of how
13 do we collect it so that we can use it.

14 Anyway, Mr. Chairman, I thought
15 this might help us move down with the first
16 motion if we understood possibly where this
17 road leads.

18 MR. BRANCH: Okay, thank you,
19 David.

20 I guess I have a couple of
21 questions for clarification.

22 So does this particular approach

1 assume the abolition of the price reduction
2 clause for products?

3 MR. DRABKIN: It doesn't assume or
4 presume, direct, or require, but if you were
5 to eliminate the price reductions clause, at
6 least from my perspective, I would feel
7 comfortable that now we have sufficient
8 process in place that the government can be
9 protected when companies make the mistake of
10 not tracking their prices and changing their
11 prices. The protection is what we initially
12 intended; that is to say, the marketplace
13 would drive the price, not something
14 artificial like the price reduction clause.

15 MR. BRANCH: Okay, thank you.

16 My second question with respect to
17 this is, Can you talk a little bit about this
18 last step with respect to transparency at the
19 contract ordering level and the pricing? Why
20 would we not publicly disclose that
21 information when, under more conventional
22 circumstances, the successful offeror's price

1 is almost always a matter of public record?

2 MR. DRABKIN: It is not necessary
3 to what I would like to achieve to make that
4 price publicly available. I am not opposed to
5 it.

6 MR. BRANCH: Okay.

7 MR. DRABKIN: But, secondly, I
8 don't propose that we capture only the winning
9 price, which is all that we would capture
10 today in FPDS. I propose that we capture all
11 of the prices that allow us then to do trend
12 analysis. I mean we need to do things we
13 don't do in spend analysis and strategic
14 sourcing. One of the reasons we can't do it
15 is because we don't have the visibility in the
16 pricing generally.

17 MR. BRANCH: Okay. So to
18 understand this, we are really not talking
19 about capturing only pricing. We are talking
20 about capturing offers as well? This is
21 almost like going to your financial pages in
22 The Wall Street Journal for the over-the-

1 counter market where we see a particular stock
2 and we see the bid price and the asked price.

3 Is that an appropriate analogy? I
4 am just trying to understand what the
5 groundrules are.

6 MR. DRABKIN: Yes. I don't
7 understand the distinction that you made, but
8 I agree with the distinction. I am trying to
9 capture all prices offered.

10 MR. BRANCH: Okay.

11 MR. DRABKIN: When my E-Buy offers
12 came back, each one of them had a price in it.
13 It had a unit price and it had a total price.
14 I had no way to capture those prices. But
15 what I am proposing is we would capture them
16 all.

17 I believe that becomes important
18 information overall in terms of strategic
19 sourcing, supply chain management, the kinds
20 of things we all talk about liking to do, but
21 none of us have the resources or information
22 to do.

1 MR. BRANCH: All right, thank you.

2 MR. DRABKIN: And again, that is
3 also why I say it doesn't have to necessarily
4 be publicly available to satisfy my
5 requirements. If someone wants to make it
6 publicly available in another context, that is
7 not what I am proposing.

8 MR. BRANCH: Thank you.

9 Tom, and then Judith.

10 MR. ESSIG: Okay. Thanks, David.
11 I think this actually is very helpful to set
12 the framework.

13 In general, I like what you have
14 here. I do have a couple of areas that I
15 would like to probe a little further.

16 The first one is just more of a
17 technicality. It is in that third statement
18 up there. I talked about the prices are both
19 fair and reasonable and competitive. That set
20 us up with a bit of a distinction I am not
21 sure that exists in the regulations.

22 I would propose using the words

1 that are determined to be fair and reasonable
2 based on adequate price competition, which are
3 already either in FAR or the DFARs. But,
4 again, it is competition is being used to
5 determine that the price is fair and
6 reasonable; they are not separate and
7 distinct.

8 Secondly, I still think we need to
9 take a look at the upfront cost of
10 determination of fair and reasonable tied to
11 the schedule itself. Whatever we do, we need
12 to ensure that the value that it provides is
13 greater than the cost of doing that.

14 Thirdly, I do have some concerns
15 about disclosure of that pricing data.
16 Capturing data on all offers may have some
17 value. I am not sure it would not also create
18 a bit of information overload. You know, what
19 do we do with all that data? Does it clog the
20 database, whatever?

21 I would be more concerned,
22 however, if that became publicly-releasable

1 information. There are some current
2 provisions about protecting bid data from
3 unsuccessful offerors. I am not sure I would
4 want the winning offeror to realize how much
5 it won by and changing its price the next time
6 around. So I think I would need to think
7 through that also.

8 MR. BRANCH: Thanks, Tom.

9 Judith?

10 MS. NELSON: I am wondering about
11 the true value-add capturing the data in the
12 market that we have right now, particularly in
13 the IT market, which is changing so rapidly.
14 So I am just trying to think through it.

15 So we have a bid that goes out
16 through E-Buy, and there is a \$122,000 order
17 that is placed. There's nine products in it.
18 The products are priced out. That is a
19 winning bid.

20 What the bid price is, it is
21 captured somehow; within 48 hours that data is
22 available. Two days later, somebody wants to

1 get the same thing. Yet, those are no longer
2 the prices that are available, or three weeks
3 later those are no longer the prices that are
4 available, or those models are no longer even
5 available.

6 So I am not sure that in the end
7 the cost of doing that type of system that
8 would capture the data would actually turn
9 around and provide the value-add to the
10 government customer, you know, the cost-
11 benefit.

12 Maybe enhancing in some of the
13 capacities of GSA Advantage in some ways or
14 FPDSNG, systems that already exist, to be able
15 to provide some data. But because of the
16 rapid turnaround in change in pricing in some
17 of the industries, I am not sure that while we
18 have the lofty thought of giving the
19 transparency at the sale price, I don't know
20 that we are going to get a cost-benefit value.

21 MR. BRANCH: Debra?

22 MS. SONDERMAN: Well, I think

1 following up on the comment about that there's
2 one thing about internal transparency, the two
3 examples you gave are both publicly
4 accessible, GSA Advantage and FPDS, and I
5 imagine my Co-Chair of the ACE would second a
6 motion that we would not want to entertain
7 changing FPDS right now because we are still
8 working on getting it right as it is.

9 But I think the general concept of
10 let's make sure there's a benefit for the cost
11 that would have to be involved in collecting
12 that data, in other words, we have to have a
13 good business case to support that, I
14 completely agree with.

15 MR. BRANCH: Other discussion on
16 that? Jackie?

17 MS. JONES: Yes, I have a
18 question. What do you see as the purpose of
19 having a basis-of-award customer and how would
20 that function?

21 MR. DRABKIN: I am not prepared in
22 my own mind to throw away the concept of a

1 basis-of-award customer when it comes to
2 sitting down and negotiating a price with a
3 particular vendor, in no small part because I
4 don't believe that currently we have
5 sufficient data available or people trained to
6 use that data to do an open market analysis of
7 the price that they are being offered. That
8 doesn't mean we shouldn't get there and we
9 shouldn't have it, but I believe that is the
10 case.

11 So having a basis-of-award
12 customer, negotiating with a company to make
13 sure that I am getting a price at least as
14 good as the company's customer who buys the
15 way I buy, however that is, gives me some
16 assurance in the marketplace that with respect
17 to that vendor I am getting a good price.

18 I added the horizontal pricing
19 because, even if I am getting a good price
20 from that vendor, if that vendor is overpriced
21 in the market, then I need to know that by
22 comparing that horizontally to -- and some

1 people tell me, well, if they're overpriced in
2 the market, they won't be in business long,
3 and that's not true because there are plenty
4 of examples of people who overpriced and stay
5 in the market. They may be worth that being
6 overpriced. But that is something that needs
7 to be addressed here.

8 Does that answer your question?

9 MS. JONES: Yes, it answers the
10 question. However, we would have to put a
11 framework in place for ensuring that we track
12 with that customer or are tracking any changes
13 to that customer.

14 MR. DRABKIN: And again, I don't
15 disagree with that, and I am not proposing to
16 throw out the basis-of-award customer at all.
17 I am only proposing really to add a horizontal
18 view to check and make sure that not only is
19 the vendor's price good between the vendor and
20 its customers, but it is good between the
21 vendor and the market.

22 That will be extra work for us.

1 It is work we have not done before, which is
2 why I have the third issue on transparency, so
3 that at least I begin building the database
4 where I can look at prices.

5 Although I know prices change
6 greatly, when I talk to my colleagues who
7 purchase in private industry, not the people
8 who sell to us, the people who buy for the
9 people who sell to us, many of them institute
10 and follow, much like we used to do in the
11 federal government when we had item managers
12 who tracked -- and I'm sure Elliott remembers
13 the days of items managers.

14 They knew exactly what was going
15 on in a particular market with regard to a
16 particular item. They followed its pricing.
17 They followed the raw materials. They
18 followed labor issues, where it was being
19 produced, all of which assisted us in the
20 pricing process.

21 I am proposing to try to capture
22 some of that back again, so that we are able

1 to address folks like Tom who have concerns
2 about what do those prices mean and are they
3 of any value whatsoever.

4 If I may, I would like to go back
5 to something that Tom said real quickly. I
6 didn't want to let it pass.

7 Tom, I understand what you said
8 about fair and reasonable pricing, but you, of
9 course, recall that on a sole-source or a
10 single award you must also make a
11 determination of fair and reasonable. There
12 is no competition. I thought it was important
13 here to make the distinction that not only is
14 the price fair and reasonable, but it is the
15 result of a competitive process.

16 I think the American people
17 understand that, whereas if we leave it at
18 fair and reasonable, for those of us who know
19 you can do a sole-source, what people call a
20 sole-source contract or single award, and you
21 can still have a fair and reasonable price
22 based upon some sort of analysis.

1 I think addition of the
2 competition or addition of the point that it
3 was the result of competition will also
4 satisfy some of our critics in the IG
5 community and the GAO community who are
6 concerned that in some cases we don't get a
7 competitive price, and they are unable, when
8 they look at FAR, Part 12, to make sense of
9 how can you say the price is fair and
10 reasonable if you got no competition.

11 MR. BRANCH: Okay. I would like
12 to react to this a little bit because I think
13 you have kind of taken us back to what I
14 consider to be a fundamental issue in this
15 discussion, David.

16 What we appear to be doing in the
17 first step of the overall schema is ensuring,
18 as you have termed it, vertical and horizontal
19 competitiveness or reasonableness of the
20 price. We are not only baselining the
21 offeror's concessions with respect to its
22 pricing against those which he gives to other

1 customers similarly situated, but we are also
2 benchmarking the pricing outcome that that
3 yields against what the marketplace would give
4 us. I certainly support that.

5 But I go to the third step in your
6 schema, and I see how we are using
7 transparency at the contracting and ordering
8 level to maintain that horizontal
9 reasonableness of the price. But what I don't
10 see there is maintaining, if you will, the
11 vertical reasonableness of the price.

12 So I think the discussion then
13 kind of goes back to, well, in that schema, do
14 you need a price reductions clause? So once
15 you have used the basis-of-award customer to
16 satisfy yourself that you are being treated
17 reasonably, that is to say, as well as any
18 similar customer that that particular offeror
19 might have, then is it sufficient to rely on
20 the marketplace competition in the 803
21 environment and the transparency internal to
22 the government at large of that pricing to

1 assure that that pricing integrity is
2 maintained?

3 MR. DRABKIN: To the extent, sir,
4 that there was a logic to my madness, you have
5 uncovered it. Because by the time we get to
6 step three, and we have the transparency into
7 the price, transparency which we don't have
8 now and will take us a while to build, then
9 from my own personal comfort level, I believe
10 I could live without the price reductions
11 clause because the market is driving the
12 price, not a particular customer or how
13 someone treats a particular customer.

14 By the way, I can now also drive
15 the market because I have the intelligence --
16 well, okay, that might be difficult in my case
17 (laughter), but I have the empirical data that
18 I would need to sit down at the table and say
19 to competing companies, "That's garbage; your
20 price is 20 percent over what it should be,
21 and here's why I think that, and come down. "
22 Today I don't have that kind of empirical

1 data.

2 MR. BRANCH: And I am only
3 speaking for myself. I could live with that
4 approach provided that we provide for some
5 mechanism to reset the baseline pricing.

6 So here's kind of my use cases.
7 The software developers would say we have a
8 GSA contracting officer at the time of
9 schedule contract formation doing both a
10 vertical and horizontal view of the pricing.
11 We have a system in place that allows for
12 competitive pricing ala 803. We then further
13 have a system that gives us internal
14 transparency with respect to pricing as it
15 falls out on a transactional basis.

16 But I think it would be important
17 then to have a mechanism that would drive GSA
18 at the schedule level back to, say,
19 periodically, whether that period is two
20 years, three years, four years, whatever,
21 whatever periodicity is appropriate, to go
22 back to a vendor and say, "This is your

1 history, and when I look at your history
2 against the baseline prices, win or lose, the
3 prices in your schedule contracts no longer
4 reflect your pricing strategy in this market.
5 So you need to reset those."

6 So to the extent that those
7 schedule prices provide some economic
8 information for either market research
9 purposes or for the purposes of doing a small
10 buy, you need to reset those prices so they
11 reflect the reality of your bid structure in
12 the market.

13 MR. DRABKIN: And thus, we evolve
14 from baseline customers to market pricing, but
15 we can't do it all in one step.

16 MR. BRANCH: Agreed, and I would
17 probably further propose, if you went down
18 this path, that we probably need to retain the
19 price reduction clause with a specific
20 recommendation to the Administrator that it be
21 sunset over time, as the dataset grows richer
22 and we have the ability to do this analysis.

1 Yes, Judith?

2 MS. NELSON: In theory,
3 philosophically, I am very much interested in
4 the proposal. My concern comes around the
5 transactional data and the ability to get it,
6 primarily because I know that a great deal of
7 the transactions and buys are not occurring
8 through E-Buy or GSA Advantage, even for
9 products. They are happening at the vendor's
10 website, and they are happening at the agency
11 level. Most of the buys are not happening
12 through GSA's portals.

13 So I am not sure at all how this
14 transactional data would actually be
15 collected. I am not sure, because a lot of
16 the products, particularly in the IT or even,
17 say, in security, which is very much in
18 products outside of IT one of the largest
19 product areas, they need to be configured.

20 So while they are discrete
21 products, you know, you go to IBM or you are
22 going to go to -- well, they're sitting in the

1 room, so I'll just go to CDWG. You say, "I
2 need this." Well, this is a multi-faceted
3 system that now needs to be configured before
4 it can be delivered.

5 So you are not just saying, well,
6 ship me 15 nuts and bolts and packages. So it
7 is happening at the website, and you need a
8 specialist to contact in order to make that
9 occur. So it is not happening at a portal.

10 So the transactional data that we
11 are talking about in order to collect, to be
12 able to monitor those trends, is not that easy
13 to get to. So are we asking, then, to impose
14 -- we're talking about we started this
15 morning, Mr. Allen started this morning
16 talking about the burdensome compliance
17 requirements that we are putting on our
18 vendors as well as our agency for contract
19 compliance. Now we are talking about a
20 massive compliance requirement for
21 transactional data.

22 So I would like for us to take

1 that into consideration because you are not
2 going to get this from E-Buy and you are not
3 going to get this from Advantage.

4 MR. BRANCH: David?

5 MR. DRABKIN: Actually, no. Thus,
6 my second point, which talks about
7 competition. E-Buy currently is not
8 configured to strip out the data and provide
9 it to us, but that is up to the GSA
10 Administrator in conjunction with our third
11 recommendation, if you were to adopt it, how
12 he would strip it out.

13 But the second point will drive
14 agencies to use E-Buy out of convenience for
15 themselves. In order to satisfy that they are
16 compliant with 803, or whatever it will be
17 called now, they must solicit all vendors, get
18 three bids, or do a justification.

19 We know what DoD chose to do, the
20 largest user of the schedule. They chose to
21 use E-Buy and solicit all vendors. That puts
22 them into our bailiwick. That gets them out of

1 going to individual websites to do their
2 ordering because they can't be compliant that
3 way, because they can't guarantee they will
4 get three vendors, and that means they've got
5 to write a justification.

6 So there is some -- although now I
7 am being defensive, and I don't want to be
8 defensive in my proposals, but there is some
9 logic here to drive behavior, which would not
10 require the companies to bear the burden of
11 collecting or providing the data. There would
12 be a burden to GSA to figure out how to modify
13 E-Buy so that when the prices came in, it
14 would strip the prices out, not strip them
15 out, but copy them somewhere else to fill this
16 database, which I would never ever recommend
17 be part of FPDSNG, particularly since I voted
18 no on version 3.

19 MR. BRANCH: Others? Larry?

20 MR. ALLEN: Mr. Chairman, I
21 appreciate this discussion. I think it is a
22 good one to have in order for us to set up an

1 overall framework for how we want to proceed.

2 But I think that we can probably
3 proceed with motions on at least the first
4 order, which we had discussed preliminarily
5 before lunch, and perhaps even the second one
6 before we go further.

7 So, in the interest of trying to
8 move the ball along a little bit, I would
9 suggest that maybe we go back to the motion
10 offered right before lunch and see what it
11 looks like based on the discussions we have
12 just been having, to see whether or not maybe
13 the panel is ready to proceed with that
14 motion.

15 MR. BRANCH: I think that is fair.
16 So could we see the motion as it was
17 constructed prior to lunch?

18 MS. JONES: Elliott?

19 MR. BRANCH: Yes?

20 MS. JONES: Excuse me. I'm sorry,
21 I may be out of order, but I just wanted to
22 comment on David's proposal again --

1 MR. BRANCH: Sure.

2 MS. JONES: -- and maybe suggest
3 something.

4 MR. BRANCH: Yes, proceed.

5 MS. JONES: Okay. When we are
6 forming a contract, we are looking at
7 commercial sales disclosures, and based on
8 that, we set this basis-of-award customer. In
9 the past, before policy was changed, at one
10 point when the contractors reduced their
11 prices on schedule to a federal agency, they
12 had to offer that to all federal agencies.
13 That policy was changed to allow spot-pricing,
14 if you will, or contractors to propose based
15 on the requirements. We are talking about
16 gathering this information in historical
17 selling prices that the contractors have sold
18 at.

19 At the time of the option period,
20 we revisit those commercial sales practices,
21 especially to see if there have been any
22 changes to that. I have a suggestion for also

1 gathering sales to federal agencies at their
2 lowest prices at the option period, so that we
3 can take a look at how the contractors have
4 been selling in the marketplace over this past
5 five years and possibly renegotiate prices at
6 the option period.

7 MR. BRANCH: Okay. I think
8 another country to be heard from. Judith?

9 MS. NELSON: I would strongly
10 disagree. I think that we have, GSA has
11 offered the spot-pricing and the ability to
12 reduce the pricing at any time to a federal
13 agency for any reason, so that for the benefit
14 of the U.S. Government, a contractor can lower
15 their pricing overall to provide the best
16 price. That allows for competitive reasons,
17 but, again, that is based on requirements that
18 are defined, the scheduled pricing, or based
19 on non-requirements.

20 I think Debra mentioned that at
21 one of the very first meetings when we looked
22 at the price reduction clause, that any

1 industry partner should be allowed to reduce
2 to her their pricing on a contract that she
3 puts out herself through the Department of
4 Interior and feel free to bid, knowing that
5 this is not going to affect their schedule
6 pricing.

7 It shouldn't hazard them at their
8 time of option, which should be their issue is
9 how they price commercially and how their
10 competitors price commercially. Otherwise,
11 you're not going to -- I mean you put at
12 hazard the entire --

13 MS. JONES: Well, it is in light
14 of what we are saying here. We are wanting to
15 see that information no matter how we get it.
16 We want to see what they are selling out there
17 in the competitive customer requirements
18 world.

19 I am saying, by requiring the
20 contractor to submit that information to us at
21 the option period does not necessarily make it
22 mandatory that we get those prices, but at

1 least give it to the CO, have the contractor
2 give it to the CO, so the CO can evaluate
3 that.

4 I mean if our customer agencies
5 are repetitively getting 50 percent discounts
6 off our schedule prices, I think we need to
7 take a look at that at the option period and
8 probably renegotiate our pricing if it is a
9 consistent practice.

10 MR. BRANCH: Okay. Debra?

11 MS. SONDERMAN: I agree and,
12 Judith, I think that we were discussing
13 collecting. If we are collecting it off
14 E-Buy, that is federal procurements. That is
15 looking at trends in the federal marketplace.

16 So I don't know why we wouldn't
17 want -- I don't know why GSA wouldn't want to
18 say, wow, every time you received an order you
19 actually charged 30 percent less than our
20 schedule; let's lower the schedule so that
21 everybody benefits from that. I don't know
22 why you wouldn't want to do that, as someone

1 who is providing service to me.

2 MR. BRANCH: If I could come back
3 to Larry, I think he raised a really good
4 point. So with an eye toward moving forward,
5 unless he has additional comments, we have
6 Motion No. 3 on the table from this morning.
7 I think the question is, Can we move through
8 that?

9 So the question I have to the
10 panel, Is there any further discussion on
11 that? Alan?

12 MR. CHVOTKIN: I think this was my
13 motion a long, long time ago.

14 (Laughter.)

15 Mr. Essig suggested an enhancement
16 regarding thresholds relating to order values,
17 and we took a pause at that point saying,
18 well, we sort of know there's something else
19 that should be captured, but we weren't sure
20 what.

21 I have written down another
22 phrase. Let me suggest that that second

1 sentence or the last sentence of that might
2 read, "We recommend that the GSA Administrator
3 issue clear and consistent guidance to
4 implement the price objective, including
5 information relating to thresholds of
6 purchasing experiences."

7 That would encompass the quality
8 and quantity that we had talked about. We
9 used that similar phrase when we talked about
10 services. It isn't the most elegant, but I
11 think it will capture some of the data and
12 some of the kinds of additional information
13 that you might have been interested in, Tom,
14 if I understood it properly.

15 Then if that adjustment is
16 acceptable to you, I would propose to modify
17 that Motion 3 and move its adoption.

18 MR. BRANCH: Agreed.

19 MS. SONDERMAN: Say that again.

20 MR. BRANCH: I think it was
21 information related to purchasing experiences.

22 MR. CHVOTKIN: Yes, thresholds of

1 purchasing --

2 MR. BRANCH: Thresholds of
3 purchasing experiences.

4 MR. CHVOTKIN: Well, this will
5 come in the guidance, in the Administrator's
6 guidance. So this is her problem. We can sort
7 of think of simplified thresholds, you know,
8 major systems kinds of activities, whatever
9 they may be.

10 MR. BRANCH: Okay. As this was
11 Mr. Chvotkin's motion, I think he has the
12 right to amend it without any further
13 discussion on the amendment.

14 MR. CHVOTKIN: Only if it will
15 pass.

16 MR. BRANCH: Is there any
17 discussion, further discussion, on the motion
18 as it is before us right now?

19 Jackie?

20 MS. JONES: Could you clarify the
21 thresholds of the purchasing experiences?

22 MR. CHVOTKIN: Well, maybe Mr.

1 Essig and I can consult on the language for
2 the report, but there are thresholds relating
3 to a dollar value. There are thresholds
4 relating to procedures to be used, when it
5 might be appropriate to use simplified
6 purchasing procedures, when it might be
7 appropriate to use other techniques.

8 Again, we are talking about the
9 purchase of straight products and not hybrids,
10 not solutions, not services, just the straight
11 products, and not something that has to be
12 configured.

13 I don't know all of the thresholds
14 that might be appropriate. Some might be
15 based on the time of the year. There may be
16 something different when you are purchasing at
17 the end of the fiscal year than when you are
18 purchasing in the beginning of the fiscal
19 year.

20 Those are the kinds of
21 flexibilities that I think the Administrator
22 might value. I think the language of our

1 report might address some of those.

2 MR. BRANCH: Other discussion?

3 (No response.)

4 Call the question. All those in
5 favor of the motion as currently written
6 signify by raising their hands.

7 (Show of hands.)

8 All those opposed?

9 The ayes have it. The motion
10 carries.

11 MR. CHVOTKIN: Mr. Chairman, the
12 next item that we had on the agenda was that
13 motion maybe now noted as Motion No. 4.

14 When we talked about the services,
15 we said that it was important that not only do
16 we have an objective, a price objective, but
17 that the buying activities now know how the
18 GSA contracting officer arrived at the
19 decision of fair and reasonable pricing.

20 Moving right on down the scheme of
21 it that Mr. Drabkin laid out, this motion
22 again related to products, but it is probably

1 applicable across the board, is to recommend
2 that GSA disclose to the federal agencies the
3 basis on which the contracting officer
4 determined that a specific set of prices are
5 fair and reasonable.

6 We adopted a similar motion with
7 respect to services. I think it is absolutely
8 appropriate here as well.

9 I move the adoption of Motion No.
10 4.

11 MR. BRANCH: Do I have a second?

12 All right, we have a second.

13 Discussion on the motion?

14 MS. JONES: Wouldn't that be a
15 matter of policy in terms of how we are
16 setting our pricing objectives for the
17 schedules program? Because if we had that,
18 then everybody would know how the COs are
19 determining the contract price as fair and
20 reasonable.

21 MR. PERRY: I'll make the same
22 comment I made on the services. Unless we

1 have this specifically here, my concern is it
2 will not be addressed.

3 MR. BRANCH: Yes, Alan?

4 MR. CHVOTKIN: I think this is an
5 effort, Jackie, at moving one level down below
6 the objective. Everybody will be clear on the
7 objective. This is how that objective is
8 applied to a specific set of award decisions.

9 Was it beyond the objective or how
10 did the contracting officer arrive at that?
11 What kind of market analysis, market research
12 was done? What kind of prior review of prices
13 were taken? What was the basis of experience
14 and the basis-of-award customer, the
15 horizontals and verticals that Mr. Drabkin
16 said?

17 That kind of an overview answer
18 would be very helpful. It again adds to the
19 transparency, if you will, for the buying
20 activity to know, when they are getting ready
21 to place an order, how did the contracting
22 officer conclude that that set of prices in

1 the contract are fair and reasonable?

2 MR. BRANCH: Yes, Judith and then
3 Larry, and then I'll exercise my prerogative
4 to insert myself in the queue.

5 MS. NELSON: Well, to be frank, I
6 will go back to what I said in the services
7 side. I still don't understand the value.

8 So it is disclosed on some website
9 that for John Q. Company, I, as the
10 contracting officer, looked at it, and the
11 basis of award for this company was their
12 national account class of customer, and I did
13 some horizontal and vertical market research,
14 in part was the GSA Advantage as of the date
15 of award and three weeks prior, and some
16 commercial market research, as well as two
17 other tools in my toolbox, which was a review
18 of commercial sales practices, and I don't
19 know, one other thing. And that went on the
20 website.

21 I truly, quite honestly, do not
22 understand the value that that adds to anybody

1 six months down the line in any agency, other
2 than the fact that this panel has sat for
3 three months and people have said, "I have no
4 assurance that the prices are fair and
5 reasonable."

6 So all we have done here is say
7 that the 1102s at GSA in the MAS Program know
8 how to follow the rules and have gotten their
9 warrants by legitimate format, and they are
10 putting on a piece of paper that "I have done
11 the following things," and they are
12 documenting for other contracting officers
13 that they have followed the rules of being a
14 contracting officer.

15 But I do not understand how this
16 adds any value to anybody at any agency.

17 MR. ALLEN: My comment on this is
18 going to be substantively similar to what it
19 was when we talked about services, except for
20 the fact that, were this motion to pass, I
21 strongly suggest that we put report language
22 around it that makes it abundantly clear we

1 are not discussing the possibility of
2 disclosing proprietary information.

3 Like the motion for services, I
4 think this gets very close to disclosing
5 proprietary information. It depends on the
6 degree of specificity to which you drill down.

7 Judith mentioned national
8 accounts. I am more concerned that it would
9 be saying something along the lines of this is
10 predicated on the discount we gave to
11 American Airlines. That type of information
12 is then not just really available to people in
13 the government; it is available to United
14 Airlines, who might get upset that the company
15 gave United a worse deal than it gave
16 American.

17 I think we need to be very careful
18 about what we say is the level, not just the
19 level of information, but who will have access
20 to it. Again, my concern here is that we are
21 running right up against the disclosure of
22 proprietary pricing information, and we want

1 to be very, very careful to make sure that we
2 don't make it seem like that's an okay thing
3 to do.

4 MR. BRANCH: Having taken
5 prerogative to insert myself into the queue,
6 let me talk a little bit, I think, about
7 Judith's comments from a user perspective.

8 I go back to the idea that a fair
9 and reasonable price is highly contextual,
10 that what this does -- and I think it can be
11 done at a level of disclosure that provides
12 contracting officers with the information they
13 need, and it also addresses Larry's concern
14 about the release of proprietary data.

15 What it allows me to do is it
16 allows me to then look at the context of a
17 given procurement, to look at the context
18 under which those prices in the GSA contract
19 have been determined fair and reasonable, and
20 to answer two simple questions.

21 No. 1, is my context, is my
22 economic context similar enough that I can

1 rely on those schedule prices, and if not,
2 what acquisition strategy should I pursue to
3 get a fair and reasonable price for my
4 particular context?

5 So, again, I think that is very
6 important because right now, when I look at a
7 price -- and let's take a price for hardware
8 since we are talking about hardware. When I
9 look at the unit price for any piece of
10 hardware, I don't know whether the GSA
11 contracting officer determined that price to
12 be fair and reasonable within the context of
13 (a) as a vendor I sell onesies and twosies to
14 everybody; I'm not giving you a discount
15 because I don't give any commercial customer
16 a discount, going back to Jackie's point this
17 morning, or, gee, when I look at my aggregate
18 sales data, I really consider you to be one of
19 my best customers. Therefore, I am going to
20 give you a discount similar to what I give my
21 best commercial customer.

22 So let's take the former case

1 where the guy says, "I don't discount to
2 anybody. I don't discount to anybody because
3 I sell at onesies and twosies." Well, then,
4 if I'm buying a onesie or twosie, then I look
5 at that price and say, okay, that's a
6 reasonable price.

7 On the other hand, if I am buying
8 an order of magnitude or two orders of
9 magnitude more units in that particular
10 procurement, I am going to insist, whether he
11 gives anybody a discount or not, that if he
12 wants to play, he's going to give me a
13 discount, simply because the context for
14 determining price reasonableness is not the
15 same context used for the GSA contracting
16 officer to establish a fair and reasonable
17 price.

18 So I think that information does
19 have some value to us in the ordering
20 agencies.

21 Yes, Glenn?

22 MR. PERRY: Adding a little bit

1 more from the ordering agency, I think we have
2 sort of agreed -- I'll be careful how I use
3 "agreed" -- between us that it has been
4 acknowledged on schedule after schedule,
5 there's differing places that GSA is going to
6 get on establishing contract pricing.

7 At the end of the day when we make
8 the order, we are responsible for making sure
9 we do have the lowest cost or the best value
10 alternative that we make that award for.

11 If we are going to work as a team
12 between what GSA does and leverage the
13 abilities of both the GSA and the ordering
14 agency, then I think it is incumbent in this
15 process that the agency know where GSA left
16 off and what still needs to be done in order
17 to get to that.

18 The way we could do that is know
19 for that particular area where it was left off
20 and the reasons why it was left where it was,
21 and this is what we have left to do, or to go
22 back to what Elliott said: if we see that

1 we're already there, then the buyers can say,
2 "Okay, we're already there," and then pick
3 amongst that without doing a lot of other
4 things.

5 On other schedule-type items, you
6 know we are going to have to go through a
7 further process to get to that end-point.
8 That is the end-point thing that we are
9 interested in. I think this is absolutely
10 necessary to help us be able to do that.

11 MR. BRANCH: Okay. Jackie?

12 MS. JONES: What you are saying is
13 that the integrity of the prices on schedule
14 is still in question.

15 MR. PERRY: No, I --

16 MS. JONES: Well, I mean, then the
17 agency has to do a further analysis to
18 determine them fair and reasonable as it
19 relates to how we got there at the schedule
20 level.

21 If the prices on schedule are that
22 questionable, then we need to do something

1 about the way we establish those prices, so
2 that we give our customers more confidence in
3 how those prices were awarded, based on
4 establishing some sort of pricing objective at
5 the schedule level that gives you confidence
6 as a customer that you are getting a fair and
7 reasonable price, whether you are buying one
8 or one hundred.

9 MR. BRANCH: You know, Jackie, I
10 have to disagree with you there. It isn't an
11 issue, I think, and I will hesitate to put
12 words in the mouths of my colleagues from the
13 ordering agencies, but I am fully confident
14 that if I do not represent what they have
15 said, we're thinking they will spit them out
16 with alacrity.

17 (Laughter.)

18 But I look at it this way: I live
19 within walking distance of a Metro station.
20 So on a sunny day, with a nice breeze, a fair
21 and reasonable price for a cab ride from a
22 Metro station to my house is very, very

1 different than on a day when we are in the
2 middle of a torrential downpour.

3 What I would argue is that GSA has
4 the ability, however diligent they are, to
5 establish the fair and reasonableness of a
6 price in a single context, that that context
7 does not apply to every agency procurement,
8 that every agency procurement scenario is
9 different. All we are looking to do is to
10 say, How close is our particular scenario to
11 the one that GSA used to establish the
12 fairness and reasonableness of a price? Was
13 it a sunny day with a nice breeze that
14 indicated a nice walk home or was it a
15 torrential downpour, which necessitated the
16 payment of a premium to stay dry?

17 So it is not that we question the
18 integrity of GSA prices; it is simply that we
19 are saying the circumstance, the context for
20 price reasonableness is different in every
21 case, and that this kind of disclosure would
22 give the contracting officer at the agency

1 level insight, as I think Glenn puts it, to
2 know whether we need to finish the good work
3 that GSA has started or whether the good work
4 that GSA started is sufficient for that
5 particular buy.

6 Judith?

7 MS. NELSON: Okay. I will confess
8 I have been strongly swayed by my panel
9 colleagues, my esteemed colleagues from the
10 agencies, but going back to what Mr. Allen
11 said, I would like to see a friendly amendment
12 put in to protect proprietary data, to make
13 note that the motion does bump straight up
14 against proprietary data.

15 As we were looking in the previous
16 about disclosure of bidded information, I
17 think that in this motion we do need to make
18 sure that, when it is interpreted in the
19 report, that we keep it at a level that does
20 not move to proprietary data, but rather to
21 higher-level information that would be of use
22 to the agencies. So that there's clear

1 guidance to the contracting officers and to
2 the policy offices, but it is not taken with
3 overzealousness.

4 MR. BRANCH: Okay, Mr. Chvotkin, I
5 believe that is your amendment or your motion.
6 Will you entertain a friendly amendment to
7 that?

8 MR. CHVOTKIN: Well, I would be
9 happy to, but let me ask Judith whether the
10 statement that Larry proposed to make sure
11 that, if we take Larry's sentences, shall we
12 move the sentence that Larry offered there and
13 make sure that this does not disclose
14 proprietary pricing, and address who has
15 access to such information? If we move that
16 up to the amendment, would that answer both of
17 your concerns? Is it necessary to put that as
18 part of the motion? If it is, I am happy to
19 make that suggestion.

20 MS. NELSON: Yes, to ensure that
21 this does not disclose.

22 MR. CHVOTKIN: Yes, if it doesn't

1 cost me votes among the rest of the panel
2 members, I am happy to make that modification.

3 (Laughter.)

4 If we could play with the words
5 for a minute or two afterwards, Mr. Chairman,
6 but conceptually I agree with that. It was
7 never my intent to disclose proprietary
8 information, and I think that is very
9 consistent with the kinds of disclosure that
10 I would expect the agencies to engage in, GSA
11 to engage in.

12 MR. PERRY: I would say I guess,
13 whenever I hear someone tell me about
14 proprietary information, it is beauty is in
15 the eyes of the beholder on that one some
16 days.

17 So I guess the comment, I would
18 like something written around that to make it
19 real clear about what would be considered to
20 be proprietary versus -- I just would not want
21 to see that turn into where we are not going
22 to get any information at all.

1 I think there are certain parts,
2 certain information there that I don't think
3 is proprietary that we could figure out how to
4 provide without jeopardizing the business in
5 the way a company does business. That will
6 probably take some discussion as to how
7 that -- we will have to work that out.

8 But since it's price, if most of
9 these we are talking fixed, there's some
10 pieces of that information that I think it
11 would be helpful. I wouldn't want to see, for
12 example, the points that the Chairman brought
13 up not get out of this because someone decided
14 that that was proprietary, because there is
15 going to be a fine line there.

16 I think, as Larry had said
17 earlier, it is close to that line. So I just
18 want to recognize in the writeup around this
19 be careful of not getting to where we want to
20 go through too broad of interpretation of the
21 word "proprietary".

22 MR. DRABKIN: If I may, we could

1 write whatever we want here. The
2 Administrator is not knowingly going to
3 release proprietary data, nor will the people
4 that provide him advice or guidance. If we
5 were to recommend that he or she release
6 proprietary data, they would ignore our
7 recommendation, as they are required.

8 While I appreciate the discussion
9 and the concern that some of this data may
10 fall into a discussion with industry, who, as
11 we all know, we send them the data that we are
12 proposing to release; they send it back to us
13 stamping it; it is all proprietary. We then
14 call them up and say, no, it's not. We have
15 a negotiation with them, and eventually we
16 either agree or we make a decision on our own,
17 as the government, as to what to release.

18 I appreciate the discussion.

19 MR. BRANCH: And you get sued.

20 MR. DRABKIN: That is incredibly
21 rare, and that is why we have lawyers and that
22 is what risk management is all about.

1 I, quite frankly, think our
2 discussion would be better taken on some other
3 points. I think we should note that we are
4 concerned about the potential that industry
5 might pursue some of this as being proprietary
6 and care should be taken. But, beyond that,
7 I don't think we need to really wordsmith our
8 motion or recommendation because, quite
9 frankly, our lawyers in GSA aren't going to
10 let us go where they think the risk is too
11 high. By the way, neither would the lawyers
12 in your own agencies.

13 Anyway, I suggest we move on.

14 MR. ESSIG: I have to agree.
15 Nothing in this recommendation is going to
16 violate the Trade Secrets Act.

17 MR. BRANCH: Any further
18 discussion on this motion?

19 (No response.)

20 Anybody care to call the question?

21 The question has been called. All
22 those in favor of Motion 4 signify by raising

1 their hands.

2 (Show of hands.)

3 All those opposed?

4 The ayes have it. The motion
5 carries.

6 So now that we have taken the
7 first hour of the afternoon to dispose with
8 the good work of the morning, I suggest that
9 we may want to take about a 10-minute break
10 and prepare ourselves to have a richer
11 discussion of Mr. Drabkin's framework.

12 So if we could be back at 2:45 by
13 the computer clock, we will resume then.

14 (Whereupon, the foregoing matter
15 went off the record at 2:36 p.m. and went back
16 on the record at 2:51 p.m.)

17 MR. BRANCH: We can resume,
18 please.

19 All right, I think we've done some
20 good work so far today reasoning through those
21 particular circumstances that surround the
22 purchase of goods from the schedule. I think

1 the two motions that we have passed have set
2 the table very, very well for us to finish our
3 work this afternoon.

4 So at this point, we have
5 dispositioned all motions that were not
6 tabled. I think the Chair will entertain Mr.
7 Drabkin's introduction of his proposed
8 motions.

9 I guess let me just ask a question
10 for clarification. Does your overall schema
11 really take the form of a motion there, David,
12 or would you advance that as report language
13 surrounding those motions?

14 MR. DRABKIN: Mr. Chairman, I
15 would only move the unnumbered motions at the
16 top of the page. I drafted the schema so that
17 I could articulate where I thought I was going
18 in light of where I thought we needed to be
19 based upon our discussion before lunch.

20 I would propose that the schema,
21 if the motions are adopted, even if they
22 aren't, that the schema form some basis of the

1 report later on, but they are not part of the
2 motion itself.

3 But it did occur to me that, as we
4 were talking before lunch, that part of our
5 problem may have been we didn't know where we
6 were going, and the fear of going to Abilene
7 was such -- yes, there are a few of us who are
8 that old and remember the road to Abilene,
9 yes.

10 (Laughter.)

11 What happened to those good old
12 days of TQM training?

13 (Laughter.)

14 What was the name, Tom what's his
15 name, the guy who was making a fortune at
16 that?

17 Anyway, I do move unnumbered
18 motion -- Tom Peters -- I do move now the
19 first unnumbered motion which I think is now
20 Motion No. 5, that the Administrator of
21 General Services implement the requirements of
22 Section 803 as mandatory for use of the MAS

1 Program for all users governmentwide at the
2 order level.

3 I understand that may become law,
4 but at the moment it isn't. I think it is an
5 important recommendation in the context of the
6 discussion we have been having.

7 MR. BRANCH: Okay. Do I hear a
8 second?

9 MS. NELSON: I second it.

10 MR. BRANCH: The motion has been
11 seconded. Discussion?

12 (No response.)

13 Hearing none, I'll call for a
14 vote.

15 All those in favor of unnumbered
16 Motion No. 1 signify by raising their hand.

17 (Show of hands.)

18 All those opposed?

19 The ayes have it. The motion
20 carries.

21 MR. DRABKIN: Next, Mr. Chairman,
22 I move as Motion No. 6 the second unnumbered

1 motion on the previous page.

2 MR. BRANCH: Okay, if we could
3 give Pat a minute to scroll back to that?

4 So the motion introduced is that
5 the Administrator of General Services develop
6 a solution that captures pricing at the order
7 level and makes it available to contracting
8 officers at both schedule and order level to
9 conduct market research, determine fair,
10 reasonable pricing at the contract level and
11 competition at the order level.

12 MR. DRABKIN: Yes.

13 MR. BRANCH: Do I have a second
14 for that motion?

15 The motion is seconded.

16 Discussion?

17 (No response.)

18 Okay, hearing none, I guess I'll
19 start out.

20 This may go to one of the
21 objectives that I have tried to hold to, and
22 if it does, please speak up, in terms of

1 engineering the solution, but I go back to my
2 earlier observation this morning, that I am
3 somewhat concerned about the length of GSA
4 contracts.

5 I do believe in the usefulness
6 from an economic information about the
7 baseline pricing in GSA contracts. So I could
8 support that motion, but I think that motion
9 needs to make it very clear that we expect GSA
10 to periodically, and the periodicity of that
11 I think is open for discussion, but to
12 periodically use that information gathered at
13 the order level to reestablish the baseline
14 GSA price.

15 I think that would likely play out
16 somewhat like this: to look at transactions
17 on an individual basis is somewhat futile.
18 They represent particular snapshots, and I
19 would be inconsistent with my own sentiments
20 in looking at snapshots because I do believe
21 that fair and reasonable is highly contextual.

22 However, having said that, I think

1 that information in the aggregate could
2 certainly be examined for particular trends.
3 It would be my expectation as a customer that
4 GSA would look at the trends for any given
5 vendor or any given class of supplies, and
6 based on those trends, say we understand what
7 the baseline pricing looks like; we are
8 comfortable with its fair and reasonableness,
9 but as we have activity that is actually
10 taking place in the market, that this is what
11 is actually occurring, and to use that
12 information periodically to go back and re-
13 baseline the schedule price.

14 It would be my hope that that
15 would be done more often than every five
16 years, at the time of option exercise. I
17 think for many of these commodities, five
18 years is much, much too long.

19 I think the goal has to be to
20 strike a happy medium because, as it has been
21 observed in the IT world, five minutes could
22 be considered to be much, much too long. But

1 if we are going to advance a general policy
2 statement, there has to be some time period
3 which kind of balances the fidelity of that
4 schedule pricing with what is reasonable in
5 terms of resources and execution.

6 So I generally support the motion,
7 but I do believe that information needs to be
8 used to reassess the schedule pricing on a
9 period basis, one that allows that pricing to
10 provide meaningful information to both GSA and
11 the agencies. I would like to see an
12 amendment to that effect.

13 David?

14 MR. DRABKIN: Mr. Chairman, let me
15 join you in your concern about the length of
16 contracts generally under the schedules
17 program.

18 I know, Elliott, that you and I
19 and many of the others have talked, not vis-a-
20 vis the panel but in our other collegial
21 settings, about the need to tailor contracts
22 to both the nature of the requirement and then

1 to the market in which they operate.

2 In the GSA schedules, an Evergreen
3 Program with a 20-year contract life for IT is
4 nonsensical from the perspective of the fact
5 that the products that you start out with in
6 year one already by year five are obsolete and
7 by generations, and certainly by the end of
8 the 20-year period of time may be not only
9 generationally different, they may be
10 conceptually different.

11 I mean when we started the IT
12 schedules, telecommunications was considered
13 to be a separate discipline. As we know now
14 under using IPV6, it is part of the IT world.
15 Printers and copying machines used to be
16 considered a separate entity unto themselves.
17 It is clear today that they are fully
18 integrated in any IT architecture, and it is
19 important you do that.

20 So I share your concern, but I am
21 not sure how to address it in the context of
22 this particular initiative. I think there's

1 yet some other motions or yet some other
2 recommendations, and perhaps these are general
3 recommendations, that we should be making to
4 the Administrator to go back and review the
5 schedules.

6 In some of the other commodity
7 programs, in textiles, although perhaps that
8 is not true, but I am sure there are other
9 commodity programs where longer contracts can
10 make sense and serve the market.

11 What we need is the flexibility,
12 so that the schedules program can change as
13 the markets change, so they reflect the
14 markets.

15 A lot more work for GSA, but with
16 revenue comes responsibility. We should
17 undertake that.

18 Here what is important, I think,
19 for the first time is for us to collect this
20 data for use in the context of what we have
21 been talking about today. That is, pricing
22 both at the contract level initially and

1 pricing at the order level when we have
2 competition.

3 Once this schema, assuming
4 adopted, is implemented, it will take the
5 better part of a year or two before the
6 database is as rich -- I believe is the word
7 you used, "rich" -- rich enough to begin to
8 form the basis of going back and reforming
9 contracts that we have already negotiated,
10 based upon our own internal evaluation of what
11 that pricing is like.

12 During the break, a number of
13 colleagues have talked about the fact, well,
14 if someone has been selling something on their
15 schedule for 30 percent less to every customer
16 in the world, but their schedule price is 15
17 percent discount, something is wrong, and we
18 need to fix that at the schedule contract
19 level.

20 It all goes back to the proper
21 role of strategic sourcing and supply chain
22 management which we need to adopt.

1 So if I might prevail upon you to
2 address this motion, and then begin with some
3 overall larger recommendations to the
4 Administrator about adopting a strategic
5 sourcing and a supply chain management
6 approach to the schedules program, as opposed
7 to the current program, which I guess could be
8 best described by some people as get it on
9 contract as fast as you can, whatever it is,
10 and worry about it later.

11 MR. BRANCH: Tom, and then Judith.

12 MR. ESSIG: Actually, I think I
13 agreed with what you both just said. I think
14 there's a connection between Motion 6 and your
15 addendum, Elliott. I think that they are both
16 worth exploring further.

17 What I would propose doing is
18 separating yours into a separate motion,
19 however, so that it does not take away from
20 the other important aspects of Motion 6. Make
21 yours Motion 7 and leave David's as Motion 6.
22 I think both need to be addressed.

1 MR. BRANCH: Judith?

2 MS. NELSON: Well, given what Mr.
3 Essig has said, I think that my comments
4 mostly come with what would be Motion 7. So
5 I will let them lay.

6 MR. BRANCH: You know, I am
7 comfortable doing that because I believe I can
8 rely on the goodwill of my fellow acquisition
9 professionals to do the right thing here. But
10 I can just see us, if we do not -- so let me
11 footstomp this one.

12 I can see us, if we do not have a
13 companion methodology or process to
14 rebaseline, this becoming a Washington Post
15 story because we all know that, if we have
16 pricing in a GSA schedule contract which is
17 public knowledge, and we have this database,
18 if you will, behind the firewall which
19 indicates to us that that pricing is not
20 reasonable nor valid, nor, indeed, are we
21 paying those prices, that we will be starting
22 the story, "But I can explain...." Whenever

1 you have to start the story, "But I can
2 explain...." in Washington, D.C., you know it
3 is going to be a bad day.

4 So I think very clearly we have to
5 provide, if we are going to go down this path,
6 for an internal control that mandates the
7 periodic rebalancing of prices at the schedule
8 level to maintain the confidence of our
9 stakeholders in what GSA does.

10 MR. DRABKIN: Mr. Chairman, if I
11 might, if I'm not out of order, may I propose
12 that we lay aside Motion 6 for a moment, so
13 that I can make another motion?

14 MR. BRANCH: Do I have a second to
15 that?

16 All right, all those in favor?

17 All right, opposed?

18 Okay, without objection, so
19 ordered.

20 MR. DRABKIN: Mr. Chairman, I move
21 that we recommend that the Administrator of
22 GSA use whatever data is available to him or

1 her to conduct regular reviews of pricing on
2 schedule contracts to make sure that those
3 prices are relevant to the market and market-
4 available prices.

5 MR. BRANCH: Do we have a second?

6 All right, we have a second.

7 Discussion on that motion?

8 MR. DRABKIN: Mr. Chairman, I now
9 move that we lay aside Motion No. 7 and take
10 back up Motion No. 6 to move Motion No. 6.

11 MR. BRANCH: All right, there is a
12 motion to table No. 7.

13 (Laughter.)

14 MR. PERRY: We haven't gotten No.
15 7 yet.

16 MR. DRABKIN: Okay. Recommend
17 that the GSA Administrator use whatever data
18 is available to regularly review and refresh
19 prices on schedule contracts to reflect market
20 pricing or relevant market pricing.

21 MR. PERRY: My comment, I thought
22 that's what you were going to say. My issue,

1 when I think about when you tried to add the
2 other sentence, somewhere age is an issue here
3 of that data and when those reviews are done.

4 Can we put any recommendations
5 about how frequent?

6 MR. DRABKIN: Can I?

7 MR. PERRY: Yes.

8 MR. DRABKIN: Okay, let's see.

9 MR. PERRY: I've heard argued that
10 the five-year period is --

11 MR. DRABKIN: Well, regular review
12 consistent with -- well, somehow we need to
13 convey consistent with the nature of each
14 market segment because that is different.
15 Consistent with each market segment.

16 Does that satisfy your suggestion,
17 Glenn?

18 Now you see, Mr. Chairman, you
19 don't have to rely upon our goodwill; you have
20 a motion that you can look at while we dispose
21 of Motion No. 6.

22 MR. BRANCH: Well, it is on the

1 table and it may not come off.

2 (Laughter.)

3 So I will continue to rely on your
4 goodwill.

5 MR. DRABKIN: You can be assured
6 of a lot of goodwill as long as I don't have
7 to give you cash.

8 (Laughter.)

9 MR. BRANCH: So 7, there is a
10 motion to lay 7 on the table. Second for
11 that?

12 All those in favor of 7 going on
13 the table?

14 (Show of hands.)

15 Opposed?

16 All right, 7 is laid on the table.

17 I move that we take 6 from the
18 table for consideration.

19 MR. DRABKIN: Second it.

20 MR. BRANCH: Okay, all those in
21 favor?

22 (Show of hands.)

1 Opposed?

2 All right, 6 is now taken from the
3 table. Any discussion on Motion No. 6?

4 MR. ALLEN: My only comment is I'm
5 not sure exactly how useful some of that data
6 is going to be. I mean, fine if you want to
7 find a way to capture it. Of course, I think
8 it is going to be something that GSA works
9 with on its contractors because I don't know
10 that contractors are going to be thrilled if
11 that becomes a data collection requirement for
12 them, although if you use Section 803, that
13 could be an automated way where nobody gets
14 burnt for it.

15 My other comment for Motion 6 is
16 that we heard a lot of testimony during the
17 earlier meetings that pricing was driven on
18 episodic-specific, case-by-case orders,
19 competitions, if you will.

20 Therefore, putting the information
21 out there and collecting it about the pricing
22 that was available on one type of opportunity

1 may or may not be significantly relevant to a
2 current customer who is going in and looking
3 at that information, hoping to discern
4 something.

5 For one thing, it could be a
6 couple of months down the road. The whole
7 market could have changed. I wonder what
8 we're telling our customers by saying, you
9 know, if somebody got a great deal on
10 September 20th, and then you came back on
11 November 20th and the same deal wasn't
12 available to you, there are lots of ways you
13 can interrupt that, only some of them not
14 nefarious or without attributing nefarious
15 attributes at the time.

16 I'm also concerned -- and this is
17 not necessarily a reason to sink it, but it's
18 a concern nonetheless -- that there is such a
19 thing as gathering too much information. You
20 can gather all the information you want, but
21 of what utility are you going to make it?
22 That becomes the real question.

1 I just got my cable upgraded. So
2 now we have over a thousand channels. Well,
3 I'm not sure what good that does me, and it is
4 the same type of thing here. I'm not sure
5 that having this type of data captured is
6 going to really pay off for a lot of people.

7 Outside of the idea that some of
8 the bid information I think may or may not be
9 proprietary, I hate to keep bringing that back
10 up, but it is an issue, I'm not sure that it's
11 going to do anything other than to confuse
12 buyers. It may mislead them into thinking
13 that they didn't get as good a deal as another
14 agency got buying similarly, but not
15 identically, at a different point in time.
16 I'm just concerned that this type of
17 information could open up a Pandora's box of
18 unintended consequences, not to mention the
19 fact that it is a lot of work for somebody to
20 do.

21 So I think we want to be very
22 careful, if you are going to undertake this

1 exercise, that we have a fairly decent
2 understanding about how the data is going to
3 be collected, who it is going to be used by,
4 and whether or not it is actually going to be
5 of any utility to a purported user.

6 MR. BRANCH: David, and then Tom,
7 and then Judith, and then I'll exercise my
8 prerogative to insert myself into the queue.

9 MR. DRABKIN: I want to take care
10 here not to challenge you to another duel.

11 (Laughter.)

12 Only because I thought it was
13 funny to say that.

14 I just returned from -- well, not
15 just -- I went to a conference in August in
16 Amsterdam where my colleagues from various
17 countries around the world spent several days
18 studying procurement, studying government
19 purchasing. Except for about half of the
20 cases that were presented -- these were
21 actually scholarly cases presented -- there
22 was a team of both academics and practitioners

1 who presented. Half of the cases dealt with
2 e-procurement; the other dealt with spend
3 analysis and strategic sources. All of them
4 made the point, both the e-procurement cases
5 and the ones dealing with strategic sourcing
6 and spend analysis, that you have to collect
7 the data in order to analyze the trends, in
8 order to understand what is going on.

9 There is always a question, when
10 you are collecting data, of what is relevant
11 to a particular decision and what isn't, but
12 the first key in every situation is to collect
13 the data.

14 Now, clearly -- no, it's not now
15 clearly -- secondly, with regard to this
16 motion, we are only talking about collecting
17 the pricing information. I realize that the
18 pricing of an unsuccessful offeror or quoter
19 might be considered proprietary; it might not
20 be. We could have an argument about it all
21 day long.

22 But I am not proposing that that

1 information be made available publicly,
2 although there is a bill on the Hill that
3 seems to suggest that all this stuff will get
4 published, not just the successful offeror,
5 but the bids that we received as well.

6 But I'm not suggesting that. I'm
7 only suggesting that this pricing information
8 be captured so that we could begin doing that
9 which we are unable to do currently, which is
10 real spend analysis. How can we call
11 ourselves purchasing professionals in the
12 government if we cannot do the kind of spend
13 analysis that lets us make strategic sourcing
14 and supply chain management decisions that
15 reduce the price to the government overall,
16 the total cost? I'm not talking about getting
17 low price, but I am talking about managing the
18 solutions, so we get what the taxpayer
19 deserves.

20 All I am proposing here, Larry, is
21 to collect this information and to keep it
22 within the government and to use it. Now

1 you're right, there are going to be some
2 people who will be overwhelmed by this
3 information and won't use it. We will have a
4 great deal of effort to train people on how to
5 use it.

6 The average contracting officer
7 probably won't use it, but offices like mine,
8 and I'm sure Tom has an office and Elliott
9 probably has a group of people and Jan who
10 will be looking at trends in their particular
11 agency, looking at opportunities to reduce the
12 total cost of ownership to the government,
13 particularly since this is in the context of
14 products.

15 I think they will be using it, and
16 I think we will be able to return to the
17 taxpayer a real return, not by driving prices
18 to their lowest possible point, but by getting
19 real value that we can then explain why we
20 paid what we paid.

21 So that is why I think we need to
22 go here. It is also so that we can prove to

1 our own customers that they are getting good
2 prices.

3 By the way, intuitively, I believe
4 that most of the prices we get on the
5 schedules are pretty good prices, not the best
6 prices in town. But the reason I believe that
7 intuitively is because, when you talk to
8 people about what's the price to beat, the
9 answer is the GSA schedule price. Everybody
10 takes joy at beating the GSA schedule price.
11 Well, they wouldn't want to beat that price if
12 they didn't think it was a fairly good price
13 to start with.

14 Go to the State of California and
15 try to sell to them. The first thing they
16 will ask you is, What is your GSA schedule
17 price? That is where they start their
18 negotiations from.

19 I would like to drive that price
20 to a better place, not again by shaving profit
21 from vendors, but by getting competitive
22 prices that they might give the State of

1 California that I don't get. That is the
2 concept here.

3 I don't want anybody to think that
4 we are going any further than that here in
5 this proposal. Thank you, Mr. Chairman.

6 MR. BRANCH: Tom, and then Judith.

7 MR. ESSIG: Two comments, and I
8 think they are consistent with everything
9 David just said.

10 The issue of proprietary data I
11 really view as a non-factor here. Again, the
12 Trade Secrets Act is very clear. It restricts
13 the release of proprietary data by government
14 employees outside the government. It does not
15 restrict the use of proprietary data by
16 government employees in the conduct of their
17 official duties.

18 Secondly, what we are talking
19 about here is not unlike what is required by
20 the Truth in Negotiations Act in situations
21 where we do not have full and open or adequate
22 price competition. That requires current,

1 accurate, and complete cost data.

2 Now the purpose of the Truth in
3 Negotiations Act is to level the playing field
4 between the government and the contractor, so
5 that when we are sitting across from each
6 other at the negotiation table we both have
7 access to the same data.

8 Today I would hope that all
9 companies know what prices they are selling
10 their equipment for. It is not the same on
11 the other side of the table.

12 What we are asking for here is,
13 again, that the government have access to the
14 same information that the contractor does when
15 we sit down and negotiate those prices. So
16 it's a lot of data. It's not unlike what we
17 do in other places.

18 I think I wouldn't want to say
19 that to a contracting officer, "This is too
20 much for you to be concerned about, so I am
21 not going to give it to you." We need to have
22 them trained and informed on how to do their

1 jobs, give them access to that data, and let
2 them use it appropriately.

3 MR. BRANCH: Judith?

4 MS. NELSON: I think very much
5 along the same line as Tom and David; I am
6 spending a lot of time reading a lot of best
7 practices for market trend analysis and spend
8 analysis in the commercial market for both
9 commodities and services. Those in industry
10 who know me, I have become very much the
11 advocate for data and more data and more data.

12 I think that David's motion
13 doesn't say which data needs necessarily to be
14 collected. You know, it is talking about
15 getting to the data. The key, then, would be
16 to very carefully craft that data collection.

17 I mean there's a lot of data that
18 can be collected, and, yes, there is the fear
19 of data overload. But every nuance of data
20 that is out there need not be captured and
21 collected or that which can be can be put in
22 a file but not all of it needs to be analyzed

1 and made public or used. The key is to
2 actually look and see what is vital and what
3 can be used and turned around and be made and
4 looked at for data trends that can then have
5 some value for both the agency, GSA, and for
6 our customers. But, otherwise, as many of the
7 agencies have said, they don't know what they
8 are getting.

9 I know OMB, in making some
10 presentations to OMB, they have often said:
11 What's the value proposition for the
12 schedules? Can you tell us what you are
13 selling to the agencies? Can you make an
14 empirical case for your sell prices to the
15 agencies?

16 I think what David is saying is
17 let's make an empirical case for what we are
18 selling to the agencies and make that case to
19 the agencies and give the agencies the
20 ammunition that they need in order to be able
21 to go out and make their procurements. This
22 will give it to them.

1 MR. BRANCH: I have to agree with
2 David, Tom, and Judith. I do this from a
3 slightly different perspective.

4 This is going to be hard. Let's
5 just accept that. But we don't have a choice.
6 If you will indulge me, let me give you a
7 little fiscal history lesson.

8 So if you go back and look at the
9 budget in terms of Gramm-Rudman-Hollings
10 categorizations, and if you go back to FY
11 1962, we were spending 67 percent of the
12 federal government on discretionary items. As
13 we submit the 2010 budget and work, the
14 forecast by CBO and others who track these
15 things say we will be spending 33 percent of
16 the budget on discretionary items. So we have
17 reversed that course.

18 We have legislation that comprises
19 a financial rescue package, frankly, I believe
20 to be of indeterminate amount. We have
21 started, on top of those actions taken by the
22 Fed and the Treasury, we have said here's

1 another \$700 billion; we don't know where that
2 is going to go.

3 I can tell you, as we disengage
4 from Iraq, and we step up tempo in
5 Afghanistan, those forces that we bring home
6 from a DoD perspective, primarily the Army and
7 the Marine Corps, will need to be
8 recapitalized.

9 So I lay all of this out to make
10 the point that, whatever we have done in the
11 past, and whatever we think the rules of
12 engagement with respect to strategic buying on
13 behalf of the government in the past, are
14 largely irrelevant going forward.

15 So we will have to train a
16 workforce that knows how to use this data. We
17 will have to put people in policy positions
18 that understand what data needs to be
19 collected, and we will need the cooperation of
20 industry to do this.

21 I would submit to you that, going
22 forward, if our commercial partners are not

1 willing to do this, that they will not have a
2 seat at the table, because we in government
3 cannot afford to act inefficiently. We can't
4 afford to leave money on the table.

5 Now, to echo David's sentiments,
6 that is not to say that we want razor-thin
7 profit margins. You know, we, hopefully, have
8 learned that lesson in the past as we have
9 bargained hard to agreement that companies
10 going out of business and making for a less
11 robust competitive environment is not a way
12 forward.

13 But I think we collectively, as a
14 community, are going to have to do those
15 things smartly, to husband the meager
16 resources that we are going to get in the
17 years going forward. It is really very
18 simple. We can't afford to do otherwise.

19 On that note, I would like to call
20 the question.

21 Alan?

22 MR. CHVOTKIN: Mr. Chairman, I

1 fully support and I will vote for the motion.
2 My only concern is now with the addition, and
3 maybe stress that I would like to call to your
4 attention we have added a second bullet up
5 there, Ms. Brooks did, under the motion to
6 explain what it is we are trying to do. That
7 second bullet responded to your point, Tom,
8 about that this information is going to be
9 similar to what we get in the TINA process.
10 I hope it is nothing similar to what we get in
11 the TINA process.

12 With your concurrence, if we could
13 strike that bullet, then I think it avoids a
14 whole lot of discussion on my part.

15 MR. BRANCH: I think that's --

16 MR. DRABKIN: Could I ask that we
17 not strike the bullet, that we capture it
18 later to use it in our discussion?

19 MR. CHVOTKIN: Yes, but the
20 information that we are capturing is pricing,
21 David; it's transaction data. It is not the
22 information on costing --

1 MR. BRANCH: Let me clarify. As
2 far as I am concerned, procedurally, the
3 bullets are not part of the motion.

4 MR. CHVOTKIN: I don't even want
5 them as part of our legislative history,
6 but --

7 MR. BRANCH: So I will leave it to
8 the report writers on the product team to
9 disposition that in a way that everybody can
10 live with in the final report.

11 MR. CHVOTKIN: That would be
12 great. If we could disposition that off the
13 page to start with, I would feel a lot more
14 comfortable that it's not even in the
15 discussion.

16 (Laughter.)

17 MR. BRANCH: I think, with Tom's
18 concurrence, since that was his thought, can
19 we take that bullet out of there, in the
20 interest of comity, and not "comedy"?

21 Okay, so the question has been
22 called. All those in favor of the motion as

1 drafted raise your hand.

2 (Show of hands.)

3 All those opposed?

4 The motion carries unanimously.

5 I move that --

6 MR. DRABKIN: Mr. Chairman, I move
7 we adjourn.

8 (Laughter.)

9 I withdraw my motion.

10 Mr. Chairman, I move that we next
11 consider Motion No. 7.

12 MR. BRANCH: All right.

13 MR. DRABKIN: Mr. Chairman, I move
14 that we next consider Motion No. 7.

15 MR. BRANCH: Okay. Second to take
16 Motion No. 7 off the table?

17 All those in favor of taking
18 Motion No. 7 off the table?

19 (Show of hands.)

20 Opposed?

21 The motion is brought forward for
22 discussion. So we have Motion 7, recommend

1 that the GSA Administrator use whatever data
2 is available to regularly review, consistent
3 with each market segment, and refresh prices
4 on schedule contracts to reflect relevant
5 market prices.

6 Discussion on that motion?

7 MR. CHVOTKIN: Mr. Chairman, I
8 think if we move the parenthetical phrase
9 "consistent with each market segment" to the
10 end of the sentence, then we will have -- or
11 someplace else. It is stuck in the middle.
12 Maybe it comes after "refresh prices", but it
13 didn't belong where it was.

14 "Review and refresh prices,
15 consistent with each market segment", that
16 will be fine.

17 MR. BRANCH: Mr. Drabkin, that's
18 your motion. Is that acceptable to you?

19 MR. DRABKIN: It is most
20 acceptable, Mr. Chairman.

21 MR. BRANCH: Okay, thank you.

22 So ordered.

1 Jackie, and then Judith.

2 MS. JONES: David, can you clarify
3 the scope of regular market prices?

4 MR. DRABKIN: Relevant market
5 prices? Can I clarify the scope? No, I'm
6 afraid I can't.

7 MS. JONES: Well, I guess what I
8 am getting to is, Are you meaning within the
9 federal marketplace as well as the commercial
10 marketplace?

11 MR. DRABKIN: Yes. Well, I mean,
12 in the context of our discussion today, we
13 have talked about vertical pricing, which is
14 how a vendor prices its own product and
15 services -- well, we have been talking about
16 products, products for sale to both its
17 government and commercial customers. So that
18 includes commercial pricing.

19 Then we talked about the
20 horizontal check, to look at the market price
21 as well, and I don't believe in that
22 discussion or in that context I suggested, or

1 anyone else did -- and if they did, I
2 apologize; I missed it -- that we would limit
3 it only to the federal market.

4 In fact, I thought I heard some
5 people talk about going online. In fact, it
6 was even Tom, I think, using some electronic
7 tool where you can check the price of a
8 television on -- what is it? -- geeves.com,
9 and they will go out and find all the Toshiba
10 52-inch, 1080 DPI televisions and line them
11 up, and you can do a comparison shop,
12 including what their price is.

13 So, yes, I meant relevant market
14 price. I used the word "relevant" in this
15 case to make sure we are talking about the
16 same product. That's, I think, what I meant
17 when I used the word "relevant".

18 Relevant may also have a time
19 factor associated with it, but I don't know
20 what that is. Some people talked about
21 relevancy in terms of how old the prices are.
22 On some products, going back three years may

1 make sense. On others, going back 60 days
2 would be too far. It just depends on the
3 particular item and the particular market, and
4 the timing in that market. So rather than try
5 to explain all that in lots of words, I used
6 the word "relevant".

7 MS. JONES: I would just make a
8 suggestion that we frame that with some of
9 that language in terms of clarifying what that
10 really means in the writeup.

11 MR. BRANCH: Debra?

12 MS. SONDERMAN: David, in this
13 motion you are referring to products. Is this
14 a recommendation that you intend to apply to
15 both products and services or only to
16 products?

17 MR. DRABKIN: Thank you for that
18 question because you point out correctly that,
19 while we were discussing Motion No. 6, we were
20 talking about this motion in context as an
21 overall recommendation to the Administrator
22 about the schedules program in general. In

1 fact, when we finish with this motion, I think
2 I have probably another to address some other
3 comments we have talked about in terms of the
4 length of the schedules.

5 So while I didn't articulate it, I
6 did intend it to mean both products and
7 services, not just products, whereas all of
8 the previous motions that we have talked about
9 today I understood to be limited to products.

10 MS. NELSON: So I am looking at
11 this and I'm not sure whether or not my
12 questions/clarifications will lead to asking
13 to table this in light of a different motion,
14 perhaps either from myself or Elliott, or
15 whether or not to amend this one. I am not
16 exactly sure where it is going to end up
17 going.

18 But as I read this, in the course
19 of how we do business right now without any
20 adjustments to how schedules are currently
21 awarded, we award a schedule contract based on
22 finding a class of customer that is akin to

1 how the government buys, and that becomes the
2 basis of award. There is a class of customer
3 that then triggers a price reduction clause,
4 and so a contract is entered into with those
5 found.

6 If I am looking at this, then
7 routinely if, as required, economic price
8 adjustments are submitted when they are
9 relevant, and price reductions are submitted
10 when they are relevant, now this
11 recommendation, as I read it, says,
12 essentially, in addition to those, that
13 periodically, and whatever that periodic time
14 be as the market deems for that market
15 segment, that GSA do a review for that group
16 of schedule contracts and say, "Hmmm, these
17 prices are not consistent with the market
18 segment."

19 Let's assume that that is going to
20 result in a reduction of prices, if any
21 changes in prices. I don't know; maybe it
22 will result in an increase in prices. It

1 could happen.

2 I know that there is one
3 particular solicitation where, actually, based
4 on the tool that they use, there have been
5 times when contractors have been told that
6 actually their pricing is low. Now the
7 contracting officers then don't say you should
8 actually give us higher prices. That would be
9 absurd.

10 So we periodically say, you know
11 what, we've done our periodic review and we
12 have found that your pricing is not consistent
13 with the market segment. So this is separate
14 and apart for the mechanisms that are
15 currently in place.

16 So what I am suggesting is that
17 perhaps, prior to looking at this motion, that
18 we look at something that says maybe we need
19 to look at a different way in which GSA
20 negotiates its pricing and maintain the
21 pricing with that vendor, which is to say that
22 GSA negotiate a baseline price at contract

1 formation, and then for a period of time, or
2 for the length of the contract -- and I will
3 agree with David that the lengths of our
4 schedule contracts are absurdly long, both the
5 base period and the options. But for whatever
6 period of time, and we'll call it -- what are
7 we calling it? -- consistent with the market
8 segment, allow the market to dictate the
9 prices.

10 I will go back, and as I tend to
11 do, harp on allowing for unilateral
12 modifications with notification to the
13 contracting officer to change those prices up
14 and down.

15 Then have GSA do a trend analysis
16 through the collection of the data, through a
17 previous motion that we have put in, and
18 overlay that trend analysis, and then look at
19 those prices and say whether or not the
20 pricing that they have done through their
21 market, allowing the market to dictate, falls
22 within that trend analysis.

1 If we say that one sigma is X, Y,
2 Z or two sigma is Y, Z, X, that they fall
3 within 20 percent of that, or whatever that
4 is. So that we are looking at a trend and not
5 a onesie/twosie, this product is "X" and this
6 product is "Y", you know, we came to hear,
7 which is, as Thomas talked about, what's the
8 value and how you're going to actually have a
9 workforce that is going to constantly do this.

10 My motion would actually, my
11 thought would be that we lay this aside or add
12 onto it, which I do believe it is a good
13 motion, but I think that we look at how we
14 baseline award them and how we administer
15 them, and then take this and say, yes, we do
16 periodically, per the market segment, review
17 them and do a trend analysis within a certain
18 sigma and say, What is that relevance?

19 MR. BRANCH: Tom?

20 MR. ESSIG: I think what you have
21 been talking about are specific techniques
22 that can be used to review and refresh prices

1 on those schedules. I really don't think that
2 there's anything in any of those reviews that
3 says that this has to be outside of and be
4 over and above what is being conducted in
5 those reviews. That is at the level of detail
6 that I think would need to be worked out by
7 GSA.

8 All this says is periodically
9 review and refresh. It doesn't get into the
10 details as to the extent of the review, what
11 you're going to use, what you're not going to
12 use.

13 So I don't think this is a case of
14 duplicating all of that or redundant to that.
15 That can be incorporated into it. This is a
16 simple statement.

17 In Motion No. 6 we agree to start
18 gathering this data. This says use it.

19 MR. BRANCH: Yes, I guess I've
20 kind of come to a middle ground on this. I
21 think, due to some excellent leadership from
22 many members of this panel, we have come

1 through a framework this morning. So if we
2 kind of go back to the top, what we have said
3 that Alan is urging is, okay, let's talk about
4 the pricing objective. So we have done that,
5 and we have said go out and get a fair and
6 reasonable price.

7 Then the next thing we have really
8 said is, okay, and let's allocate the fairness
9 and reasonableness of price between the
10 contract formation level and the transactional
11 level by collecting that data, so that
12 contracting officers can do market research,
13 determine what is fair and reasonable at both
14 the order level and the contract level.

15 Further, let's take that data and
16 use that to refresh the baseline pricing, so
17 that an agency can have confidence that this
18 is a good place to start.

19 I agree with everything Judith has
20 said, but let me suggest that maybe that needs
21 to be content of the report, and maybe it
22 needs to be framed in such a way to the

1 Administrator as, when you look at these three
2 motions as whole, this is a strategy or this
3 is a path that we might recommend that you
4 explore. We think you can do it this way,
5 this way meaning looking at your market
6 segments and determining the appropriate
7 periodicity for review, looking at the data in
8 the aggregate to conduct trend analysis,
9 determining what your metrics are for whether
10 that trend is in control or out of control,
11 and what to do in the event that you find the
12 trend out of control.

13 I think those might be very
14 important thoughts to convey to the
15 Administrator, but I don't know that they
16 really ought to be conveyed in the form of a
17 recommendation because I think there may be
18 more than one way to solve that problem.

19 Having said that, I think that is
20 a very good approach to solving a problem, and
21 we would be remiss by not conveying that. But
22 I don't believe it needs to be conveyed in the

1 context of a motion.

2 MR. ALLEN: I recommend we call
3 the question.

4 MR. BRANCH: The question has been
5 called.

6 MS. NELSON: I second.

7 MR. BRANCH: All those in favor of
8 Motion No. 7 signify by raising their hand.

9 (Show of hands.)

10 All those opposed?

11 The motion carries.

12 MR. DRABKIN: Mr. Chairman, I have
13 yet another motion.

14 Mr. Chairman, I move that the
15 Administrator of GSA review the length of the
16 current schedule contract program and adjust
17 the length of that program to reflect periods
18 of time that address the types of issues that
19 this body has addressed; for instance, how one
20 prices a contract for IT over 20 years. I am
21 not suggesting that a 20-year contract made up
22 of 10 two-year options is inappropriate, but

1 I am suggesting that the one-size-fits-all
2 solution that currently exists is
3 inappropriate and should be reviewed.

4 So my motion would be that the GSA
5 Administrator review the length of MAS
6 schedule contracts.

7 MR. BRANCH: Okay, do we have a
8 second?

9 MS. NELSON: I second that.

10 MR. BRANCH: The motion is
11 seconded.

12 Any discussion on the motion?

13 Alan?

14 MR. CHVOTKIN: Mr. Chairman, I
15 wonder whether we need to be this explicit or
16 maybe suggest an alternate path.

17 When we talked about services, we
18 actually adopted two separate motions, and
19 there was nothing in the text that would drive
20 us directly to services only.

21 Motion No. 4 that we adopted in
22 September said that GSA periodically evaluate

1 the program SINs description to determine if
2 the descriptions are consistent with the
3 customer needs, and current market offerings
4 and labor categories are consistent. That
5 might be different.

6 Motion 5 said GSA undertake a
7 periodic evaluation, in consultation with the
8 ordering agencies and industry partners, of
9 the current MAS Program schedules to determine
10 their relevance in the marketplace and
11 applicability for meeting agency needs.

12 I think we have already covered
13 that, but if there is any ambiguity from our
14 actions in September that those addressed only
15 services, then I would renew, as an
16 alternative to David's substituting the
17 combined Motions 4 and 5, to make sure they
18 are applicable to products.

19 MR. BRANCH: Judith?

20 MS. NELSON: I don't think that
21 Motions 4 and 5 addressed the length and the
22 Evergreen clause. They addressed the

1 description of the SINs and the descriptions
2 of the solicitations and the terms and
3 conditions, but they did not specifically
4 address the length of the contracts or the
5 specific Evergreen clause. So there are two
6 or three, in this case, different motions
7 actually.

8 MR. BRANCH: David?

9 MR. DRABKIN: I do not oppose the
10 suggestion -- I support the suggestion from
11 Mr. Chvotkin.

12 MR. BRANCH: Yes, I have to kind
13 of go back to Judith's observation. I think
14 we need to be very careful here. I don't have
15 an issue with the combined motion with respect
16 to supplies and services. I think Motions 4
17 and 5, as we have passed them, would certainly
18 be useful for both. But I see your motion,
19 David -- and correct me if I'm wrong -- as
20 doing something else.

21 Motions 4 and 5 really, in my
22 mind, went to the heart of, one, are those

1 things being offered to us on schedule
2 relevant to our needs and, two, given the
3 changing nature of the workplace, and the
4 changing nature of job descriptions, are those
5 things that we are offering on schedule
6 consistent with the marketplace?

7 I saw your motion as dealing more
8 narrowly with simply, given that we can hold
9 those two things static, the nature of what's
10 being offered and its description, is the
11 pricing correct for that?

12 So I think we need to be very
13 careful before we combine the motions, if my
14 understanding of your intent on Motion 8 is
15 correct.

16 MR. DRABKIN: My intent on Motion
17 8 was to address the program as a whole, as we
18 began talking about when we talked about
19 Motion 7, and that we specifically recommend
20 that they review this current Evergreen
21 policy.

22 Let me not suggest by the motion

1 that I think necessarily it has to be
2 eliminated. It is just that it may be proved
3 to be more relevant to be, instead of four
4 five-year options, ten two-year options, 19
5 one-year options. I mean whatever makes sense
6 for the market and that it may change, but
7 right now GSA has a one-size-fits-all
8 solution, which it has adopted and managed for
9 eight or nine years, and it may account for
10 some of the discontent that some of the
11 customers have expressed in its utility.

12 MR. CHVOTKIN: Mr. Chairman, my
13 goal is the same as Mr. Drabkin's, which is to
14 keep these relevant.

15 My reason for trying to stay away
16 from having a motion that adopts as a
17 recommendation that we review the length,
18 rather, that that be one of the elements of
19 consideration, is that today we simply no
20 longer have schedules contracts that are just
21 for products or just for services. The
22 homogenization, my word, of these contracts

1 with the SIN numbers that cover such a wide
2 range probably makes it impractical to look at
3 the length of a schedules contract solely in
4 the context of products or solely in the
5 context of services.

6 Yet, consistent with that, there
7 may very well be SINS that should not go out
8 for five years on a product basis or some
9 other flexibility. I just think that that is
10 one of the elements in my overall goal of
11 keeping these schedules relevant, consistent
12 with the marketplace, that I would add, as
13 just sort of the report language, that the
14 length of the schedule element is certainly a
15 consideration for the Administrator to take
16 into account when looking at the overall
17 relevancy and current, complete, and accurate
18 in a very different context for this review.

19 MR. BRANCH: Yes, Debra?

20 MS. SONDERMAN: Well, I respect
21 that point of view, but I share the concern
22 about this specific element and would prefer

1 to see it retained as a separate motion for
2 emphasis, if nothing else.

3 MR. BRANCH: Other discussion on
4 this? Larry?

5 MR. ALLEN: I'm coming in with
6 Alan on this. I think it is implicit, or can
7 be implicit, in the report, if we write it up
8 that way, and it definitely looks at the
9 program more at a strategic level and lets the
10 Administrator look at the schedules across the
11 program and make sure they are finetuned. I
12 think we can add it in with the report
13 language that says, you know, there are
14 various elements; one of them is the length of
15 the contract.

16 I think that that is, by the way,
17 a fine and appropriate thing to look at, the
18 length of the contract. I understand that
19 there can be -- it is a big program, and
20 different contract lengths may or may not be
21 a better approach, given what you are selling.
22 So it is not that I don't support that,

1 because I think it is not a bad idea, but
2 merely that I think looking at it from more of
3 a comprehensive and strategic way is a good
4 way to go.

5 MR. BRANCH: Further discussion on
6 this motion?

7 (No response.)

8 Okay, hearing none, then we will
9 call the vote on it.

10 All those in favor of Motion No. 8
11 please raise your hand.

12 (Show of hands.)

13 All those opposed?

14 The ayes have it. The motion
15 carries.

16 Tom?

17 MR. ESSIG: Actually, if it is
18 okay, I would like to make Motion No. 9.
19 It's, in conjunction with the approved motions
20 to ensure fair and reasonable pricing,
21 eliminate the most favored customer price
22 adjustment clause.

1 We have put enough controls in
2 place in Motion 1 through 8 to ensure a fair
3 and reasonable pricing.

4 MR. BRANCH: Do I hear a second?

5 MS. SONDERMAN: I think there is a
6 motion on the table that recommends
7 elimination of the price reduction clause for
8 products.

9 MR. DRABKIN: Point of
10 clarification: do you mean most favored
11 customer or do you mean the price reduction
12 clause? There are two different clauses.

13 MR. ESSIG: Remind me what they
14 cover.

15 MR. DRABKIN: Most favored
16 customer is the basis-of-award customer, and
17 the price reduction is, if you didn't tell us
18 about a price reduction and we're entitled to
19 it, we get it.

20 I think we were talking about
21 eliminating the price reduction clause.

22 MR. BRANCH: All right. So the

1 motion would be more appropriately to remove
2 from the table Motion 1, which is where we
3 started this morning.

4 MR. ESSIG: Actually, I think you
5 did that before I got here.

6 MR. BRANCH: Yes, I think we did.
7 It has been a long day.

8 MR. ALLEN: I would second that
9 motion to bring that off the table.

10 MR. BRANCH: All right. The
11 motion is to remove from the table Motion No.
12 1, which was the motion to eliminate the price
13 reduction clause and substitute an 803-like
14 competitive process.

15 MR. DRABKIN: We have already
16 adopted a motion to do an 803-like --

17 MR. BRANCH: Right, but that was
18 Motion No. 1 as stated.

19 MR. DRABKIN: I'm sorry. I'm
20 sorry.

21 MR. BRANCH: So I guess we need to
22 get it off the table or not, so we can amend

1 it.

2 MR. ESSIG: We don't need to make
3 a motion to that.

4 MR. BRANCH: No.

5 MR. ESSIG: No, you don't write
6 those as separate.

7 MR. BRANCH: No, no.

8 MR. ESSIG: Just go back up.

9 MR. BRANCH: No. Yes, it is a
10 subsidiary. Okay.

11 So I think we have moved and
12 seconded taking Motion No. 1 off the table.

13 All those in favor of removing
14 Motion -- can we go back up to the top, so
15 folks can see that?

16 It's a very short motion. There
17 it is.

18 So all those in favor of removing
19 Motion No. 1 from the table?

20 (Show of hands.)

21 All those opposed?

22 All right, the motion is removed

1 from the table.

2 Discussion on Motion No. 1?

3 MR. ALLEN: Mr. Chairman, I think
4 that it's timely for us to do this. As I
5 mentioned this morning when I moved to put
6 this motion on the table to begin with, that
7 it was important for us as a panel to come up
8 and look at other things surrounding the
9 schedules program, and particularly pricing
10 competition at the task order level, fair and
11 reasonable pricing at the contract formation
12 level.

13 We voted on those motions, along
14 with other things, to ensure that the amount
15 of information available not just to GSA
16 contracting officers, but to customer agency
17 contracting officers is robust, indeed.

18 These motions, in sum, will
19 provide buyers with an unprecedented level of
20 information that they need to ensure that the
21 government is getting fair and reasonable
22 pricing, not just relevant to what the other

1 government customers pay, but also as to what
2 is going on in the commercial market on an
3 ongoing basis.

4 Therefore, there really is no
5 requirement that the price reductions clause
6 remain. It would become an almost completely
7 obsolete contract term.

8 Therefore, I think it is
9 appropriate that we do it, that we remove it.
10 I also think, however, that this motion needs
11 to be amended to at least say just remove the
12 price reductions clause from the products
13 schedules, since we have adopted subsequently
14 a resolution on Section 803.

15 MR. BRANCH: So since this is your
16 motion, feel free to amend it as you see fit.

17 MR. ALLEN: Actually, I think it
18 was Ms. Sonderman's motion.

19 MR. BRANCH: Oh, I'm sorry, it was
20 Ms. Sonderman's. Pardon me. Or Debra.

21 MS. SONDERMAN: So put a period
22 after "schedules".

1 MR. BRANCH: And is that
2 acceptable to you?

3 MS. SONDERMAN: Yes.

4 MR. BRANCH: So we have,
5 essentially, a friendly amendment.

6 Let me talk to this.

7 Philosophically, I'm here. As I have said
8 publicly before, and this is one of my
9 mantras, our job is governance, but not
10 politics. But I think good governance
11 probably indicates that we ought to look at
12 some of the politics surrounding this.

13 I am comfortable with this motion
14 as long as we make that a phased removal of
15 the price reduction clause because I believe
16 it is going to take us some time to put a
17 system in place to gather the kind of data
18 that would allow us to substitute good
19 analysis for the function of the price
20 reduction clause.

21 I think to simply propose its
22 wholesale removal today, and leaving that

1 vacuum in for any period of time, is just a
2 non-starter politically.

3 So I would offer a friendly
4 amendment that says to remove the price
5 reduction clause from product schedules in
6 phases as the Administrator implements the
7 recommendations with respect to establishing
8 pricing transparency for the schedules
9 program.

10 I guess that is to Debra, since it
11 is her motion.

12 MS. SONDERMAN: That is fine.

13 MR. ESSIG: Question about it,
14 though?

15 You focused on this one, on the
16 transparency aspect of it rather than on the
17 competition at the order level under 803. I'm
18 not sure we need to wait for transparency to
19 be at that point.

20 MR. BRANCH: Tom, I think that's a
21 point well-taken, but I guess the realist in
22 me says that, as we deploy Section 803 across

1 all the civilian agencies, it is not going to
2 be immediate.

3 So that we might want to take a
4 phased approach, and I would certainly
5 entertain any clarifying words there that
6 bring forward the fact that this 803 approach
7 will get us on that road. But I don't want to
8 walk out of here today and say, hey, we just
9 killed the clause and we left this vacuum.

10 Yes, Debra?

11 MS. SONDERMAN: What about saying
12 remove the price reduction clause from product
13 schedules in phases as the Administrator
14 implements recommendations for competition and
15 price transparency at the order level?

16 MR. BRANCH: Okay.

17 MS. NELSON: I could support a
18 motion to that effect.

19 MR. BRANCH: Okay. Glenn, did you
20 have --

21 MR. PERRY: It is essentially the
22 same. My concern, when we started talking,

1 was somewhat adopting remove price reduction
2 clause without all the rest of the stuff we
3 have done all day; it has to complement
4 whatever that motion is.

5 MR. BRANCH: Yes, absolutely.

6 MR. PERRY: Somehow we have to say
7 in conjunction; that's what we say at this
8 time.

9 MR. BRANCH: All right. Jackie?

10 MS. JONES: I have a question. In
11 David's motion earlier, he talked about
12 establishing a basis-of-award customer for the
13 schedules. The price reductions clause is one
14 mechanism or the mechanism for ensuring that
15 our prices track with that basis-of-award
16 customer.

17 So if we are going to retain a
18 basis-of-award customer, how are we going to
19 ensure that our prices track along with that
20 customer, absent this clause and replacing it
21 with something else?

22 MR. BRANCH: Yes, Judith?

1 MS. NELSON: In my mind, what we
2 are moving to -- and this is just my
3 opinion -- what we are moving to is really
4 looking at establishing a baseline award price
5 that is looking at how a vendor sells to a
6 commercial customer or a class of customer,
7 and that is the basis of award, but that not
8 necessarily be the tracking customer.

9 But it is a baseline, and that one
10 of the recommendations that we have adopted in
11 the form of a motion is to disclose to our
12 sister agencies, our customers, what that
13 basis of award was, so that they could use
14 that in their procurement decisions. So that
15 is the value of that.

16 It is a baseline decision, which
17 is also the value, so that our contracting
18 officers have a starting point for their
19 negotiation as that baseline, but it not be
20 for the tracking of the base contract.

21 MR. BRANCH: Glenn and then David.

22 MR. PERRY: I think the important

1 thing about what we have done today is that we
2 are making recommendations that change how the
3 schedule contracts are managed, where we are
4 proactively managing what is going on in the
5 pricing from the government's side, instead of
6 relying upon passive tools that in most cases
7 does not get us the information we need to
8 really get to where we want to be when we make
9 the order.

10 So, therefore, I am not concerned
11 about the basis of award as it has been
12 written, but the way in which we have used in
13 it in the motion. My short-term memory is
14 getting really bad. I can't even do it by the
15 minute now.

16 (Laughter.)

17 So I'm going to quit.

18 MR. BRANCH: David?

19 MR. DRABKIN: Yes, I mean I did
20 retain the term "baseline" in the earlier
21 motion. I would continue the baseline
22 customer for all new schedule awards in order

1 to give us both, as I described before, that
2 vertical as well and then a horizontal view of
3 pricing.

4 But after the initial award, and
5 once this solution is identified and
6 implemented, so that we are tracking prices
7 across the whole market space, I think the use
8 of the price reduction clause is no longer
9 necessary because the real information that
10 should be concerning us is what is the market
11 price and are we getting a good market price,
12 not whether or not they are giving us a
13 consistent price with a baseline customer.

14 Ultimately, I think the baseline
15 customer becomes irrelevant as the contract
16 grows older, but it is important to get those
17 two points of reference to make the initial
18 award price as we bring someone into the
19 program, so that we can satisfy ourselves that
20 we are getting a good price.

21 Although we didn't articulate that
22 in the motion, it would certainly be what I

1 would intend to offer to whoever is writing
2 this part of the products piece to include in
3 that discussion.

4 So we would retain baseline for
5 initial contract awards. It becomes more and
6 more irrelevant as the solution is in place
7 and we can track prices.

8 If GSA were to adopt one and not
9 the other of our recommendations, i.e., not
10 track the prices, then eliminating the price
11 reduction clause might be a bad thing. It
12 might not be, but it might be.

13 So I think the way that we have
14 moved this so that we are conditioning it on
15 competition, and we have already agreed we are
16 going to force 803-like competition for
17 everything, products, because it is limited to
18 products, I think we get, again, two points of
19 reference in order to check prices and to
20 assure both ourselves and our stakeholders and
21 our overseers that we have gotten good
22 pricing.

1 MR. BRANCH: Debra?

2 MS. SONDERMAN: Question for the
3 group: should we amend this to say, "price
4 transparency at the schedule contract and
5 order level"?

6 MR. DRABKIN: It would be
7 consistent with our other language in the
8 other motion on transparency.

9 MR. CHVOTKIN: But we said earlier
10 that the price reduction clause has no meaning
11 at the schedule formation. So to add it here,
12 I'm happy because it doesn't hurt, but I think
13 the consistent view of this panel and the
14 testimony is that it serves no purpose at the
15 formation.

16 MR. BRANCH: Alan, I think you are
17 correct. However, adding at the schedule
18 contract level I think makes that phrase
19 consistent with all of our other
20 recommendations which address both competition
21 and transparency at all levels of formation.
22 I think that was where Debra was coming --

1 MR. CHVOTKIN: Debra, I think
2 you're right. The way you have put it there,
3 yes, we are talking about price and
4 competition at both the schedule and order
5 level, not the price reduction clause. I
6 think you make a good suggestion.

7 Expunge my comments from the
8 record.

9 MR. DRABKIN: I would take out
10 "delivery" and leave it just plain "order",
11 unless you want to put "task and delivery" in.

12 MS. SONDERMAN: Just "order".

13 MR. BRANCH: Any other discussion
14 on this motion?

15 (No response.)

16 Then we'll put it to a vote.

17 All those in favor of Motion No. 1
18 as revised signify by raising your hands.

19 (Show of hands.)

20 All those opposed?

21 The motion carries.

22 So I will put a motion on the

1 table.

2 MR. PERRY: Isn't there another
3 motion on the table down below here?

4 MR. BRANCH: No, I don't think
5 there's another motion on the table.

6 MS. SONDERMAN: I thought there
7 was still a motion on the table.

8 MR. BRANCH: All right, I withdraw
9 -- that was my motion, so I will withdraw
10 that motion. So that takes care of that one.

11 I will move that the
12 recommendations that we have formulated for
13 both products and services be applied as
14 appropriate to solutions to be purchased under
15 multiple award schedules.

16 Do I have a second?

17 MR. ALLEN: I would second that.

18 MR. BRANCH: All right, we have a
19 second.

20 Let me talk to that. I have been
21 giving a lot of thought to this as we have
22 gone through this very, very long journey.

1 Before I talk to that, I would
2 really like to thank the members of the panel
3 for their thoughtful, heartfelt, and I think
4 incisive deliberations on these issues.

5 But I think we have come up with a
6 set of recommendations for products and
7 services that are consistent with each other,
8 and in that, if we apply them when an offeror
9 proposes to give us a solution under the
10 schedule, I don't think there is anything in
11 here that is inconsistent with the way a
12 vendor or a set of vendors might propose a
13 solution to us.

14 So I guess it is my sense that
15 there probably is no additional work required
16 to address any peculiarities in solutions. So
17 in the services portion of it, there will be
18 a statement of work. That will be subject to
19 competition.

20 We have already said the supplies
21 will be subject to competition in 803-like
22 language, that that information will

1 eventually be reported. I guess it would be
2 my expectation, as that information is
3 reported, if a vendor should adopt a
4 particular pricing schedule, or a particular
5 pricing strategy in a solutions procurement,
6 and that were to cause outliers on either the
7 product or the schedule side of things, that
8 that would show up in that data, and that it
9 is our responsibility at the agency as well as
10 the GSA level to ask the question why. If
11 that is an anomaly because it was a solutions
12 procurement, that should be identified as such
13 and that should figure into the thinking of
14 the contracting officer as he or she proceeds
15 with things.

16 So I offer that motion to kind of
17 close out our deliberations today and
18 respectfully ask that you consider it.

19 MR. CHVOTKIN: Mr. Chairman, it is
20 awful enticing to close out the discussion on
21 solutions with this motion. I'm concerned and
22 I want to make sure that there is clarity in

1 my mind, and maybe that poses a question about
2 solutions in your mind.

3 There are really two very
4 different types of solutions that we see
5 possible under the schedules program. One is
6 essentially where the agency builds a
7 recommendation through a combination of
8 products that exist on a schedule and services
9 that exist on a schedule.

10 Also, very common on the schedules
11 today are what we might loosely term
12 solutions, where the special item number is
13 itself a solution.

14 I am not sure how this guidance
15 would be applied when we have addressed some
16 very different issues with respect to separate
17 products and separate services to this new
18 hybrid called solutions.

19 So I don't disagree that the
20 thoughts of competition and transparency work.
21 I am just not sure, because I haven't thought
22 it out as clearly as you appear to have done,

1 how that might apply here in the solutions
2 area. That is my only degree of hesitancy at
3 this point, not opposition.

4 MR. BRANCH: Okay. We'll go to
5 David, and then let me come back and address
6 your concerns, Alan.

7 MR. DRABKIN: I'm not sure that
8 solutions belong on schedules, period.

9 Solutions -- thank you very much,
10 Alan. Did you just throw that at me? Now am
11 I being assaulted by panel members for
12 expressing a question? Okay, good.

13 Well, in that case, I'm pretty
14 positive. No. I'll tell you why.

15 Actually, if we can make a
16 recommendation, we should.

17 A solution is a combination,
18 generally speaking, in today's marketplace, of
19 services and goods, the pricing of which may
20 bear absolutely no relationship whatsoever to
21 the initial pricing work we have done.

22 So I've got to ask myself the

1 question, when you compete for a solution, of
2 what relevance is any of the base work that
3 was done to set up the contract in the first
4 place, particularly in those cases where we
5 are using a fixed price to buy a solution,
6 which by the way pretty much is the only
7 sensical way to do it.

8 How does any of that bear
9 relevance? You can't take, for instance, from
10 their supply schedule a list of the items that
11 might make up the solution they are going to
12 offer you and use them to really determine
13 whether or not the price they are offering you
14 as part of the solution makes sense. Forget
15 whether it is fair and reasonable or
16 competitive.

17 Because of the way the schedules
18 are set up, and because of the way each
19 individual vendor prices or negotiates its own
20 schedules contract, you may not even be able
21 to find the things that you are going to get
22 in your solution on their schedule. It may be

1 coming from an arrangement which we have
2 authorized them to make, either through
3 teaming or from something else, and how do you
4 then do a price comparison that way?

5 It seems to me in the very end, as
6 heretical as it might sound to my colleagues
7 from GSA, that solutions really belong on our
8 GWACs or in an open market environment where,
9 one, you have a number of different choices
10 for pricing, including cost-plus, and, two,
11 you can get a head-to-head comparison in a
12 field where things kind of make sense.

13 Now I am not saying I am opposed
14 to solutions on the schedules. I am just
15 trying to figure out how it works.

16 I think we, quite frankly, allowed
17 solutions on schedules because people wanted
18 to buy them, not because we sat down and
19 thought through this as a "should we have
20 solutions on schedules and then how do you
21 price them?"

22 I'm glad that you have made the

1 motion, Mr. Chairman, but I am afraid it opens
2 up a door which, at least in my mind, requires
3 a lot more discussion and investigation before
4 we could make a recommendation that I could be
5 comfortable with.

6 MR. BRANCH: Let me come back and
7 address both Alan's comments as well as yours,
8 David.

9 To Alan's -- well, let me start
10 out with a more global view. So whether a
11 solution is something that we buy, that we see
12 as an integrated unit, and the example I will
13 use is training course delivery, where
14 essentially you are providing some material as
15 well as labor.

16 The way I would see this working
17 is let's think about what we have done. We
18 have said the price reductions clause isn't
19 going to apply to either supplies or services.
20 We have further gone back to a precept that
21 says the GSA contracting officer will use some
22 set of tools as to be recommended or

1 implemented by the Administrator to determine
2 the fair and reasonableness of that price, and
3 that they'll disclose the basis of that to the
4 agency users, so that they can make a smart
5 decision.

6 So, as I go down the road of a
7 solution that is essentially a single unit,
8 training, help desk services, whatever you
9 call it, I think what that motion does is it
10 kind of takes the Administrator out of the
11 dilemma as to, well, you have dealt with
12 supplies, you've dealt with services, what do
13 I do with these hybrid items? Because,
14 essentially, we have now agreed to treat both
15 products and services relatively consistent:

16 Competition at the ordering level,
17 a collection of that pricing, a use of that
18 pricing to periodically determine whether that
19 makes sense both in the context of what's sold
20 to other government agencies as well as the
21 marketplace.

22 To go to, I guess, the second

1 class of solutions, those that we cobble
2 together, and I don't mean to offend anyone by
3 using the word "cobble", but the ones that we,
4 if you will, aggregate from components of the
5 schedule, again, we have decided whether they
6 are services or goods. We are going to
7 compete them. We are going to have
8 transparency.

9 I would argue that, to the extent
10 that a vendor's pricing strategy in
11 aggregating schedule items into a solution
12 results in anomalies, that that is the purpose
13 for the data, that it is up to the informed
14 buyer to say that looks like an anomaly, to
15 inquire why, and upon understanding the reason
16 why, to disposition that information
17 appropriately.

18 So I think, going to David's
19 further philosophical issue, yes, I would tend
20 to agree, solutions probably don't belong on
21 schedules at all. Because, in my view, it
22 requires both contracting officers as well as

1 vendors who sell to us to perform a set of
2 unnatural procurement acts to optimize their
3 offerings to the government.

4 But given that they are there, and
5 that they may continue to be there until the
6 Administrator makes a different policy
7 decision, I don't think the things we have
8 been asked to address within this charter,
9 given the recommendations that we are making,
10 are applied in a way different because we are,
11 indeed, in the business of selling solutions.

12 So I would argue, if we want to
13 make a recommendation or an observation to the
14 Administrator that perhaps selling solutions
15 on GSA schedule is less than appropriate, then
16 that would be fine. But to the extent that
17 they are sold today and they continue to be
18 sold for some time, I do not believe any of
19 the recommendations we have made for either
20 products or services are inconsistent with
21 each other, nor are solutions within the
22 context of the recommendations we have made

1 that unique.

2 Yes, Judith.

3 MS. NELSON: I don't know that I
4 would -- well, I know, let me put it that way,
5 I adamantly know that I would not go so far as
6 to say that the sale of complex solutions
7 under the schedules is inappropriate.

8 I think that the ordering
9 procedures and the processes, particularly
10 under the BPAs, particularly within the BPAs,
11 under the award of multiple BPAs, and the
12 ability to do the RFQs and make the selections
13 under the BPAs, not only allows for a lot of
14 flexibility, but is working very well. We
15 have a lot of customers. We had some
16 testimony before the panel which spoke to
17 that, as to how well that was working with the
18 multiple BPAs and the ability to have those
19 base contracts and price, and that he had his
20 pricing staff there who are able to do what
21 they did best, which was negotiate the pricing
22 that they needed to do while the base

1 contract's terms and conditions that they
2 needed were in place, and they could
3 concentrate on the pricing and the unique
4 terms and conditions that they needed and they
5 were experts on. That is something that the
6 schedules -- that is one of the major value-
7 adds that the schedules are able to provide.

8 So I am not willing to go there,
9 to say that there are -- I do believe that
10 there are issues that are unique for having
11 services on, I mean solutions on. If we do
12 move to a place that GSA adopts the
13 recommendations as put forward by the panel,
14 at a time 803 goes governmentwide for the
15 civilian agencies, that takes some of the
16 barriers of having solutions with services and
17 products, because if you have multiple
18 different lines in which you have to manage a
19 price reduction clause, that is a major issue.
20 So some of the barriers come aside.

21 But I do think that it certainly
22 takes more contemplation and deliberation than

1 I know I have at 4:25 in the afternoon to even
2 decide whether or not it takes deliberation.
3 But I could not back -- I would take, at a
4 minimum, an adamant minority voice in any
5 report that said solutions do not have a
6 significant role in value-added to our
7 customers on the schedules.

8 MR. BRANCH: David and then Jackie.

9 MR. DRABKIN: Well, beyond what I
10 have already said, let's go back and look at
11 what we have talked about doing for goods and
12 services and then look at your motion.

13 You say that the motions developed
14 for products and services apply to solutions
15 as appropriate. Well, how do you price a
16 solution? At the very first instance when a
17 contractor comes to you and says, "I want to
18 sell solutions through the schedules," one
19 might ask the question, "Okay, what are you
20 going to sell?"

21 The answer "solutions" isn't very
22 helpful. So you ask for specifics. We know

1 that solutions are tailored to customer
2 requirements. They are more uniquely tailored
3 to a customer's requirements than just about
4 anything else that is being sold.

5 By the way, I don't think a help
6 desk is a solution in that sense. I think a
7 help desk is actually a commoditizable service
8 and that it would not fall within this
9 definition.

10 But if you are talking about an
11 integrated IT solution that puts together your
12 financial system with your contract writing
13 system with your property accountability
14 system, that's incredibly unique. I have no
15 idea how, as a contracting officer, you would
16 sit there and try to figure out in the first
17 instance how does he price this for his
18 customers vertically, much less what's the
19 market price for this, because it is going to
20 be all over the map. So from the pricing
21 perspective, I don't know how you do it.

22 On the competition perspective, I

1 mean competition is competition. I can see
2 that being applicable here. They should
3 subject themselves to the same competitive
4 pressures.

5 You know what? I'm ready to let
6 the group vote whichever way they want. I
7 just think that we ought to give this a lot
8 more thought.

9 By the way, since my colleague
10 raised it, we haven't talked about BPAs, but
11 I've got a real issue with writing indefinite
12 quantity contracts on top of indefinite
13 quantity contracts, but I suppose we probably
14 don't have time this afternoon to entertain
15 yet another motion.

16 MR. BRANCH: All right, Jackie?

17 MS. JONES: I was going to say
18 that we haven't really defined what solutions
19 are. It's a very generic term. But in the
20 sense of schedules, the way that we normally
21 train the agencies is that a solution is a
22 combination of services, let's say, of

1 companies that have different capabilities,
2 and then they can team in a teaming
3 arrangement and provide a solution to an
4 agency that has a requirement that spans
5 across maybe multiple schedules or outside of
6 the scope of what they can provide alone, that
7 company can provide alone.

8 So I think that it provides an
9 opportunity for small businesses to obtain
10 more business than they normally would by
11 having that opportunity to provide their
12 services to an agency through a teaming
13 arrangement with another company. It also
14 rewards those contractors who are innovative
15 enough and go out there and get teaming
16 partners to perform the work for these
17 agencies as a solution.

18 MR. BRANCH: Let me kind of come
19 back to this. I know it is late and we are
20 toward the end of the day, but I put this
21 motion out here, and let me kind of walk
22 through my thought process.

1 At the end of the day, the only
2 components in a solution are people, which we
3 have dispositioned with respect to our policy
4 on buying services, and products, which we
5 have dispositioned, given our policy on how we
6 want to treat products.

7 If you were to go to that
8 whiteboard over there and draw a diagram on
9 the recommendations we have made with respect
10 to how we ought to buy services and the way we
11 ought to buy products, I guess I would submit
12 that they are consistent and compatible with
13 each other enough that there isn't a
14 particular set of characteristics for a
15 solution that would cause us to do anything
16 differently.

17 In other words, if I've now got a
18 solution, and part of that is going to be
19 people, well, we have said you've got to issue
20 a statement of work. We're going to let the
21 marketplace determine what the reasonable
22 price is. We have the baseline rates in the

1 GSA contract to help us understand what the
2 market ought to bear for those types of labor
3 and those skill sets.

4 We have essentially done the same
5 thing for hardware. We have said the price
6 reduction clause doesn't apply. There is a
7 baseline or what I like to call a signal price
8 for that hardware, and you should be using
9 that signal price to determine whether a
10 particular solution is consistent with what
11 the market will bear.

12 I go to the recommendations we are
13 going to make on price transparency, which
14 says you will collect all that data, and you
15 will use that data to make some intelligent
16 judgments about what the price trend ought to
17 be.

18 So to the extent that I am a
19 vendor and I have a pricing strategy for
20 solutions that either makes the labor
21 component an outlier or makes the product
22 component an outlier, because I've bid a

1 certain way, then that should surface in the
2 data. A reasonable contracting officer should
3 inquire as to why the anomaly. Once figuring
4 out that it is part of a solution, I should
5 disposition that as appropriate in the request
6 to establish a fair and reasonable price.

7 So I'm not, if you will,
8 theologically wed to this, but I felt that it
9 was important to put the motion out there to
10 see if we really needed to have an additional
11 discussion around solutions and to start folks
12 thinking about whether solutions with respect
13 to the policy job we have been given are
14 significantly enough different that we have to
15 make special recognition of them and proffer
16 an additional set of recommendations.

17 So I just kind of leave that as my
18 line of thinking out there, so you understand
19 that I am really not trying to give folks
20 indigestion on the way home at rush hour. But
21 as I have listened to all of our discussion
22 over the last three meetings or so, I am not

1 sure that from a policy perspective there's
2 anything fundamentally different about a
3 solutions procurement such that we would have
4 to take another day and come up with specific
5 recommendations about.

6 So just my thought process for the
7 benefit of the panel.

8 Yes, Jackie?

9 MS. JONES: I second your motion.

10 MR. BRANCH: Okay. Yes, we have a
11 second to that.

12 MR. CHVOTKIN: Mr. Chairman?

13 MR. BRANCH: Alan?

14 MR. CHVOTKIN: Your thought
15 process is very helpful. I think there are
16 some differences between the aggregation of
17 the products and services piece combined and
18 maybe your example of the delivery of training
19 courses, an example of a solution which we
20 know what the people component is and we can
21 sort of guess what a product component is, if
22 that is what that case may be.

1 But I think there are enough
2 examples, at least that I can think of, claims
3 processing, HSPD-12, where the method/the
4 purpose of the procurement is something
5 different than just bodies or products, claims
6 processing or the enrollment/fulfillment on
7 the HSPD-12, that makes me just pause a little
8 bit and say I've not had the opportunity to
9 reflect on the solution, on the
10 recommendations that we have adopted
11 separately for products and services to see
12 how that would work.

13 I don't suggest that I would come
14 to a different discussion or a different set
15 of recommendations or that we need some. I am
16 really saying I haven't done that work, and I
17 think there are enough unique areas that it is
18 worth reviewing what we have done in products
19 and what we have done in services and revisit
20 that for a short period of time, or maybe not
21 at all, at the next meeting.

22 I just would like to welcome the

1 opportunity to do that.

2 MR. BRANCH: Yes. Glenn?

3 MR. PERRY: Yes, I guess I would
4 also say I would like to deal with this and
5 get it over with, but I am thinking, for
6 example, it just seems there is something
7 gnawing at me; there's something more to this
8 that is more complicated than this. I don't
9 want to make it more complicated.

10 But, for example, the end of the
11 fiscal year always bring out the best in
12 everybody.

13 (Laughter.)

14 We had a case, for example -- I
15 can give you a real-live case where we tried
16 to use the schedule to buy some software.
17 There was a price for the software. I'm sure
18 that is what the GSA folks did when they put
19 the schedule in place, put the schedule
20 contract in place for this.

21 It was like, without disclosing
22 it, it was, I guess -- that might be

1 proprietary information. But I can tell you,
2 in magnitude, the software for the license was
3 like \$100,000. I'm pretty sure the GSA did
4 something to determine that was fair and
5 reasonable.

6 I don't think what was found in
7 the schedule pricing was what came with it,
8 which was a \$2 million price tag to be able to
9 install and use that software.

10 (Laughter.)

11 So I'm trying to think about what
12 you proposed here, and I'm just at 4:30 in the
13 afternoon -- there is something here that I
14 think this needs to be tweaked. I just don't
15 know what that is right this second.

16 MR. BRANCH: I'll let Debra have
17 the last word, but in the spirit of not
18 rushing due process in the panel, then I will
19 move that we table Motion No. 9 until the next
20 meeting. Okay?

21 All those in favor of tabling?

22 (Show of hands.)

1 All those opposed?

2 All right, Debra?

3 MS. SONDERMAN: Well, listening to
4 this discussion I guess made me think back to
5 an earlier meeting where we got into a
6 discussion about, if I can remember Mr.
7 Drabkin's eloquent words, commoditizable
8 services.

9 Maybe a sort of blanket approach,
10 maybe as we are thinking about solutions in
11 preparation for the next meeting, there are
12 those solutions, the simpler ones,
13 commoditizable services like help desk,
14 training, other things like that, where the
15 broad-brush approach fits well.

16 There are other things that
17 definitely are more complex, where we issue a
18 performance-based statement of objectives and
19 we really don't know is it software; is it new
20 hardware? We want better performance on "X"
21 and you come back and tell us.

22 I have really grave concerns about

1 whether that is appropriate for procurement
2 through a schedule order.

3 MR. BRANCH: Judith?

4 MS. NELSON: Maybe we do it for
5 the clarity of the panel -- I think we did it
6 when we first started the services discussion.
7 There are certain things that in general the
8 contracting officers do not consider services
9 or solutions, so to speak.

10 For instance, training is not
11 considered, when negotiated, it is not
12 considered a service. It is essentially,
13 whether or not you want to use the term
14 "commoditize", it is a product. It is
15 essentially a firm, fixed product. It has a
16 delivery. It can be defined.

17 It could be the same thing if
18 you're marketing in some cases. Even though
19 it is being done by individuals, you could
20 have a firm that says, in order to do this
21 marketing campaign for you, I am going to
22 deliver the following nine items; one includes

1 a radio spot; another includes, you know, a
2 blah, a blah, a blah. The full breadth of
3 this will be priced at \$45,000 or \$92,000.
4 Now if you want something else, that will cost
5 something else.

6 But it has a fixed price
7 associated with it. So it is not that it is
8 being priced out by this.

9 Another one which we discussed
10 comes when you buy the software, and the
11 automatic updates associated with it, like you
12 do nothing but every once in a while your
13 software stops because you have to click here
14 because of the updates coming. That type of
15 manual software update license, you know,
16 whatever, that would be considered a product.

17 MS. SONDERMAN: If you had paid
18 the maintenance agreement.

19 MS. NELSON: Right, if you pay for
20 the maintenance agreement, as opposed to a
21 maintenance agreement that says you have the
22 right to call up and get online help. Now

1 that, on the other hand, would be considered
2 a service versus a commoditized product.
3 Those are very different things. Okay?

4 MR. BRANCH: Jackie?

5 MS. JONES: If you're issuing a
6 task order for a solution and you're issuing
7 that against the schedules program, then the
8 company is supposed to provide a response to
9 that RFQ based on what they have been awarded
10 on the schedule.

11 When they start quoting things
12 outside of the scope of their schedule or
13 incidentals or ODCs that exceed the value of
14 what you are buying off schedule, then you
15 need to go open market.

16 So I guess what I am saying is
17 that solutions, whether it is a solution,
18 service, product, they are not really
19 separate. If you are placing an order against
20 the schedule, it is the same method, if you
21 will.

22 MR. BRANCH: Larry?

1 MR. ALLEN: I was just going to
2 say I think we are starting a very robust
3 discussion here at the end of a very long day.
4 I might recommend that we hold these
5 collective thoughts until we can come back
6 when we are a little more fresh.

7 MR. BRANCH: So the Chair will
8 entertain a motion to adjourn.

9 (Laughter.)

10 MR. DRABKIN: So moved.

11 MR. BRANCH: All right, without
12 objection, so ordered.

13 We are adjourned until, I think,
14 the 27th of October. So we have a fair amount
15 of time to consider these. My goal would be
16 to dispose of these issues as quickly as
17 possible.

18 Again, thanks to everyone on the
19 panel for a very good discussion and good
20 piece of work today.

21 (Whereupon, at 4:41, the meeting
22 was adjourned.)

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