

July 17, 2006

Request for Public Comment

The attached proposal has been submitted by Panel Member Marshall Doke for consideration.

While this proposal has not been approved by the Acquisition Advisory Panel as a recommendation, the Panel seeks public input.

Please submit written public statements in accordance with instructions contained within this website.

IMPROVING COMPETITION

A. The Competition Process

The requirement for competition in public contracting has a long history and has been imposed in all 50 states.¹ The purposes of the requirement include preventing unjust favoritism, collusion, or fraud in the procurement process.²

There are, however, qualitative differences in types and process of competition, whether in contracting, sports, games, or other competitive activities. Few would conclude that professional wrestling is “real” competition. Similarly, the fact that a law defines a contracting process as “competition” does not mean the process satisfies fundamental principles of competition. As Abraham Lincoln said, calling a dog’s tail a leg doesn’t make it a leg.

In federal contracting, basic fundamentals of competition have been developed in decisions by the courts and the Comptroller General of the United States in bid protest cases involving virtually all aspects of the competitive process. In 1998, the American Bar Association adopted ten “Principles of Competition in Public Procurement” derived from these decisions. The ten principles are:

1. Use full and open competition to the maximum extent practicable.
2. Permit acquisitions without competition only when authorized by law.
3. Restrict competition only when necessary to satisfy a reasonable public requirement.
4. Provide clear, adequate, and sufficiently definite information about public needs to allow offerors to enter the public acquisition on an equal basis.
5. Use reasonable methods to publicize requirements and timely provide solicitation documents (including amendments, clarifications and changes in requirements).
6. State in solicitations the basis to be used for evaluating bids and proposals and for making award.
7. Evaluate bids and proposals and make award based solely on the criteria in the solicitation and applicable law.
8. Grant maximum public access to procurement information consistent with the protection of trade secrets, proprietary or confidential source selection information, and personal privacy rights.

¹ *Board of County Commissioners, Wabaunsee County v. Umbehr*, 116 S. Ct. 2342, 2351 (1996).

² *United States v. Brookridge Farm, Inc.*, 111 F.2d 461, 463 (10th Cir. 1940).

9. Insure that all parties involved in the acquisition process must participate fairly, honestly, and in good faith.
10. Recognize that adherence to the principles of competition is essential to maintenance of the integrity of the acquisition system.

All of these principles are supported by decisions of courts and the Comptroller General of the United States and, therefore, are useful in evaluating the competitive effectiveness of any public acquisition process.

B. The Government's Requirements

One fundamental aspect of federal acquisitions that is different from commercial contracting is that the Government can buy only what it needs, not what it wants.³ This limitation is reflected in the old adage of “the Government drives Chevrolets, not Cadillacs.”⁴ The limitation is based on a long-standing doctrine expressed by the Comptroller General as follows:

It has long been the rule, enforced uniformly by the accounting officers and the courts, that an appropriation of public moneys by the Congress, made in general terms, is available only to accomplish the particular thing authorized by the appropriation to be done. It is equally well established that public moneys so appropriated are available only for uses *reasonably and clearly necessary* to the accomplishment of the thing authorized by the appropriation to be done. (emphasis added).⁵

In the absence of a specific statute authorizing the procurement (a “contract authorization act”), an appropriation of money to fund an acquisition is necessary for an agency to support an actual “need” for an item or service.⁶ The doctrine also is recognized in FAR § 10.001(a)(1) expressing the policy that agencies must assure that “legitimate needs” are identified. The appropriation of funds is what provides the Congressional “authority” to contract (if there is not a specific contract authorization act).

The determination of the Government's minimum needs and the best methods of accommodating those needs are primarily matters within the contracting agency's discretion. However, the Competition in Contracting Act of 1984 requires that agencies specify their needs and solicit offers in a manner designed to achieve full and open competition so that all responsible sources are permitted to compete.⁷ If a specification is challenged as unduly restrictive of competition, the procuring agency has the responsibility to establish that the specification requirement is reasonably necessary to meet its needs.⁸

³ *Maremont Corp.*, Comp. Gen. No. B-186276, 76-2 CPD ¶ 181 at 18 (specifications should be based on minimum needs *required* and not the maximum *desired*).

⁴ See *Greenhorne & O'Mara*, Comp. Gen. No. B-247116 (Recon.), 92-2 CPD ¶ 229 at 203.

⁵ 10 Comp. Gen. 294, 300 (1931).

⁶ See *Management Systems Designers, Inc., et al.*, Comp. Gen. No. B-244383, 91-2 CPD ¶ 518 at 4-5.

⁷ *Allied Protection Services, Inc.*, Comp. Gen. B-297825, 2006 CPD ¶ 57 at 2.

⁸ *Carahsoft Technology Corp.*, Comp. Gen. B-297112 2005 CPD ¶ 208 at 3.

Overstatement of the Government's needs is a material solicitation deficiency requiring cancellation of the solicitation,⁹ because agencies are only permitted to include requirements that meet their *minimum* needs.¹⁰

Even though overstating the Government's minimum needs is improper, it is not uncommon for solicitations to give evaluation credit for proposed features that exceed the solicitation's objectives or specified performance or capability requirements.¹¹ Some solicitations give significant points for the "degree" to which the proposal exceeds the specifications,¹² or even offer no evaluation points unless the product exceeds the specifications.¹³ The Comptroller General has held that agencies may use evaluation methods giving extra credit for exceeding the requirements of the solicitation.¹⁴

C. Best Value Procurements

1. **General.** Most major competitive acquisitions of services and products are conducted under a "best value" source selection.¹⁵ This method permits an agency to pay a higher price ("price premium") to an offeror whose proposal is rated higher for technical evaluation factors than a competitor's proposal offering a lower price. Increasingly, Congress has been critical of the cost of major acquisitions, including weapons systems and services. While FAR Part 15 requires agencies to justify their source selection in a best value procurement, the documentation supporting that selection is maintained in the agency's files. No process exists for collecting and making available the information in the source selection files discussing the price premiums paid for the selection of other than the lowest-price of an acceptable proposal.

2. **Method of Evaluation.** An agency's method of evaluating the relative merits of competing proposals is a matter within the agency's discretion, because the agency is responsible for defining its' needs and the best method for accommodating them.¹⁶ Therefore, source selection officials in a negotiated procurement have broad discretion in determining the manner and extent to which they will make use of the technical and cost evaluation results.¹⁷ Agencies have broad discretion in selecting evaluation factors appropriate for an acquisition.¹⁸ An agency's source selection plan is an internal agency instruction and, as such, need not be

⁹ *West Alabama Remodeling, Inc.*, B-220574, 85-2 CPD ¶ 718 at 2-3.

¹⁰ *Ramco Equipment Corp.*, Comp. Gen. B-254979, 94-1 CPD ¶ 67 (at 4); *J.A. Reyes Associates, Inc.*, Comp. Gen. B-230170, 88-1 CPD ¶ 536 at 3-4.

¹¹ *See Engineered Air Systems, Inc., et al.*, Comp. Gen. B-283011, 99-2 CPD ¶ 63 at 3; *CVB Co.*, Comp. Gen. B-278478, 98-2 CPD ¶ 109 at 6.

¹² *Heimann Systems, Inc.*, Comp. Gen. B-272182, 96-2 CPD ¶ 120 at 1-2.

¹³ *Nicolet Instrument Corp.*, Comp. Gen. No. B-258569, 95-1 CPD ¶ 48 at 4, note 3.

¹⁴ *American Material Handling, Inc.*, Comp. Gen. No. B-297536, 2006 CPD ¶ 28 at 4; *IAP World Services, Inc.*, Comp. Gen. No. B-297084, 2005 CPD ¶ 199 at 2-3.

¹⁵ A "best value" procurement is one in which the award is made to the offeror whose proposal "provides the greatest overall benefit in response to the requirement." FAR 2.101.

¹⁶ *Crofton Diving Corp.*, Comp. Gen. No. B-289271, 2002 CPD ¶ 32 at 10.

¹⁷ *Creative Apparel Associates*, Comp. Gen. No. B-275139, 97-1 CPD ¶ 65 at 6.

¹⁸ *Oceanometrics, Inc.*, Comp. Gen. No. B-278647.2, 98-1 CPD ¶ 159 at 3-4; *Staber Industries, Inc.*, Comp. Gen. No. B-276077, 97-1 CPD ¶ 174 at 2.

disclosed in the solicitation. The plan does not give outside parties any rights.¹⁹ Thus, an agency's failure to follow its own plan cannot be the basis of a protest.

3. **Evaluation Factors.** The requirements for RFPs and evaluation factors and significant subfactors are set out in the FAR 15.205 and 15.304. There is little guidance in the regulations regarding evaluation factors and significant subfactors except that they must (i) represent the key areas of importance and emphasis to be considered in the source selection decision and (ii) support meaningful comparison and discrimination between and among competing proposals.²⁰ The only *required* evaluation factors are cost and (generally) past performance.²¹ Otherwise, there is no regulatory guidance relating to the number, type, or weights (except relative weights) to be given to evaluation factors and significant subfactors.

In many acquisitions, the sheer number and types of evaluation factors and significant subfactors make it difficult, if not impossible, to determine if they comply with the regulatory requirement to represent the “key” areas of importance and significance and support meaningful comparisons among competing proposals.²² Agencies are required by CICA to “clearly establish the relative importance assigned to the evaluation factors and subfactors and whether all evaluation factors (other than cost or price) are significantly more important, approximately equal in importance, or significantly less important than cost or price.”²³ If a solicitation does not indicate the relative weights of technical and price factors, the Comptroller General will presume that they were of equal weight.²⁴ In other words, if the relative weights are not stated, they are considered to be of equal importance to each other.²⁵ Agencies are not required to disclose internal evaluation guidelines for rating proposal features as more desirable or less desirable because they are not required to inform offerors of their specific rating methodology.²⁶

Agencies are required to identify all “significant” evaluation factors and subfactors in a solicitation, but they are not required to identify all “areas of each factor” which may be taken into account by the evaluators, provided that the unidentified areas are reasonably related to or encompassed by the stated criteria.²⁷ Therefore, agencies are not required to identify all areas of each factor or subfactor that might be taken into account in the evaluation.²⁸ Accordingly, a

¹⁹ *Centech Group, Inc.*, Comp. Gen. No. B-278904.4, 98-1 CPD ¶ 149 Note 4 at 7.

²⁰ FAR 15.304(b).

²¹ FAR 15.304(c)(1) and 15.304(c)(3).

²² Examples of such solicitations and the *number* of evaluation factors and subfactors include *L-3 Communications Westwood Corp.*, 2005 CPD ¶ 30 at 2 (17); *United Coatings*, 2003 CPD ¶ 146 at 2-3 (18); *Pueblo Environmental Solution, LLC*, 2003 CPD ¶ 14 at 3-4 (13); *Basic Contracting Services, Inc.*, 2000 CPD ¶ 120 at 2-3 (16); *Matrix International Logistics, Inc.*, 97-2 CPD ¶ 89 at 2-3 (23); *Lockheed Support Systems, Inc.*, 96-1 CPD ¶ 111 at 3 (17); *Antenna Products Corp.*, 90-1 CPD ¶ 82 at 2 (21).

²³ 10 U.S.C. § 2305a (a) and (b); 41 U.S.C. 253a (a) and (b).

²⁴ *Intermagnetics General Corp.*, Comp. Gen. No. B-286596, 2001 CPD ¶ 10 Note 7 at 8; *Carol Solomon & Associates*, Comp. Gen. No. B-271713, 96-2 CPD ¶ 28 Note 2 at 2.

²⁵ *Ogden Support Services, Inc.*, Comp. Gen. No. B-270354, 96-1 CPD ¶ 175 Note 2 at 2; *Hellenic Technodomiki S.A.*, Comp. Gen. No. B-265930, 96-1 CPD ¶ 2 Note 1 at 1.

²⁶ *Olympus Building Services, Inc.*, Comp. Gen. No. B-285351, et al., 2000 CPD ¶ 178 at 5.

²⁷ *DSDJ, Inc.*, Comp. Gen. No. B-288438 et al., 2002 CPD ¶ 50 at 7; *D.F. Zee's Fire Fighter Catering*, Comp. Gen. No. B-280767.4, 99-2 CPD ¶ 62 at 6; *Borders Consulting, Inc.*, Comp. Gen. No. B-281606, 99-1 CPD ¶ 56 at 1.

²⁸ *North American Military Housing, LLC*, Comp. Gen. No. B-289604, 2002 CPD ¶ 69 at 5; *MCA Research Corp.*, Comp. Gen. No. B-278268.2, 98-1 CPD ¶ 129 at 8.

subfactor does not have to be disclosed if it is “reasonably related” to a disclosed factor.²⁹ Similarly, the subfactor does not have to be disclosed if it is “encompassed by” a disclosed factor.³⁰ The Comptroller General also has held that an area of evaluation need not be disclosed where it is (1) *inherent* in the evaluation of proposals, such as risk³¹ or safety,³² (2) *implicit*,³³ (3) or *intrinsic* to the stated factors.³⁴ By way of example, the Comptroller General held that an offeror’s quality assurance procedures could be rated in the evaluating proposals because they were intrinsically related to and encompassed by the factor of “business practices.”³⁵ Similarly, the Comptroller General held that consideration of “organizational structure and transition/startup plan” did not have to be disclosed because they were logically related to the disclosed “staffing plan” factor.³⁶

4. **Subjective Evaluation Factors.** The use of *subjective* evaluation factors may make it difficult for competitors to understand the real basis for evaluating proposals. The use of subjective factors permits an agency to influence the outcome of the competition without risk of a successful protest inasmuch as that there is no objective standard against which the evaluation can be measured. The use of such subjective factors could create circumstances that competition is intended to avoid (favoritism, fraud, overspending, etc.). Examples of such subjective factors include (1) user friendliness,³⁷ (2) aesthetics,³⁸ (3) plan for contract management and contract operation,³⁹ (4) employee appearance,⁴⁰ (5) innovation,⁴¹ (6) intrinsic value,⁴² (7) level of confidence,⁴³ (8) reputation,⁴⁴ and (9) vision.⁴⁵

5. **Responsibility-Type Factors.** The quality of competition is diluted by the use of responsibility-type evaluation factors to compare the relative ability of offerors to perform the contract satisfactorily. The procurement regulations provide that contracts may be awarded only to “responsible” prospective contractors.⁴⁶ “Responsibility” is a term used to describe the offeror’s ability to meet its contract obligations.⁴⁷ Thus, a “responsible” offeror is one the contracting officer determines can perform its contract obligations *satisfactorily*.

²⁹ *Olympus Building Services, Inc.*, Comp. Gen. No. B-285351 et al., 2000 CPD ¶ 178 at 5; *JoaQuin Manufacturing Corp.*, Comp. Gen. No. B-275185, 97-1 CPD ¶ 48 at 2.

³⁰ *Mid-Atlantic Design & Graphics*, Comp. Gen. No. B-276576, 98-1 CPD ¶ 132 at 3-4.

³¹ *Keane Federal Systems, Inc.*, Comp. Gen. No. B-280595, 98-2 CPD ¶ 132 at 11-12.

³² *Israel Aircraft Industries, Ltd., MATA Helicopters Division*, Comp. Gen. No. B-274389 et al., 97-1 CPD ¶ 41 at 6-7.

³³ *DSDJ, Inc.*, Comp. Gen. No. B-288438 et al., 2002 CPD ¶ 50 at 7.

³⁴ *Amtec Corp.*, Comp. Gen. No. B-261487, 95-2 CPD ¶ 164 at 4-5.

³⁵ *Techsys Corp.*, Comp. Gen. No. B-278904.3, 98-2 CPD ¶ 64 at 9.

³⁶ *NCLN20, Inc.*, Comp. Gen. No. B-287692, 2001 CPD ¶ 136 at 2.

³⁷ *Infection Control and Prevention Analysts, Inc.*, Comp. Gen. No. B-238964, 90-2 CPD ¶ 7 at 6.

³⁸ *Global Industries, Inc.*, Comp. Gen. No. B-270592.2 et al., 96-2 CPD ¶ 85 at 2.

³⁹ *Hughes STX Corp.*, Comp. Gen. No. B-278466, 98-1 CPD ¶ 52 at 2.

⁴⁰ *Scheduled Airlines Traffic Offices, Inc.*, Comp. Gen. No. B-253856.7, 95-1 CPD ¶ 33 at 21-22.

⁴¹ *PRC, Inc.*, Comp. Gen. No. B-274698.2 et al., 97-1 CPD ¶ 115 Note 13 at 14.

⁴² *National Steel and Shipbuilding Co.*, Comp. Gen. No. B-281142 et al., 99-2 CPD ¶ 95 at 3.

⁴³ *UNICCO Government Services, Inc.*, Comp. Gen. No. B-277658, 97-2 CPD ¶ 134 at 3-4.

⁴⁴ *Consultants on Family Addiction*, Comp. Gen. No. B-274924.2, 97-1 CPD ¶ 80 at 1-2.

⁴⁵ *Research for Better Schools, Inc.*, Comp. Gen. No. B-270774.3, 96-2 CPD ¶ 41 at 7.

⁴⁶ FAR § 9.103(a).

⁴⁷ *Vador Ventures, Inc.*, Comp. Gen. No. B-296394, et al., 2005 CPD ¶ 155 at 3.

The general standards of responsibility are set forth in FAR § 9.104-1 and include factors such as adequate financial resources, ability to comply with delivery or performance schedules, satisfactory record of performance, satisfactory record of integrity and business ethics, and necessary organization experience, accounting and operational controls, and technical experience to perform the contract. Considerations that are used to determine responsibility also can be included as technical evaluation criteria, and proposals then may be *comparatively* evaluated utilizing those criteria.⁴⁸ Examples of responsibility-type factors that have been used in the evaluation of proposals include (1) business systems,⁴⁹ (2) compensation levels,⁵⁰ (3) technical capability,⁵¹ (4) computer systems,⁵² (5) continuity of service,⁵³ (6) contract management,⁵⁴ (7) corporate experience,⁵⁵ (8) efficiency,⁵⁶ (9) quality control plan,⁵⁷ (10) equipment,⁵⁸ (11) experience,⁵⁹ (12) financial capability,⁶⁰ (13) key personnel,⁶¹ (14) management,⁶² (15) management plan,⁶³ (16) managerial capacity,⁶⁴ (17) plant, equipment, and tools,⁶⁵ (18) vendor relationships,⁶⁶ and (19) ISO certification.⁶⁷

6. **Small Business Concerns.** The use of responsibility-type evaluation factors in best value procurements has a direct impact on small business concerns. The Small Business Administration has “conclusive authority to determine the responsibility of a small business concern.”⁶⁸ This conclusion is based on the SBA’s statutory power and duty under 15 U.S.C. § 637(b)(7)(A). When a procuring agency finds a small business concern nonresponsible, it must refer the matter to the SBA for a final determination.⁶⁹ As described in FAR Subpart 19.6, the SBA may issue a “Certificate of Competency” (COC) stating that the small business concern is responsible for the purpose of receiving and performing a government contract. The SBA’s issuance of a COC is conclusive on the agency, which must award the contract to the small business concern.⁷⁰

⁴⁸ *A.I.A. Construzioni S.P.A.*, Comp. Gen. No. B-289870, 2002 CPD ¶ 71 at 2; *Opti-Lite Optical*, Comp. Gen. No. B-281693.2, 99-2 CPD ¶ 20 at 5; *Dual, Incorporated*, Comp. Gen. No. B-280719, 98-2 CPD ¶ 133 at 8.

⁴⁹ *Keane Federal Systems, Inc.*, Comp. Gen. No. B-280595, 98-2 CPD ¶ 132 at 8.

⁵⁰ *E.L. Enterprises, Inc.*, Comp. Gen. No. B-271251.2, 96-2 CPD ¶ 29 at 3-4.

⁵¹ *Sigma One Corp.*, Comp. Gen. No. B-294719, et al., 2005 CPD ¶ 49 at 2.

⁵² *Matrix International Logistics, Inc.*, Comp. Gen. No. B-272388.2, 97-2 CPD ¶ 89 at 2-3.

⁵³ *Quality Elevator Co., Inc.*, Comp. Gen. No. B-271899, 96-2 CPD ¶ 89 at 4.

⁵⁴ *Hughes STX Corp.*, Comp. Gen. No. B-278466, 98-1 CPD ¶ 52 at 2.

⁵⁵ *Burns & Roe Services Corp.*, Comp. Gen. No. B-296355, 2005 CPD ¶ 150 at 2.

⁵⁶ *Systems Research and Applications Corp.*, Comp. Gen. No. B-257939.5, 95-1 CPD ¶ 214 at 7.

⁵⁷ *SOS Interpreting, Ltd.*, Comp. Gen. No. B-293026.4, et al., 2005 CPD ¶ 25 at 2.

⁵⁸ *ATLIS Federal Services, Inc.*, Comp. Gen. No. B-275065.2, 97-1 CPD ¶ 84 at 2.

⁵⁹ *Chapman Law Firm, LPA*, Comp. Gen. No. B-293105.6, et al., 2004 CPD ¶ 233 at 2.

⁶⁰ *Deployable Hospital Systems, Inc. – Reconsideration*, Comp. Gen. No. B-260778.4, 96-2 CPD ¶ 6 Note 3 at 3.

⁶¹ *SWR Inc.*, Comp. Gen. No. B-286044.2 et al., 2000 CPD ¶ 174 at 3-4.

⁶² *Ocean House Builders*, Comp. Gen. No. B-283057, 99-2 CPD ¶ 53 at 1-2.

⁶³ *Davis Rail and Mechanical Works, Inc.*, Comp. Gen. No. B-278260.2, 98-1 CPD ¶ 134 at 2; *Quality Elevator Co., Inc.*, Comp. Gen. No. B-271899, 96-2 CPD ¶ 89 at 5-6.

⁶⁴ *International Resources Group*, Comp. Gen. No. B-286663, 2001 CPD ¶ 35 at 2.

⁶⁵ *Hadley Exhibits, Inc.*, Comp. Gen. No. B-274346, 96-2 CPD ¶ 172 at 1.

⁶⁶ *Telestar Corp.*, Comp. Gen. No. B-275855, 97-1 CPD ¶ 150 at 2.

⁶⁷ *LBM Inc.*, Comp. Gen. No. B-286271, 2000 CPD ¶ 194 at 4-5.

⁶⁸ *Advanced Resources International, Inc. – Recon.*, Comp. Gen. No. B-249679.2, 93-1 CPD ¶ 348.

⁶⁹ *T. Head & Co.*, Comp. Gen. No. B-275783, 97-1 CPD ¶ 169.

⁷⁰ FAR § 19.602-4(b).

The Comptroller General holds, however, that procuring agencies may use responsibility-type factors in best value procurements for comparative evaluation of those areas, and this can result in a small business losing the contract to a large business with greater “capability” without referral to the SBA for a COC.⁷¹ The Comptroller General’s reasoning is that the comparative evaluation is one of relative technical merit, not unacceptability.⁷² The Comptroller General’s earlier decisions held that such comparative evaluations should be used only if “special circumstances” warrant a comparative evaluation.⁷³ The reason, as explained by the Comptroller General was that

“Otherwise, an agency effectively would be determining the responsibility of an offeror under the guise of making a technical evaluation of proposals. Under the Small Business Act, agencies may not find that a small business is nonresponsible without referring the matter to the SBA, which has the ultimate authority to determine the responsibility of small business concerns [citations omitted].”⁷⁴

However, there is no guidance or specific requirements on what the “special circumstances” must be to use responsibility-type factors for comparative evaluations. Today, any requirement that there be “special” circumstances to warrant the use of responsibility-type evaluation factors has disappeared (if it ever existed).

D. Findings

1. The quality of competition could be improved if solicitations identified all evaluation factors or subfactors to be separately rated and the rating methodology to be used by the evaluators.

One of the American Bar Association’s Principles of Competition in Public Procurement is that solicitations should state the basis to be used for evaluating bids and proposals. Doing so is essential to enable competitors to submit proposals for the same government requirement. The less competitors have to “guess” about what the Government wants or believes is most important, the more competitive the proposals will be. Identification of all evaluation factors and subfactors and the rating methodology is the best method to communicate to all competitors what the Government deems to be most important. There is no logical reason why items to be separately rated should be “secret.” It is in the Government’s interest to disclose this information in order that all competitors can offer the product or service that is most responsive to the Government’s requirements and what the Government desires to obtain.

⁷¹ *Capitol Creag LLC*, Comp. Gen. No. B-294958.4, 2005 CPD ¶ 31, note 6 at 7; *Dual, Inc.*, Comp. Gen. No. B-280719, 98-2 CPD ¶ 133 at 8.

⁷² *R.L. Campbell Roofing Co.*, Comp. Gen. No. B-289868, 2003 CPD ¶ 37 at 10.

⁷³ *Paragon Dynamics, Inc.*, Comp. Gen. No. B-251280, 93-1 CPD ¶ 248; *Clegg Industries, Inc.*, Comp. Gen. No. B-242204.3, 91-2 CPD ¶ 145.

⁷⁴ *Federal Support Corp.*, Comp. Gen. No. B-245573 92-1 CPD ¶ 81 at 4. See also, *Paragon Dynamics, Inc.*, *supra*.

2. The use of objective evaluation factors helps describe the Government's requirements and permits competitors to be more responsive to such requirements.

Objective evaluation factors and subfactors communicate to competitors more specifically what the Government is seeking to acquire. Subjective evaluation factors provide "fuzzy rules" for the competitive process and, often, substitute for planning and effort to describe the Government's requirements. The subjectivity allows the "measure" for evaluation to be determined by the evaluators after the proposals are submitted. The more objective the rules are for the competition, the better competition the Government will obtain.

3. The assignment of specific weights to evaluation factors and subfactors permits offerors to design their proposals in a manner that would be more responsive to the Government's requirements.

Currently, FAR only requires that solicitations disclose the *relative* importance of evaluation factors and subfactors,⁷⁵ and whether all non-price factors are significantly more, equal, or less important than cost or price.⁷⁶ The disclosure of *specific* weights would permit competitors to make better decisions in their proposal preparation for responding to the Government's requirements. Disclosing the specific weights for evaluation factors and subfactors will improve the integrity of the procurement process and add to the objectivity of the evaluation. There is no good reason not to disclose specific weights, and it is common practice to do so in government solicitations.⁷⁷ The need for regulatory guidance is illustrated by instances in which cost/price is weighted at 10% or less in the evaluation of proposals.⁷⁸

4. Responsibility-type evaluation factors give large business competitors an inherent advantage over small business concerns and can result in the Government paying a "price premium" for "more than" satisfactory performance and, thus, more than the Government actually needs.

In most cases, large companies will have more financial resources, facilities, personnel, experience (*i.e.*, matters of responsibility) than small business concerns. In one case, the Government paid a price premium of almost \$385,000 based, in part, on the awardee's having over 100 years of corporate experience.⁷⁹ But should the Government be buying "more" capability or just "enough"? If a small business concern has "enough"

⁷⁵ FAR 15.203(a)(4).

⁷⁶ FAR 15.304(e).

⁷⁷ Examples include *Ace Info Solutions, Inc.*, 2005 CPD ¶ 75 at 3; *Arora Group*, 2004 CPD ¶ 61 at 2; *Bechtel Hanford, Inc.*, 2003 CPD ¶ 199, note 1 at 2; *Safety-Kleen (Pecatonica), Inc.*, 2002 CPD ¶ 176 at 2-3; *Global Solutions Network, Inc.*, 2002 CPD ¶ 64 at Comp. Gen. No. B-289342.4; and *Image One Technology & Mgmt, Ltd.*, 2002 CPD ¶ 18.

⁷⁸ Examples include *Vortec Corp.*, Comp. Gen. No. B-257568 et al., 94-2 CPD ¶ 145 (cost value at 5% for technology testing); *Diversified Contract Services, Inc.*, Comp. Gen. No. B-228163.3, 88-1 CPD ¶ 463 at 3 (cost valued at 10% for food and mess attendant services); *Kay & Associates, Inc.*, Comp. Gen. No. B-228434, 88-1 CPD ¶ 81 at 1 (cost valued at 10% for maintenance and repair of aircraft).

⁷⁹ *CACI, Inc.-Federal*, Comp. Gen. No. 225444, 87-1 CPD ¶ 53 (corporate experience was weighted at 30%).

to perform satisfactorily, why should the Government pay a higher price in a competitive evaluation to a large business with “more” financial resources, facilities, etc.? In best value procurements using responsibility-type evaluation factors, small business concerns seldom will be able to compete successfully against large business concerns. Except in cases where the Government’s requirements call for the highest level or quality of performance (such as in public health or national security), small business concerns should be evaluated on their “responsibility” (*i.e.*, their ability to perform satisfactorily), and the Government should not pay a higher price for more than satisfactory performance. If the Government needs a level of performance higher than “satisfactory,” it should amend the specification or statement of work so that the competition can be for that higher level.

5. The absence of a government reporting mechanism for the price premium paid in a contract award prevents management and public review of the aggregate amounts being paid in source selections above the amount of the lowest price in an acceptable proposal.

At the present time, there is no information available (except in individual government contract files) of the total dollars the Government pays in awarding contracts to competitors at prices higher than the price of the lowest acceptable proposal. There is no way to know how *much* the Government is paying in these price premiums and, certainly, no way to know what the Government is paying such price premiums *for*. The absence of this information makes it difficult to understand or manage the value to the Government of paying a higher price for proposals with higher technical ratings. If the Government is paying for more than it actually needs in some procurements, the amount of those price premiums would be better spent for other products, services, or personnel for which funding is not available.

6. There is no regulatory guidance for determining the weights that should be given to different types of evaluation factors or even a minimum weight that should be given to cost or price.

E. Recommendations

1. Regulatory guidance should be provided in FAR requiring that:

a. Solicitations identify the proposal rating methodology and all evaluation factors or subfactors that will be separately rated or require separate consideration by evaluators and preclude giving evaluation credits for exceeding the agency’s minimum needs.

b. Source selection plans give preference, to the maximum extent practicable, to objective-type evaluation factors and subfactors;

c. Solicitations identify specific weights that will be given to evaluation factors and subfactors in the evaluation of proposals; and

d. Unless there is a special justification for doing otherwise, solicitations should identify performance requirements in a manner that responsibility-type evaluation factors and subfactors will be evaluated on a pass-fail basis.

2. Regulatory guidance should be provided in FAR to assist in establishing the weights to be given to different types of evaluation factors, including a minimum weight to be given to cost/price, in the acquisition of various types of products or services.

3. The Office of Management and Budget should establish, for all contract awards exceeding the simplified acquisition threshold, a reporting requirement for the price premium paid in fixed-price type contracts (*i.e.*, the amount the contract award price exceeded the lowest price of an acceptable proposal).