Competitive Negotiation

The Source Selection Process

Third Edition

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Printed in the United States of America.

Product No. 0-4597-400
E-ISBN: 978-0-8080-3315-8

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INTRODUCTION

In recent years procurement through competitive negotiation has become the major process used to acquire goods and services by the federal government. This process affords the government a greater degree of flexibility than is found in the other major process — sealed bidding. There are several aspects of this flexibility. The negotiation process permits discussion between the parties and modifications of proposals by offerors while sealed bidding does not. In negotiation the government's source selection officials have much greater discretion in selecting the successful offeror for award. They can exercise this discretion by selecting a procurement strategy designed to obtain the best value — either the tradeoff process, the lowest-price technically acceptable process, some combination of the two, or any other process that meets the statutory requirements. Further, negotiation permits considerable discretion in selecting the source when tradeoffs are made between cost or price and other factors. In contrast, in sealed bidding any factors used in source selection other than bid price must be converted to dollars. Proposals submitted in negotiated procurement are not available for public inspection prior to award, while under sealed bidding public opening of bids is a major part of the process and bids may be examined by any person at that time. In sealed bidding a contracting officer is prohibited by statute from considering a bid that contains material deviations from the invitation for bids and changes to bids are not permitted. Finally, in negotiated procurement the contracting officer is not required to reject proposals that vary from the RFP requirements, but may include them in discussions and permit offerors to change their proposals. Thus, negotiation does not involve the concept of responsiveness developed in sealed bidding even though the term is sometimes used in negotiations, *Pacificon Prods., Inc*., Comp. Gen. Dec. B-196371, 80-2 CPD ¶ 58.

The standard method for competitive negotiation was originally inserted into the Armed Services Procurement Act in 1962 and was adopted by the Competition in Contracting Act of 1984 as the "competitive proposal" technique. These procedures are now embodied in similar language in 10 U.S.C. § 2305(b) and 41 U.S.C. § 253b, and are implemented in FAR Part 15.

This "competitive proposal" procedure is not a detailed procedure in either its statutory or regulatory form. Rather, it is a set of limitations on the freedom of the contracting officer in conducting competitive negotiations. However, as the statutory language was implemented by regulation and interpreted by numerous decisions, a detailed procedure was adopted by almost all agencies. This procedure involved the

solicitation of complete proposals including technical, management, and cost or price elements from each competitor. If statutory standards were met, award was made on the basis of initial proposals. If award on initial proposals was not feasible or desirable, the contracting officer proceeded to conduct negotiations by evaluating and narrowing proposals to those within the competitive range, conducting meaningful written or oral discussions, calling for the submission of final proposal revisions, and awarding a contract without further discussions. In this book we have called this the "standard" process for competitive negotiations. This process is presented graphically in Figure 1.

The Standard Negotiation Process

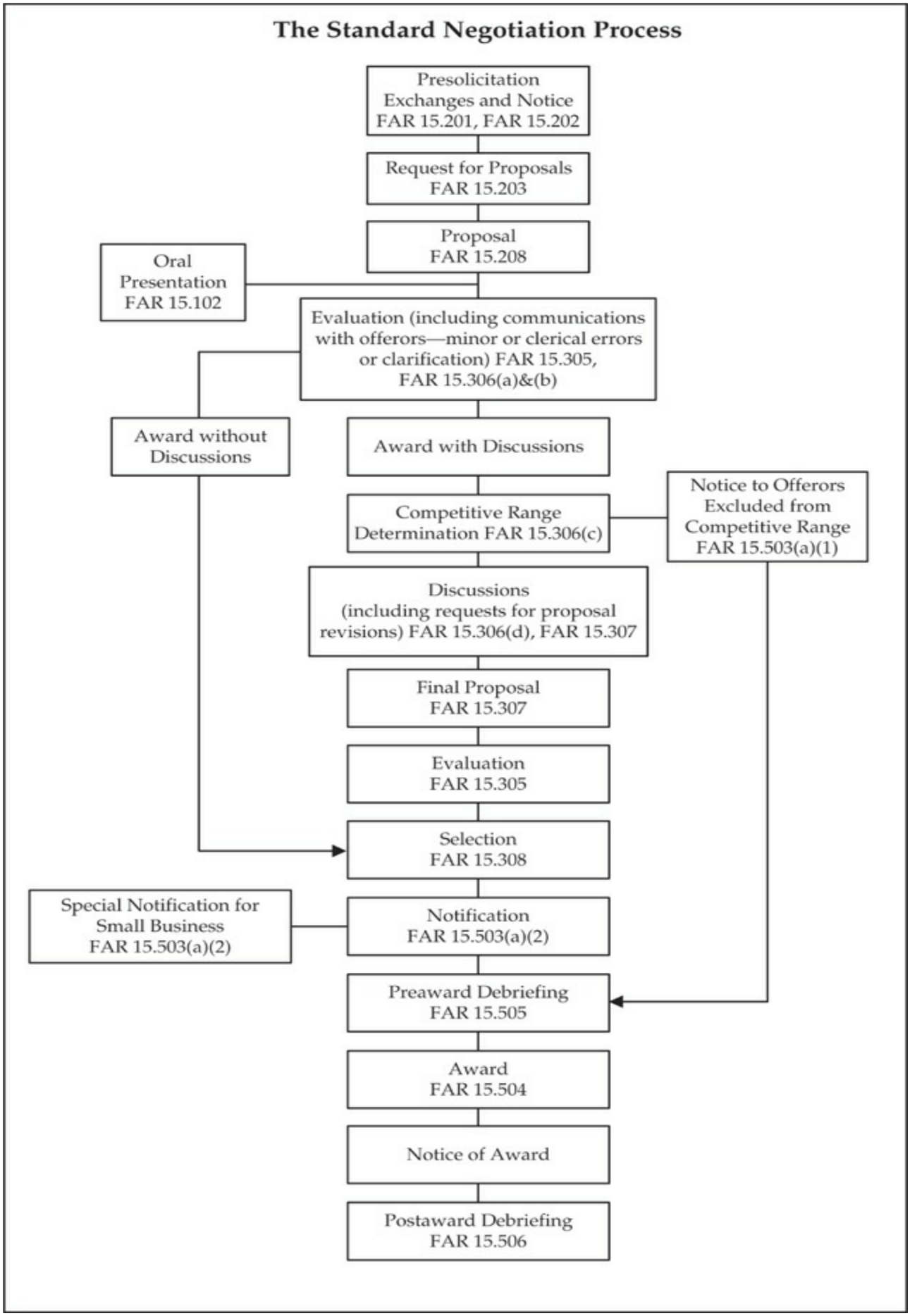


Figure 1

While this standard process for competitive negotiations is the norm, it can be followed using elaborate procedures or relatively simple procedures. During the 1980s many agencies adopted procedures requiring the expenditure of considerable time and money by both the competitors and the government agency conducting the procurement. Thus, elaborate technical and management proposals were solicited, large teams were charged with reviewing and scoring these proposals, extensive written or oral discussions were conducted with multiple offerors, major rewrites were permitted in best and final offers, and multi-tiered reviews were conducted in the final source selection process. It was not unusual for procurements to take over a year in these circumstances and one Government Accountability Office report, "Information Technology: A Statistical Study of Acquisition Time" (GAO/AIMO-95-65, Mar. 13, 1995), indicated that the average time for the award of information technology procurements over $25 million in value was 777 days. By the end of the 1980s some agencies had begun to realize that the process had become highly inefficient and took steps to adopt "acquisition streamlining" policies in order to make the competitive negotiation process more efficient. See Air Force Systems Command Regulation 550-23, *Streamlined Source Selection*, July 28, 1987, and National Aeronautics & Space Administration's *Streamlined Acquisition Handbook*, Feb. 16, 1990. The first edition of this book, published in 1993, documents the elaborate procedures that had developed and the initial efforts that had been taken to streamline the process.

After the adoption of the Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, and the Clinger-Cohen Act of 1996, Pub. L. No. 104-106, the streamlining initiatives gained momentum. *The Gore Report on Reinventing Government: Creating a Government that Works Better and Costs Less* (National Performance Review, 1993) recommended that the procurement process be simplified and stated:

> This administration will rewrite the 1,600-page FAR, the 2,900 pages of agency supplements that accompany it, and Executive Order 12352, which governs federal procurement. The new regulations will:
>
> - shift from rigid rules to guiding principles;
> - promote decision making at the lowest possible level;
> - end unnecessary regulatory requirements;
> - foster competitiveness and commercial practices;
> - shift to a new emphasis on choosing "best value" products;
> - facilitate innovative contracting approaches;
> - recommend acquisition methods that reflect information technology's short life cycle; and
> - develop a more effective process to listen to its customers: line managers, government procurement officers, and vendors who do business with the government.

In 1996 the FAR Councils undertook an effort to accelerate this effort to streamline the process by rewriting Part 15 of the Federal Acquisition Regulation to make the competitive negotiation process more efficient. The first draft of this rewrite issued in September 1996, 61 Fed. Reg. 48380, made substantial changes to the regulations giving greater flexibility to contracting agencies and removing a number of fixed requirements from the competitive negotiation process. After extensive public comment, a final rewrite was published in September 1997, 62 Fed. Reg. 51224, making less radical changes to the regulation but, nonetheless, permitting more streamlined procurements. The following comments of the FAR Council in issuing the regulation indicate its interest in promoting greater efficiency in the process:

> The goals of this rewrite are to infuse innovative techniques into the source selection process, simplify the process, and facilitate the acquisition of best value. The rewrite emphasizes the need for contracting officers to use effective and efficient acquisition methods, and eliminates regulations that impose unnecessary burdens on industry and on Government contracting officers.

This emphasis on minimizing the complexity of the negotiation process is reflected in FAR 15.002(b) as follows:

> (b) Competitive acquisitions. When contracting in a competitive environment, the procedures of this part are intended to minimize the complexity of the solicitation, the evaluation, and the source selection decision, while maintaining a process designed to foster an impartial and comprehensive evaluation of offerors' proposals, leading to selection of the proposal representing the best value to the Government (see 2.101).

The rewritten FAR did not mandate streamlined techniques nor did it contain streamlined procedures. It merely adopted procedures that its authors believed *permitted* streamlined procedures. Thus, the efficiency of the process is totally dependent on the processes that are used by contracting agencies on individual procurements. While a few agencies have adopted streamlined procedures in the 14 years since the FAR was rewritten, far more agencies have continued to conduct procurements in the old manner - soliciting technical and management proposals for the most simple products and services. In this regard, the major goal of the 1990s of making the competitive negotiation process more efficient has not been accomplished. The need for streamlined procedures is still apparent - as both government and contractor resources to conduct procurements have become more constrained - but it has proven exceedingly difficult to induce contracting agencies to seek more effective ways of conducting their procurements.

The major factor in the lack of streamlining is the use of too many evaluation factors. Many agencies continue to use a standard set of evaluation factors even when analysis of past procurements would show that many of the factors being used do not discriminate among the competitors. We have included extensive coverage of evaluation

factors in Chapter 2 in an effort to aid agencies in reducing the number of evaluation factors.

Another major effort of the FAR Rewrite in 1997 was to allow more robust exchanges during the source selection process. The encouragement of more exchanges before receipt of proposals in FAR 15.201 appears to have given agencies more freedom in this area. However, the encouragement of more exchanges during evaluation of proposals in FAR 15.306 appears to have been a failure. We added Chapter 5, Communications to Facilitate Evaluation, to the second edition to allow full exploration of this part of the source selection process. In the ensuing years, we have realized, in reading the many protest decisions in this area, that these rules are seriously flawed. The fundamental problem is that the adoption of one rule in FAR 15.306(a) for permissible exchanges before award on the basis of initial proposals and another rule in FAR 15.306(b) for permissible exchanges before establishing a competitive range assumes that an agency has made the decision of which course of action to follow before it has read the proposals. This, of course, is a false assumption with the result that agencies have been reluctant to engage in robust exchanges during proposal evaluation. We have continued to use the title of Chapter 5 in this new edition but the fact is that the rule, as currently written, does not facilitate evaluation. Rather, it has had the opposite effect of inducing agencies to decide whether to award without discussions or undertake discussions without a full understanding of what each offeror is proposing.

Similarly the rewritten rule in FAR 15.306(d) was intended to encourage more robust exchanges after a competitive range was established. The FAR Rewrite adopted the term "negotiations" to describe this part of the process and we adopted that term in writing the second edition. We have continued to use that term in this edition but it is apparent that most contracting officers are not in favor of negotiations to assist each offeror in the competitive range to make its best offer in its final proposal revision. Contracting officers seem to be intrinsically opposed to such "technical leveling" even though the prohibition of that practice was removed from FAR 15.306(e). In sum, we have concluded that the rewritten FAR 15.306, in its entirety, is a failed rule that has not led to more robust exchanges and has introduced considerable confusion into the source selection process. We discuss these problems in detail in Chapters 5 and 8.

The other element of the rewrite that has caused confusion is the use of the word "proposal' without defining its meaning. The definition of the word "offer" in FAR 2.101 states that proposals are offers but the word "proposal" in FAR Part 15 appears to mean, in most instances, not only the offer but also the information submitted by each offeror. See, for example, FAR 15.208 containing the rules on submission and

modification of "proposals" which appear to cover all information submitted by an offeror. Compare FAR 15.207 discussing "handling proposals and information" - apparently separating a proposal from information submitted by each offeror. Further confusion is created in the definition of "proposal revision" in FAR 15.001 as a "change to a proposal …as a result of negotiation" (do the parties negotiate about information?). In each chapter we have attempted to discern the meaning of "proposal" as used in the paragraph of the FAR being addressed, but we confess that the lack of clarity in the FAR makes this a dificult task. Perhaps the most trying aspect of this discernment is attempting in Chapter 5 to determine the extent of the Government Accountability Office's clarification rule which appears to depend on whether information sought by an agency is for the purpose of determining whether a proposal is "acceptable." We have done our best but it seems to us that offers are either acceptable or unacceptable but that acceptability of information is a strange concept.

In the face of these poorly drafted parts of the FAR, in this revised edition we have done our best to identify the way the regulations have been interpreted by the GAO and the Court of Federal Claims. We have also included, as in past editions, the history of the regulations and the legal rulings on those regulations. In some instances this older material is important because GAO has established a number of rules governing competitive negotiation that are independent of the specific regulations in effect at the time of a protester procurement. It is certainly clear that a practitioner cannot understand these rules without fully understanding the protest decisions. This fact that government contracting practices and procedures are an amalgamation of regulations and legal decisions is one of the unique aspects of government procurement.

This book assimilates the statutory and regulatory requirements with the numerous protest decisions into a single discussion of the procedures that can be followed. We have also made numerous references to the most helpful guidance from less formal publications such as internal directives and manuals to illustrate various policies and procedures. This does not necessarily mean that these policies and procedures would be applicable to all procurements or that other policies and procedures specified in the manuals are useful or helpful.

There are several basic principles that must be kept in mind dealing with statutes, regulations, decisions, and manuals:

1. The statutes and some regulations are *legally binding*. When promulgated pursuant to statutory authority, published regulations take on the status of law. Thus, statutes and published regulations using the terms "shall" or "may not"

are mandatory and must be followed by a contracting agency unless a deviation from the regulation is obtained pursuant to FAR Subpart 1.4. Failure to follow mandatory rules will generally result in the granting of a protest and may even result in a declaration that the contract is void. See, for example, *CACI, Inc. v. Michael P.W. Stone,* 990 F.2d 1233 (Fed. Cir. 1993), holding that the failure to obtain a Delegation of Procurement Authority, as required by the statute governing the procurement of automatic data processing equipment, resulted in a void contract.

2. The manuals and handbooks of the agencies are *not legally binding, Motorola, Inc.,* Comp. Gen. Dec. B-247937.2, 92-2 CPD ¶ 334, but contain an agency's statement of what it considers to be *good business practice*. Since the second edition was written, most of the major agencies have moved a considerable amount of text from their FAR supplements to agency manuals and guidance documents. Both government employees and contractors dealing with an agency should be fully conversant with these subsidiary documents and should recognize that the agency is free to alter these documents without going through the onerous regulatory process.

3. While the decisions of the Government Accountability Office and the Court of Federal Claims may resolve protests, they are not necessarily guidance on good business practice. If a protest is granted, the procedure followed by the agency has been determined to be improper or incorrect. Obviously, this is a clear signal that the agency should not follow that practice in the future. Denial of a protest, however, does not necessarily mean that the agency has followed good business practice in the procurement. While in some cases the agency that wins a protest has engaged in a well conducted procurement, in many other winning protests the agency has met only the bare legal requirements. Thus, critical judgment must be exercised when using award decisions as a guide to future actions. Structuring a procurement to win protests is generally questionable policy. The key is to structure a procurement to obtain what the agency needs at a reasonable price in a way that is fair to the competitors.

This book discusses the use of the negotiation process from the inception of the requirement for goods or services to the award of the contract and the debriefing of the losing offerors. The eleven chapters are organized to follow the discrete steps in the competitive negotiation process — attempting to address each issue that arises in that step. While this makes each chapter somewhat self-sufficient, it causes some

redundancy of coverage and requires some cross-referencing to obtain full comprehension of the topic. For example, proposal scoring systems are covered in Chapter 2 under the discussion of developing the source selection plan (information relevant to the selection of a system is covered). Scoring systems are discussed in Chapter 5, where their proper use (or their misuse) is covered. Similar treatment is given to many other topics. Readers should review both the index and the detailed table of contents to ensure that they find all of the coverage of any specific topic.

CHAPTER 1

ACQUISITION PLANNING

"Acquisition planning" is an expansive term that includes actions aimed at stating the government's needs, identifying potential sources, and determining the acquisition strategy that will be used to most effectively fulfill the agency need in a timely manner and at a reasonable cost, FAR 2.101. It is a process by which the efforts of all personnel responsible for an acquisition are coordinated and integrated through a comprehensive plan. The acquisition plan contains the documented results of acquisition planning. The goal of acquisition planning is to ensure that the government meets its needs in the most effective, economical and timely manner, consist with public policy, FAR 7.102(b).

This chapter reviews all elements of acquisition planning conducted by an agency. The first section explains the planning process as mandated by law and implemented by regulation. It focuses on who is responsible for planning, when acquisition planning should begin, the level of detail and formality of planning, and the consequences of inadequate planning. The integral role market research plays in acquisition planning is then discussed followed by a discussion of the policy favoring the purchase of commercial products or services. The first section concludes with a discussion of the types and scope of early exchanges of information among industry and the program, contracting and other participants in the acquisition process. The second section provides an in-depth discussion on each element of the acquisition plan.

I. PLANNING PROCESS

While planning is arguably one of most critical steps in the entire acquisition process, it is often performed as an afterthought. Sound acquisition planning ensures that the contracting process is conducted in a timely manner, in accordance with statutory, regulatory, and policy requirements, and reflects the mission needs of the agency.

A. Requirement for Planning

1. Policy

As a result of deficiencies in the planning process, a number of agencies began to

focus on the need for more formalized acquisition planning in the 1970s. Congress also identified this need during discussions on the Competition in Contracting Act of 1984 (CICA). As a result, the Armed Services Procurement Act and the Federal Property and Administrative Services Act now require that an executive agency "use advance procurement planning and market research" in preparing for the procurement of property or services, 10 U.S.C. § 2305(a)(1)(A)(ii); 41 U.S.C. § 253a(a) (1)(B). FAR Part 7 implements this requirement, and FAR 7.102(a) requires agencies to perform acquisition planning and conduct market research for all acquisitions in order to promote and provide for (1) the acquisition of commercial items to the maximum extent practicable; and (2) full and open competition or, when full and open competition is not required or possible, maximum competition practicable.

2. Agency-head Responsibilities

The FAR does not provide detailed guidance on the acquisition planning process but rather places this responsibility on the agency head. FAR 7.103 provides that the agency-head or designee is responsible for —

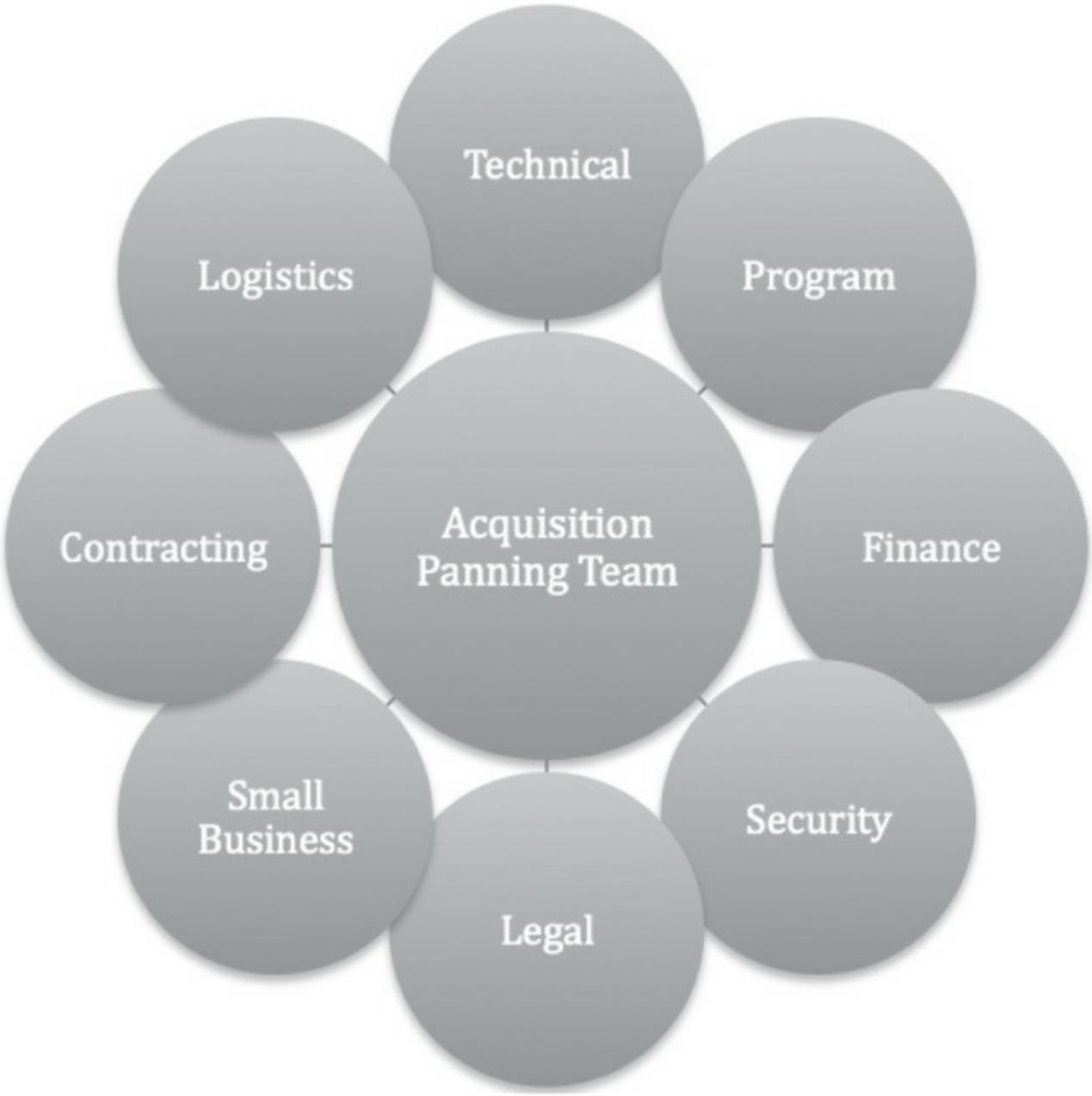
- Promoting and providing for full and open competition
- Encouraging offerors to supply commercial items
- Establishing criteria and thresholds at which increasingly greater detail and formality in the planning process is required
- Writing plans either on a systems basis, on an individual contract basis, or on an individual basis, depending upon the acquisition
- Specifying when a written plan is required
- Designating planners for acquisitions
- Reviewing and approving acquisition plans
- Establishing standard acquisition plan formats
- Waiving requirements of detail and formality, as necessary, in planning for acquisitions

Because the breadth of responsibility is placed on the agency head, specific guidance on acquisition planning is contained in agency-specific regulations, manuals, and guides.

3. Contracting and Programmatic Responsibility for Planning

The agency-head designates the person or office responsible for acquisition planning, FAR 7.103. Often this is the program manager or other official responsible for the program. For example, DOD provides that the program manager or other official responsible for the program has overall responsibility for acquisition planning, DFARS 207.103(g). The Navy states that the program manager has overall responsibility for acquisition planning, while the contracting officer advises on contracting strategy, appropriate contract type election, and other contractual matters, Department of the Navy Acquisition Planning Guide (Mar. 2007). The Air Force requires that an acquisition strategy panel be created for all acquisitions requiring a written acquisition plan, AFFARS 5307.104-90. For NASA acquisitions requiring headquarters approval, the responsible program operations division analyst serves as the coordinator in developing the procurement strategy, NFS 1807.170; NASA Guide for Successful Headquarters Procurement Strategy Meetings (rev. Sept. 2006). In both the Department of Health and Human Services and the Department of Justice responsibility is jointly shared between the program and contracting office, HHSAR 307.104(e) (contracting officer and project officer develop an acquisition planning schedule, which cannot be revised except by mutual agreement of these same individuals); JAR 2807.102(b) (acquisition planning is the joint responsibility of both the contracting and program offices).

The central role of the individual responsible for acquisition planning is to coordinate the plan and convene planning meetings with all those who have a responsibility for the development, management, or administration of the acquisition, DFARS 207.105. As depicted in the following chart, FAR 7.104(a) contemplates that acquisition planning be performed by a team consisting of all those who will be responsible for significant aspects of the acquisition, such as contracting, fiscal, legal, and technical personnel.



The most effective planning comes about through working in a collaborative relationship with those having a vested interest in the outcome of the procurement. DOE's Acquisition Guide (January 2009) emphasizes the importance of stakeholder involvement in planning, providing in Chapter 4:

> The process of planning involves lots of dialog with the user, the supporter, and the various functional experts assigned to the program management office and field staff organizations. In addition to using the team of specialists within the program office, you should use representatives from the functional staff offices to discuss and refine all planning issues… .
>
> Remember, an acquisition plan serves to generate commitment by all stakeholders to support execution of the plan. The best way to achieve this commitment by all stakeholders is to have them participate actively and early in the planning process. In order for the government to successfully meet its overall program

objectives, everyone involved in planning and executing the program must feel some ownership.

When this collaborative process is formalized it is called an Integrated Product (or Project) Team (IPT). An IPT is a management technique that simultaneously integrates all essential acquisition activities through the use of multidisciplinary teams. The purpose of IPTs is to make team decisions based on timely input from the entire team (e.g. program management, engineering, manufacturing, test, logistics, financial management, procurement, and contract administration) including customers and suppliers. IPTs are generally formed at the program manager level. IPTs began to emerge in the Department of Defense in the 1980s to support concurrent engineering approaches and culminated in 1995 with the Secretary of Defense directing the Department to apply the Integrated Product and Process Development concept of using IPTs throughout the acquisition process. See DOD Directive 5000.01. Starting in the 1990s civilian agencies began using IPTs — or similar cross-functional teams. For example, the Department of Veterans Affairs requires the use of IPTs for all acquisitions valued at $5 million. See VA Office of Acquisitions and Logistics Information Letter, October 2009. The guidance further provides that IPTs are recommended for complex acquisitions valued at less than $5 million where there are considerable technical, program, or business risk to the government. IPTs should be assembled at the earliest possible stage of the acquisition cycle. IPTs are mandated by Department of Energy (DOE) Order 413.3 and DOE Manual 413.3-1. The Order directs that "all acquisition programs and projects shall use an integrated project team approach to managing projects.

Although the FAR does not discuss the role of competition advocates in the planning process, they have become actively involved in acquisition planning in most procuring agencies. Appointed pursuant to 41 U.S.C. § 418, competition advocates are responsible for challenging barriers to competition and promoting full and open competition. The agency-level advocate is given the additional duty of providing an annual report to the senior procurement executive on the agency's use of competition in contracting. They generally work at a high level in the procuring agency with commensurate influence in determining the strategy that will be used by the agency in the prospective procurement. They also approve or review virtually all justifications for the use of other than competitive procedures. In DHS, all written acquisition plans for acquisitions over $5 million require sign off by the competition advocate, HSAM, Chapter 3007 — Appendix H.

4. The Timing of Planning

It is essential that acquisition planning be done early in the process to ensure that all actions necessary to carry out an effective procurement can be performed within the procurement cycle. FAR 7.104(a) provides that "[a]cquisition planning should begin as soon as the agency need is identified, preferably well in advance of the fiscal year in which contract award is necessary." There are two levels of acquisition planning. An annual acquisition plan is prepared prior to the beginning of each fiscal year. The annual acquisition plan contains all anticipated acquisitions — to include new acquisitions as well as contract/order modifications over the simplified acquisition threshold expected to be awarded during the next fiscal year. The purpose of the annual acquisition plan is to provide for workload scheduling, monitoring and reporting purposes. See, for example, HHSAR 307.104(a). The Office of Small and Disadvantaged Business Utilization (OSDBU) will review the annual acquisition plan to ensure that small business goals will be met. The second level is a formal or informal acquisition plan, as appropriate, for an individual acquisition. The timing of the individual acquisition plan should follow right after the annual acquisition plan. See HUD Handbook 2210.3, Procurement Policies and Procedures, which provides:

> As soon as practicable after receipt of the strategic procurement plan within OCPO, the cognizant Contracting Officer, in conjunction with the Program Office, shall develop the acquisition plan for each new contract action over $100,000." There are three formats for the plans:
>
> Basic: $100,000-$1 million;
>
> Limited: $1,000,001-$5 million; and
>
> Comprehensive: Greater than $5 million

To maximize their value, individual acquisition plans should be developed and approved in advance of preparation of the procurement request package. This assures that the primary personnel (program and procurement officials) are in agreement concerning the acquisition strategy before time and effort are invested in preparing the work statement and request package.

5. The Acquisition Plan

The acquisition plan formally "documents" the overall strategy for accomplishing and managing an acquisition. The acquisition plan communicates to senior management information on the technical and business aspects of the acquisition upon which to base their decisions.

The FAR does not specify whether written or formal acquisition plans should be

prepared but, rather, places this responsibility on agency heads, FAR 7.103(d). Specifically, the FAR allows the agency head to "establish criteria and thresholds at which increasingly greater detail and formality in the planning process is required as the acquisition becomes more complex and costly, specifying those cases in which a written plan shall be prepared," FAR 7.103(d). The thresholds at which greater detail and formality are required vary by agency.

Some agencies, such as DOD, require written plans only for large-dollar acquisitions (acquisitions for development when costs are $10 million or more and for production or services when costs are $50 million or more for all years or $25 million or more for any fiscal year) but permit the use of written plans for smaller procurements, DFARS 207.103(d)(i). The Army requires written acquisition plans in accordance with the dollar thresholds identified in DFARS 207.103(d)(i), AFARS 5107.103. The Air Force requires written acquisition plans for all acquisitions of $5 million or more, as well as for other high-risk acquisitions, AFFARS 5307.103(c) (i) (C). The Navy requires written acquisition plans for all acquisitions involving the development, production, or support of weapon systems, subsystems, or equipment that meet or exceed the thresholds of DFARS 207.103(c)(i) unless an exemption is applicable, NAPS 5207.103(c)(i).

Civilian agencies tend to require written acquisition plans at lower-dollar thresholds. For example, the General Services Administration requires written plans for acquisitions over the simplified acquisition threshold ($100,000), GSA Order, Acquisition Planning (OGP 2800.1) (Appendix 507A). This regulation also provides that the heads of contracting activities may authorize oral plans for acquisitions not exceeding $150,000, as long as the file contains the name of the individual who approved the plan. Generally more detailed written plans are required as the dollar amount of the acquisition increases. For instance, while GSA requires a limited acquisition plan at the simplified purchase threshold, a comprehensive plan is required for IT acquisitions over $20 million or for any acquisition over $50 million. In addition, the GSA Order provides that, regardless of the dollar threshold, a comprehensive plan is required when the acquisition is complex, critical to agency strategic objectives and mission, highly visible or politically sensitive, or for acquisitions with which GSA has little or no experience that may result in a need for greater oversight or risk management. Similarly, HUD has three levels of plans: basic acquisition plans for acquisitions over the simplified acquisition threshold up to $1 million, limited acquisition plans for acquisitions in the range of $1 million up to $5 million, and comprehensive acquisition plans for acquisitions over $5 million. The Department of Health and Human Services (HHS) requires a written acquisition plan for proposed

acquisitions expected to exceed $500,000 (inclusive of options), HHSAR 307.7101(a).

The specific content of acquisition plans will vary, depending on the nature, circumstances, and stage of the acquisition. Acquisition plans for service contracts must describe the strategies for implementing performance-based contracting methods or must provide rationale for not using those methods. A synopsis of the elements of an acquisition plan is depicted in the chart below. A comprehensive discussion of each element is contained in Section II of this chapter.

Acquisition Plan Outline		
Element	**FAR Provision**	**Synopsis**
Background and Objectives		
Statement of Need	7.105(a)(1)	Introduce the plan by a brief statement of need. Summarize the technical and contractual history of the acquisition. Discuss feasible acquisition alternatives, the impact of prior acquisitions on those alternatives, and any related in-house effort.
Applicable Conditions	7.105(a)(2)	Identify and discuss all significant conditions affecting the acquisition, such as requirements for compatibility with current and/or future systems/programs.
Cost (life cycle, design-to-cost, should cost)	7.105(a)(3)	Set forth the cost goals for the acquisition and the rationale supporting them. This should include a discussion on how estimated costs were arrived.
Capability or performance	7.105(a)(4)	Provide a description of the required capabilities or performance characteristics of the supplies or performance standards for the services being acquired. Discuss how they are related to the need.
Delivery or performance-period requirements	7.105(a)(5)	Describe the basis for establishing the delivery or performance period requirements. Identify the number of years (base and option periods). Discuss briefly industry practices, market conditions, transportation time, and production time.
Tradeoffs	7.105(a)(6)	Provide a brief description of and expected consequences of trade-offs among the various cost, capability or performance, and schedule goals. Discuss which is most important and how it will impact the procurement in comparison of the other goals.
Risks	7.105(a)(7)	Discuss cost, technical and schedule risks. Describe the efforts to be taken to reduce risk and consequences of failure to achieve goals. Discuss effects on cost and schedule risks.

Acquisition streamlining	7.105(a)(8)	Discuss plans and procedures to encourage industry participation by using draft solicitations, pre-solicitation conferences and any other means of stimulating industry involvement and select and tailor only necessary and cost effective requirements.
Plan of Action		
Sources	7.105(b)(1)	Indicate the prospective sources of supplies or services that can meet the need. Consider required sources of supplies or services — e.g., small businesses, service-disabled veteran owned businesses, HUB Zone businesses, etc. Address the extent and results of the market research and indicate their impact on the various elements of the plan.
Competition	7.105(b)(2)	Describe how competition will be sought, promoted and sustained throughout the acquisition. If not using full and open competition, cite the authority in FAR 6.302. Discuss the application of the authority.
Source selection procedures	7.105(b)(3)	Discuss the source selection procedures for the acquisition including timing for submission and evaluation of proposals and the relationship of evaluation factors to the attainment of acquisition objectives. Document the relative importance of non-cost factors in evaluation.
Contracting considerations	7.105(b)(4)	Identify and discuss the type of contract. If appropriate, discuss multi-year contracts and/or the inclusion of options. Discuss any other contracting methods and any special contract provisions or clauses. Discuss any incentive arrangement or document cross reference to the incentive plan.
Budgeting and funding	7.105(b)(5)	Develop and include budget estimates. Include the total value of the independent government cost estimate, including any options. Discuss the funding strategy.
Product or service description	7.105(b)(6)	Explain the use of a statement of work, performance work statement, statement of objectives, technical specifications, or other description of the requirement.
Priorities, allocations, and allotments	7.105(b)(7)	Discuss any priorities or urgent requirements. Specify the method and reason for obtaining and using priorities, allocations, and allotments.
Contractor versus Government performance	7.105(b)(8)	Address the requirement given to OMB Circular A-76.
Inherently governmental functions	7.105(b)(9)	See FAR 7.5. Document that the services do not constitute inherently governmental functions.

Management information requirements	7.105(b)(10)	Discuss the management systems to be used to monitor the contractor's efforts.
Make or buy	7.105(b)(11)	Discuss any consideration given to make or buy programs (FAR 15.407-2).
Test and evaluation	7.105(b)(12)	If applicable, describe the test program of the contractor and the government. Describe the test program for each major phase of a system acquisition.
Logistics considerations	7.105(b)(13)	Describe, as applicable, logistic considerations such as timing, transition planning, etc.
Government-furnished property	7.105(b)(14)	Indicate whether property will be furnished to contractors, including material and facilities, and discuss any associated considerations, such as its availability or the schedule for its acquisition.
Government-furnished information	7.105(b)(15)	Indicate whether government information, such as manuals, drawings and test data, will be provided to prospective offerors and contractors.
Environmental and energy conservation objectives	7.105(b)(16)	Discuss the applicable environmental and energy conservation objectives associated with this acquisition, if applicable.
Security considerations	7.105(b)(17)	Discuss any security considerations — e.g., information security requirements for information technology acquisitions.
Contract administration	7.105(b)(18)	Describe how the contract will be administered — e.g., identify how inspections and acceptance corresponding to the work statement's performance criteria will be enforced.
Other considerations	7.105(b)(19)	Discuss other matters that are germane to the plan but not covered elsewhere.
Milestones for the acquisition cycle	7.105(b)(20)	Address milestones and any other steps appropriate.
Identification of participants in acquisition plan preparation	7.105(b(21)	E.g., contracting officer, contracting specialist, program manager, legal, government technical manager

a. Program and Phased Acquisition Plans

DOD provides that written acquisition plans for large-dollar acquisitions should be prepared on a program basis, while other acquisition plans may be written on either a program or individual-contract basis, DFARS 207.103(d). The Army policy is that, when feasible, acquisition plans will be written on a program/project basis for all procurement actions generally above $30 million, AFARS 7.103(c).

The Navy provides that for programs with multiple contracts, it may be beneficial to prepare one principal acquisition plan for the major procurement and prepare individual acquisition plans for the acquisition of equipment, software or services, Department of the Navy Acquisition Planning Guide (Mar. 2007) The Navy's guidance provides that when using multiple acquisition plans, the principal acquisition plan should:

> a. Reference its subsidiary APs [acquisition plans] and vice versa.
>
> b. Identify segments of the program to be assigned to field activities for contractual action.
>
> c. Provide integrated planning for the total system, including an acquisition milestone chart.

NASA provides that acquisition plans should be prepared on a program or system basis when practical, NFS 1807.103(e). In such cases, the plan should fully address all component acquisitions of the program or system.

b. Revisions or Updates to the Acquisition Plan

The acquisition plan is required to be reviewed at least annually and changed whenever necessary. FAR 7.104(a) provides:

> At key dates specified in the plan or whenever significant changes occur, and no less often than annually, the planner shall review the plan and, if appropriate, revise it.

The Department of the Navy Acquisition Planning Guide (Mar. 2007) provides examples of when an acquisition plan should be revised, which include:

> a. The PM [program manager] is unable to meet a condition attached to a conditionally approved AP [acquisition plan].
>
> b. The PM is unable to execute the competition plan set forth in the approved AP.
>
> c. A major windfall or shortfall in program funding or a major stretch-out or compression in the program schedule is anticipated.

d. There is a substantial quantity increase and the program was previously approved on the basis of a sole source acquisition.

e. The source selection authority (SSA) proposes to change the source selection plan in a manner that would reduce the number of potential competitors adversely affect small business participation.

The Department of Health and Human Services requires the acquisition plan to be reviewed at least quarterly and modified as appropriate, HHSAR 307.104.

6. Adequacy of Planning

The lack of adequate acquisition planning can place an agency in a position where it will attempt to acquire supplies and services without obtaining full and open competition. In this regard lack of advance planning does not justify noncompetitive procurement, as stated in 10 U.S.C. § 2304 and 41 U.S.C. § 253:

(f) In no case may the head of an agency —

* * *

(5) enter into a contract for property or services using procedures other than competitive procedures on the basis of the lack of advance planning.

Nevertheless, the Government Accountability Office (GAO) has sanctioned continuation of a contract when it is impracticable to recommend corrective action. When this occurs, protesters excluded from the competition may be awarded protest costs, *RBC Bearings, Inc*., Comp. Gen. Dec. B-401661, 2009 CPD ¶ 207 (failure to plan precluded agency from second source and resulted in sole source award); *Freund Precision, Inc*., 66 Comp. Gen. 90 (B-223613), 86-2 CPD ¶ 543, *recons. denied*, 87-1 CPD ¶ 464 (failure to plan ahead precluded agency from evaluating protester's alternate product and resulted in sole source procurement); *Laidlaw Envtl. Servs. (GS) Inc*., Comp. Gen. Dec. B-249452, 92-2 CPD ¶ 366 (failure to plan led to sole source extension of contract); and *Techno-Sciences, Inc*., Comp. Gen. Dec. B-257686, 94-2 CPD ¶ 164 (failure to draft specification in a timely manner led to sole source award).

Where award has not been made, the GAO may recommend cancellation of the procurement, *TeQcom, Inc*., Comp. Gen. Dec. B-224664, 86-2 CPD ¶ 700. There, failure to plan ahead effectively deprived offerors of any opportunity to qualify their products so that they could compete with the brand-name manufacturer. However, the

GAO indicated that the agency could proceed on a sole source basis only for those quantities for which it had an urgent and compelling need.

Cases finding a lack of advance planning include *eFedBudget Corp*., Comp. Gen. Dec. B-298627, 2006 CPD ¶ 159 (agency took no steps to end its reliance on the contractor's existing software systems); *VSA Corp*., Comp. Gen. Dec. B-290452.3, 2005 CPD ¶ 103 (agency's predicament caused by its failure to consider meeting its requirement from any firm other than the incumbent and exacerbated by the fact that incumbent contract expired in May 2001 and had been extended on a sole source basis for four years); *HEROS, Inc*., Comp. Gen. Dec. B-292043, 2003 CPD ¶ 111 (agency abandoned the updating of a manual considered critical to the agency's ability to conduct full and open competition for engine overhauls more than ten years prior to the earliest retirement date); *Signal & Sys., Inc*., Comp. Gen. Dec. B-288107, 2001 CPD ¶ 168 (despite knowing of safety concerns with a vehicle control system that would have to be replaced, the agency took nearly two years to draft performance specifications that it intended to use to conduct a competitive procurement); *TLC Servs., Inc*., Comp. Gen. Dec. B-252614, 93-1 CPD ¶ 481 (agency failed to draft necessary statement of work because of personnel vacancies, inexperienced staff, and high backlog of work); *K-Whit Tools, Inc*., Comp. Gen. Dec. B-247081, 92-1 CPD ¶ 382 (agency took 10 months to determine requirements when it knew that the items were required by a fixed deadline); *Service Contractors*, Comp. Gen. Dec. B-243236, 91-2 CPD ¶ 49 (procurement process for ongoing services commenced six months after expiration of prior contract); and *Pacific Sky Supply, Inc*., 66 Comp. Gen. 370 (B-225513), 87-1 CPD ¶ 358 (nine-week delay in processing paperwork on qualification requirement deprived protester of a reasonable opportunity to compete). In *WorldWide Language Resources, Inc*., Comp. Gen. Dec. B-296984, 2005 CPD ¶ 206, the GAO sustained a protest finding the agency made an obvious error that constituted a lack of advance planning by attempting to place the requirement under an environmental services contract, which, on its face, did not include within its scope the bilingual-bicultural advisor requirement. In *New Breed Leasing Corp*., Comp. Gen. Dec. B-274201, 96-2 CPD ¶ 202, the GAO sustained a protest, finding that had the agency engaged in reasonable advance planning, it would not have taken more than a year after the solicitations were issued to realize that the solicitations were fundamentally flawed in failing to contain basic information. Similarly, in *Commercial Drapery Contractors, Inc*., Comp. Gen. Dec. B-271222, 96-1 CPD ¶ 290, an agency sought to justify its issuance of purchase orders to a Multiple Award Federal Supply Schedule contractor at higher prices than those offered by other Federal Supply Schedule contractors by arguing that it urgently needed the supplies and only the selected contractor could meet the delivery time. The GAO sustained the

protest, finding that the urgency resulted from delays caused by the agency's prior improper issuance of purchase orders to the same contractor for the same requirement and the subsequent cancellation of those orders in response to clearly meritorious protests.

In deciding protests, both the GAO and Court of Federal Claims have applied a reasonable efforts test when reviewing advance planning efforts. Thus, advance planning need not be entirely error-free or actually successful for an agency to successfully defend a protest, *L-3 Communications Eotech, Inc. v. United States*, 87 Fed. Cl. 656 (2009); *Infrastructure Def. Techs., LLC v. United States*, 81 Fed. Cl. 375 (2008); *Cubic Def. Sys., Inc. v. United States*, 45 Fed. Cl. 239 (1999); *Sprint Communications Co., L.P.*, Comp. Gen. Dec. B-262003.2, 96-1 CPD ¶ 24. See *Honeycomb Co. of Am.*, Comp. Gen. Dec. B-225685, 87-1 CPD ¶ 579, where the agency made a reasonable but unsuccessful effort to obtain competition. The GAO distinguished such a case from those where there was an absence of advance planning. In *Rex Sys., Inc.*, Comp. Gen. Dec. B-239524, 90-2 CPD ¶ 185, the agency's continued negotiations with a failing contractor placed it in a position of urgency requiring a sole source award. Although the GAO, in hindsight, indicated that it might disagree with how long the negotiations were allowed to continue, it was unable to conclude that such actions were unreasonable. The GAO found that the efforts sought to establish the failing contractor as an alternate source and were therefore related to procurement planning and fostering competition. The fact that the eff orts were unsuccessful did not constitute a lack of planning. The same reasoning was used to deny a protest in *Polar Power, Inc.*, Comp. Gen. Dec. B-270536, 96-1 CPD ¶ 157. See also *Datacom, Inc.*, Comp. Gen. Dec. B-274175, 96-2 CPD ¶ 199, rejecting the protester's claim that the urgency necessitating a noncompetitive sole-source award and contract modification resulted from the lack of advance planning. In that case the decision on how to conduct the procurement was the subject of significant congressional action. The GAO would not fault the Air Force for failure to compete its procurement in the face of a congressional report directing the agency to go no further in its effort to hold a competition of any kind.

B. Market Research

Market research is an integral element of the acquisition planning process. Acquisitions begin with a description of the government's needs stated in terms sufficient to allow conduct of market research, FAR 10.002. It is defined in FAR 2.101:

"Market Research" means collecting and analyzing information about capabilities within the market to

satisfy agency needs.

Increased emphasis on market research began in the early 1980s. In hearings before the Senate Armed Services Committee, the GAO stated that the failure to perform market research was a "major processing deficiency." Many witnesses testified that the failure to perform market research was one of the key factors responsible for the absence of competition in government procurement, Competition in Contracting Act of 1983: Hearings on S. 338 Before the Committee on Armed Services, United States Senate, 98th Cong., 1st Sess. (1983). The Senate Report on the CICA stated: "Competition in contracting depends on the procuring agency's understanding of the marketplace …. [M]arket research is essential to developing this understanding," S. Rep. No. 50, 98th Cong., 2d Sess. (1984).

1. Requirement for Market Research

As a result of the Congressional concern about the inadequacy of market research, CICA included a general requirement for market research in 10 U.S.C. § 2305(a)(1)(A) and 41 U.S.C. § 253a(a)(1). The Federal Acquisition Streamlining Act of 1994 (FASA) added new, more specific provisions at 10 U.S.C. § 2377(c) and 41 U.S.C. § 264b(c). These statutory provisions are prescribed in FAR Part 10. FAR 10.001 states the policy that agencies must:

(1) Ensure that legitimate needs are identified and trade-offs evaluated to acquire items that meet those needs;

(2) Conduct market research appropriate to the circumstances —

(i) Before developing new requirements documents for an acquisition by that agency;

(ii) Before soliciting offers for acquisitions with an estimated value in excess of the simplified acquisition threshold;

(iii) Before soliciting offers for acquisitions with an estimated value less than the simplified acquisition threshold when adequate information is not available and the circumstances justify its cost;

(iv) Before soliciting offers for acquisitions that could lead to a bundled contract (15 U.S.C. 644(e)(2)(A)).

(v) Agencies shall conduct market research on an ongoing basis, and take advantage to the maximum extent practicable of commercially available market research methods, to identify effectively the capabilities, including the capabilities of small businesses and new entrants into Federal contracting, that are available in the marketplace for meeting the requirements of the agency in furtherance of a contingency operation or defense against or recovery from nuclear, biological, chemical, or radiological attack; and

(3) Use the results of market research to —

(i) Determine if sources capable of satisfying the agency's requirements exist;

(ii) Determine if commercial items or, to the extent commercial items suitable to meet the agency's needs are not available, nondevelopmental items are available that —

(A) Meet the agency's requirements;

(B) Could be modified to meet the agency's requirements; or

(C) Could meet the agency's requirements if those requirements were modified to a reasonable extent;

(iii) Determine the extent to which commercial items or nondevelopmental items could be incorporated at the component level;

(iv) Determine the practices of firms engaged in producing, distributing, and supporting commercial items, such as type of contract, terms for warranties, buyer financing, maintenance and packaging, and marking;

(v) Ensure maximum practicable use of recovered materials (see Subpart 23.4) and promote energy conservation and efficiency; and

(vi) Determine whether bundling is necessary and justified (see 7.107) (15 U.S.C. 644(e)(2)(A)).

(vii) Assess the availability of electronic and information technology that meets all or part of the applicable accessibility standards issued by the Architectural and Transportation Barriers Compliance Board at 36 CFR Part 1194 (see Subpart 39.2).

FAR 10.002(a) provides that the government's need should be stated in "terms sufficient to allow conduct of market research." Once the need is sufficiently stated, market research is conducted to determine if commercial items or nondevelopmental items are available to meet the government's needs or could be modified to meet the government's needs, FAR 10.002(b). Market research is also used to ensure that full and open competition will be obtained by determining if additional or more competent sources are available to perform the work.

One of the basic goals of market research is to obtain competition. See *Coulter Corp.; Nova Biomedical; Ciba Corning Diagnostics Corp*., Comp. Gen. Dec. B-258713, 95-1 CPD ¶ 70. When other than full and open competition procedures are used, FAR 6.303-2(a)(8) requires that justifications describe the market research conducted or the reasons why it was not conducted. The GAO has held that an agency's reason for not conducting a market survey was adequate where it had supported the fact that a directed source was designated pursuant to an international agreement, *PacOrd*, Comp. Gen. Dec. B-238366, 90-1 CPD ¶ 466. The GAO also upheld an agency's decision not to conduct a market survey where the agency stated that it had recently determined that there was only one domestic source for a product, *Lister Bolt & Chain,*

Ltd., Comp. Gen. Dec. B-224473, 86-2 CPD ¶ 305.

2. Extent and Nature of Market Research

The extent and nature of market research conducted varies depending on such factors as urgency, estimated dollar value, complexity, and past performance, FAR 10.002(b)(1). FAR 10.002(b)(2) describes the various techniques that may be used to conduct market research:

> (i) Contacting knowledgeable individuals in Government and industry regarding market capabilities to meet requirements.
>
> (ii) Reviewing the results of recent market research undertaken to meet similar or identical requirements.
>
> (iii) Publishing formal requests for information in appropriate technical or scientific journals or business publications.
>
> (iv) Querying the Governmentwide database of contracts and other procurement instruments intended for use by multiple agencies available at www.contractdirectory.gov and other Government and commercial databases that provide information relevant to agency acquisitions.
>
> (v) Participating in interactive, on-line communication among industry, acquisition personnel, and customers.
>
> (vi) Obtaining source lists of similar items from other contracting activities or agencies, trade associations or other sources.
>
> (vii) Reviewing catalogs and other generally available product literature published by manufacturers, distributors, and dealers or available on-line.
>
> (viii) Conducting interchange meetings or holding presolicitation conferences to involve potential offerors early in the acquisition process.

See *McKesson Automation Systems, Inc*., Comp. Gen. Dec. B-290969.2, 2003 CPD ¶ 24, where the GAO found market research to be adequate where the agency had reviewed an extensive independent report comparing various firm's systems approaches, held numerous meetings with the firms to obtain additional information, had site visits to inspect various systems, and made comparisons of the various features of each firms' systems.

3. Effect of Inadequate Market Research

Inadequate market research can be a fatal defect in the procurement process if there are sources available to meet the agency's needs that were not discovered. In *Rochester Optical Mfg, Co*., Comp. Gen. Dec. B-292247, 2003 CPD ¶ 138, the GAO sustained a

protest on the basis that the market research was materially deficient. The contracting officer's market research was geographically limited for no legitimate reason and she used inaccurate information for the basis of her research. The GAO found that the market research could not be relied upon in determining not to conduct the procurement as a small business set-aside. Similarly, in *SWR, Inc*., Comp. Gen. Dec. B-294266, 2004 CPD ¶ 219, the GAO sustained a protest challenging an agency decision not to set aside a procurement for HUBZone small businesses for aircraft washing machines for three Marine Corps Air Stations. The contracting officer's basis for not setting aside the procurement for HUBZone concerns was because Pro-Net research did not identify any HUBZone concerns. However, more than a month prior to the issuance of the RFP the agency learned that the Charleston Air Force Base RFP for similar aircraft washing services was a HUBZone set-aside, not a 100% small business set-aside as the contracting specialist had mistakenly believed. The agency also learned of the existence of more than two HUBZone firms that were interested in the procurement. The GAO found that the agency's continued reliance on the contracting officer's Pro-Net research even after obtaining information that cast serous doubt on the validity of the research was unreasonable.

Market research may be found to be inadequate if available sources of information are not utilized. In *Information Ventures, Inc*., Comp. Gen. Dec. B-294267, 2004 CPD ¶ 205, the GAO sustained a protest on the basis that the market research was unreasonably limited. Although the contracting officer searched the GSA Advantage database, she did not search the Central Contractor Registration database or SBA's PRO-Net, nor did she obtain input from the small business representative.

4. Relationship of Specifications to Market Research

The CICA statutory provisions requiring market research could be read to imply that specifications should not be drafted until the agency had conducted market research to identify the market conditions that would permit full and open competition. However, such a procedure was not in accord with the traditional practice of having the technical offices of the procuring agency draft the specifications prior to the commencement of the procurement based on their conception of the needs of the agency. It is doubtful that this somewhat vague statutory language altered this traditional practice in many agencies. Congress provided a far clearer statement of the policy in the commercial item provisions of the FASA requiring that market research be conducted "before developing new specifications," 10 U.S.C. § 2377(c) and 41 U.S.C. § 264(c). This statutory

requirement is stated in FAR 10.001(a)(2)(i) requiring that market research be conducted before "developing new requirements documents." However, there is no clear statement of this policy in FAR Part 11, which enunciates the policy on preparing specifications to be used in the acquisition process. FAR 11.002(a)(1) merely states that agencies are required to specify their needs "using market research." In spite of this lack of clarity in the FAR, there should be no doubt that agencies should follow policies that require a thorough review of market conditions before new specifications are drafted. In some instances agencies may be able to prepare a new specification after a single exploration of market conditions to determine what products or services are available in the marketplace. However, the relationship between market research and specification drafting is more often an iterative process.

In some cases the agency's clear understanding of its needs and knowledge of the market may be such as to enable the preparation of a draft specification prior to discussions with potential offerors, and the market survey would consist of circulating the draft specification for comment. In other cases the market survey may be necessary to enable the agency to state its needs. This is particularly so when an agency is procuring a product or service not previously purchased — when it is imperative to determine whether there is market availability to meet, wholly or partially, the agency's needs. Whatever procedure is found to be most productive, it appears to be clear that the policy is that agencies should not finalize contract specifications until there has been thorough consultation with as many potential contractors as possible.

C. Policy Favoring Commercial Items and Nondevelopmental Products or Services

The initial consideration in the acquisition planning process is the determination of whether there are commercial items that will meet the government need. This determination is required by the statutory provisions added by FASA that clearly stated a preference for the acquisition of commercial products and services. See 10 U.S.C. § 2377 and 41 U.S.C. § 264b. This policy is implemented in FAR 12.101, which states:

> Agencies shall —
>
> (a) Conduct market research to determine whether commercial items or nondevelopmental items are available that could meet the agency's requirements;
>
> (b) Acquire commercial items or nondevelopmental items when they are available to meet the needs of the agency; and
>
> (c) Require prime contractors and subcontractors at all tiers to incorporate, to the maximum extent

practicable, commercial items or nondevelopmental items as components of items supplied to the agency.

FAR 7.102(a) carries this requirement into the planning process by stating that acquisition planning must "promote and provide for" the acquisition of commercial items or, if commercial items are not available, nondevelopmental items "to the maximum extent practicable."

1. Definitions

The definitions of "commercial item" and "nondevelopmental item" are so broad that they can be interpreted to include almost all of the products and services procured by the government. "Commercial item," as defined in 41 U.S.C. § 403(12) and FAR 2.101, includes both commercial supplies and commercial services. However, supplies and services are given different treatment, with the definition of commercial supplies being broader than the definition of commercial services. The terminology is further complicated by the fact that when used alone, "item" most often refers to supplies only.

In addition, nondevelopmental items and commercially available off-the-shelf items are distinct subcategories of supplies. For guidance on strategies for acquiring commercial items, see Office of Defense Acquisition, Technology, and Logistics, Commercial Item Handbook (Draft Version 2.0, 2009).

a. Commercial Supplies

The following general definition of commercial supplies is contained in 41 U.S.C. § 403(12) and repeated verbatim in FAR 2.101:

> (a) Any item, other than real property, that is of a type customarily used for nongovernmental purposes and that —
>
> (1) Has been sold, leased, or licensed to the general public; or,
>
> (2) Has been offered for sale, lease, or license to the general public;
>
> (b) Any item that evolved from an item described in paragraph (a) of this definition through advances in technology or performance and that is not yet available in the commercial marketplace, but will be available in the commercial marketplace in time to satisfy the delivery requirements under a Government solicitation;
>
> (c) Any item that would satisfy a criterion expressed in paragraphs (a) or (b) of this definition, but for —
>
> (1) Modifications of a type customarily available in the commercial market place; or
>
> (2) Minor modifications of a type not customarily available in the commercial marketplace made to

> meet Federal Government requirements. "Minor" modifications means modifications that do not significantly alter the nongovernmental function or essential physical characteristics of an item or component, or change the purpose of a process. Factors to be considered in determining whether a modification is minor include the value and size of the modification and the comparative value and size of the final product. Dollar values and percentages may be used as guideposts, but are not conclusive evidence that a modification is minor;
>
> (d) Any combination of items meeting the requirements of paragraphs (a), (b), (c), or (e) of this definition that are of a type customarily combined and sold in combination to the general public;

This exceedingly broad definition of commercial supplies includes a wide variety of products, as long as they meet the key test of being "of a type customarily used for nongovernmental purposes." Thus, the government can be the first purchaser of such an item even though it is not being sold commercially at the time of the procurement. Furthermore, the item being acquired need not be the same as items sold commercially — as long as it is the same class or "type" as items sold commercially. The definition also includes modified products as long as they are of the type customarily available in the marketplace or the modifications are minor. See *Electronic Vision Access Solutions*, Comp. Gen. Dec. B-401473, 2009 CPD ¶ 169 (Braille display system is commercially available even though it is not in current production or currently being sold to the general public); and *Precision Lift, Inc*., Comp. Gen. Dec. B-310540.4, 2008 CPD ¶ 166 (Helicopter platforms were commercial, non-developmental items where item was previously offered for sale to the general public, although none had been sold). In a post-award protest filed at the Court of Federal Claims, *Precision Lift, Inc. v. United States*, 83 Fed. Cl. 661 (2008), Precision Lift sought to enjoin performance, arguing that the term "offer" in the FAR definition of "commercial item" should be considered synonymous with the contractual term "offer." The court disagreed, finding this to be a very narrow reading of the FAR. The court found the platforms had been offered for sale to the general public through various advertising and marketing efforts.

Determining whether a product is a commercial item is largely within the discretion of the contracting agency, and will not be disturbed by the GAO unless it is shown to be unreasonable. See *Aalco Forwarding, Inc*., Comp. Gen. Dec. B-277241, 97-2 CPD ¶ 110 (agency properly determined that services could be acquired as commercial item under FAR part 12 procedures notwithstanding inclusion of government-unique requirements in solicitation); *Premier Eng'g & Mfg., Inc*., Comp. Gen. Dec. B-283028, 99-2 CPD ¶ 65 (determination as to whether modifications to a commercial item are minor are within the agency's technical judgment that will be disturbed only where unreasonable). In *Nabco, Inc*., Comp. Gen. Dec. B-293027, 2004 CPD ¶ 14, the GAO held that a door modification to an explosive ordnance disposal total containment vehicle was a minor modification that did not significantly alter the

nongovernmental function or essential purpose of the vehicle. The vehicle had been sold commercially and the change in the door configuration, modifying it from a "slide out" to a "swing out" style to meet the Air Force requirements, was already available to commercial customers on other containment vessels. Similarly, in *GIBBCO LLC*, Comp. Gen. Dec. B-401890, 2009 CPD ¶ 255, modifications to commercial housing units to satisfy air quality standards were minor and did not alter the commercial nature, nongovernmental functions, or essential physical characteristics of the units. See also *Canberra Indus., Inc*., Comp. Gen. Dec. B-271016, 96-1 CPD ¶ 269 (solicited item within FAR definition of commercial item where regularly sold to public and modification does not alter item's function or physical characteristics).

b. Nondevelopmental Items

Nondevelopmental items are covered by the statutes and regulations in two different ways. First, they are considered to be commercial items if they meet the following requirements contained in 41 U.S.C. § 403(12)(h) and FAR 2.101:

(8) A nondevelopmental item, if the procuring agency determines the item was developed exclusively at private expense and sold in substantial quantities, on a competitive basis, to multiple State and local governments.

A broader definition of the term "nondevelopmental item" is contained in 41 U.S.C. § 403(13), which does not necessarily include commercial items. This definition, with minor modifications, is set forth in FAR 2.101 as follows:

> (1) Any previously developed item of supply used exclusively for governmental purposes by a Federal agency, a State or local government, or a foreign government with which the United States has a mutual defense cooperation agreement;
>
> (2) Any item of supply described in paragraph (1) of this definition that requires only minor modification or modifications of a type customarily available in the commercial marketplace in order to meet the requirements of the procuring department or agency; or
>
> (3) Any item of supply being produced that does not meet the requirements of paragraph (1) or (2) solely because the item is not yet in use.

Care must be exercised in using these two definitions because some of the policies discussed in this section apply only to commercial items, while other policies apply as well to nondevelopmental items (as defined in the broader sense). If a solicitation permits proposals for either commercial items or nondevelopmental items, the second definition will be used and minor modifications will be acceptable, *Tremble*

Navigation, Ltd., Comp. Gen. Dec. B-271882, 96-2 CPD ¶ 102 (award on the basis of a proposed nondevelopmental item improper because modifications were major).

c. Commercially Available Off-the-Shelf (COTS) Items

This following definition is contained in 41 U.S.C. § 431(c) and incorporated into FAR 2.101:

> (1) Means any item of supply (including construction material) that is —
>
> (i) A commercial item (as defined in paragraph (1) of the definition in this section);
>
> (ii) Sold in substantial quantities in the commercial marketplace; and
>
> (iii) Offered to the Government, under a contract or subcontract at any tier, without modification, in the same form in which it is sold in the commercial marketplace; and
>
> (2) Does not include bulk cargo, as defined in section 3 of the Shipping Act of 1984 (46 U.S.C. App. 1702), such as agricultural products and petroleum products.

To meet the COTS definition, the item must be offered to the government without modification, in the same form in which it is sold in the commercial marketplace. See *Cerner Corp.*, Comp. Gen. Dec. B-293093, 2004 CPD ¶ 34 (met COTS requirement where enterprise-wide scheduling and registration system currently used in healthcare environments). But see *Chant Eng'g Co.*, Comp. Gen. Dec. B-281521, 99-1 CPD ¶ 45 (new equipment like Chant's proposed test station, which may become commercially available as a result of the instant procurement, does not satisfy the RFP COTS requirement).

d. Commercial Services

The statute and the FAR include two types of services within the definition of commercial items.

(1) Services In Support Of A Commercial Item

The first type is described in 41 U.S.C. § 403(12) and repeated verbatim in FAR 2.101:

> (5) Installation services, maintenance services, repair services, training services, and other services if —

(i) Such services are procured for support of an item referred to in paragraph (1), (2), (3), or (4) of this definition, regardless of whether such services are provided by the same source or at the same time as the item; and

(ii) The source of such services provides similar services contemporaneously to the general public under terms and conditions similar to those offered to the Federal Government.

These services are ancillary to commercial supplies but need not be procured at the same time or from the same supplier that provided the commercial supplies. The key requirement is that they be offered to the general public using the same workforce as will be used in providing the services to the government.

(2) Stand-Along Services

The second type of commercial services are stand-alone services, defined in FAR 2.101 as follows:

(6) Services of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed or specific outcomes to be achieved and under standard commercial terms and conditions. For purposes of these services —

(i) Catalog price means a price included in a catalog, price list, schedule, or other form that is regularly maintained by the manufacturer or vendor, is either published or otherwise available for inspection by customers, and states prices at which sales are currently, or were last, made to a significant number of buyers constituting the general public; and

(ii) Market prices means current prices that are established in the course of ordinary trade between buyers and sellers free to bargain and that can be substantiated independent of the offerors.

The most difficult aspect of this definition is determining whether services have been sold "based on established … market prices." In many instances, services such as janitorial services or construction services are sold commercially by obtaining competitive prices against a specification calling for such services related to a specific building or project. Prices obtained in this way can be readily construed as "established market prices" because they were obtained in a highly competitive market. The following guidance in Appendix C of the DOD *Commercial Item Handbook* can be read to adopt this concept:

The … stand-alone definition does not preclude the inclusion of Government-unique requirements or terms and conditions, as long as there are sufficient "common characteristics" between the commercially available service and the service being acquired. Warehousing, garbage collection, and transportation of household goods are examples of services that are commercial. Other more sophisticated services (e.g., repair and overhaul work, research-related services, software design, testing, and engineering consultation) can also be commercial.

In order to meet the commercial item definition, the price for the stand-alone services must be "based on

established catalog or market prices." The established market price for stand-alone services does not have to be published or written. Market research enables the Government to collect data from independent sources in order to substantiate the market price.

In contrast, the OFPP memorandum "Applicability of FAR Part 12 to Construction Acquisition" (July 3, 2003), states that construction should not be procured using the commercial item rule. The reason give for this policy is not that construction does not meet the commercial services definition but that contract clauses have not been drafted to permit the use of the rule for construction contracts. See also *Voith Hydro, Inc*., Comp. Gen. Dec. B-401244.2, 2009 CPD ¶ 239, agreeing with an agency decision not to procure construction-type services as a commercial item procurement.

Agencies have considerable discretion to determine that work meets the definition of stand-alone commercial services. See *SHABA Contracting*, Comp. Gen. Dec. B-287430, 2001 CPD ¶ 105, rejecting a protest of an agency determination that tree thinning was a commercial service, stating:

> Determining whether a particular service is a commercial item is a determination largely within the agency's discretion, which will not be disturbed by our office, unless it is shown to be unreasonable, *Crescent Helicopters*, B-284706 *et. al*., May 30, 2000, 2000 CPD ¶ 90 at 2. Agencies are required to conduct market research pursuant to FAR part 10 to determine whether commercial items are available that could meet the agency's requirements. FAR 12.101(a). If through market research the agency determines that the government's needs can be met by an item customarily available in the commercial marketplace that meets the FAR 2.101 definition of a commercial item, the agency is required to use the procedures in FAR part 12 to solicit and award any resultant contract. FAR 10.002(d)(1), 12.102(a).

Here, the record shows that the Forest Service concluded, based upon an informal market survey, that these tree thinning services qualify as a commercial item because the services are not unique, are not used exclusively by the government, and are offered and sold competitively by forestry and nursery firms. For example, the Forest Service reports that there were more than 150 potential offerors on the mailing list for the services, that the local telephone book contained numerous sources for tree thinning services, and that the agency has personal knowledge of several commercial companies engaged in various types of tree services.

e. Combinations and Interorganizational Transfers

The statute and FAR 2.101 permit combinations of supplies and ancillary services in support of commercial supplies:

> (4) Any combination of items meeting the requirements of paragraphs (1), (2), (3), or (5) of this definition

that are of a type customarily combined and sold in combination to the general public.

The statute and FAR 2.101 permit transfers between organizations with a contractor to be treated as commercial items:

> (7) Any item, combination of items, or service referred to in paragraphs (1) through (6) of this definition, notwithstanding the fact that the item, combination of items, or service is transferred between or among separate divisions, subsidiaries, or affiliates of a contractor.

f. Key Terms

The statutory and regulatory definitions of commercial items use a number of key terms that are not defined. The following definitions of these terms and related terms had been incorporated into FAR 15.804-3 but were removed from the FAR by Federal Acquisition Circular (FAC) 90-32, September 18, 1995.

"General public" is used in many parts of the statutory definition. The previous FAR definition stated:

> The "general public" is a significant number of buyers other than the Government or affiliates of the offeror; the item involved must not be for Government end use. For the purpose of this subsection 15.804-3, items acquired for "Government end use" include items acquired for foreign military sales.

The phrase "sold in substantial quantities" is applicable only to stand-alone services, nondevelopmental items, and commercially off-the-shelf supplies. The previous FAR definition stated:

> An item is "sold in substantial quantities" only when the quantities regularly sold are sufficient to constitute a real commercial market. Nominal quantities, such as models, samples, prototypes, or experimental units, do not meet this requirement. For services to be sold in substantial quantities, they must be customarily provided by the offeror, using personnel regularly employed and equipment (if any is necessary) regularly maintained solely or principally to provide the services.

2. Maximizing the Procurement of Commercial Items

The statutory goal is to use procurement procedures that "reduce any impediments … to the acquisition of commercial items," 10 U.S.C. § 2377(b)(5) and 41 U.S.C. § 264(b)(5). Such impediments should be identified by the contracting officer in the course of performing the required market research to determine the availability of commercial items as discussed earlier. See FAR 12.202. In general, it can be expected that the major impediments will be excessive requirements for proposal information and

the use of terms and conditions in the contract that impose noncommercial requirements. Based on an understanding of the impact of such requirements on the government's ability to attract offers from commercial sellers, the procurement should be structured to minimize the affect of such impediments by streamlining the source selection process and minimizing the terms and conditions used in the contract. The procedural guidance discussed in this section contains sufficient flexibility to permit contracting with commercial sources in most situations.

a. Streamlining the Procurement

When it is determined that the work being procured falls within the definition of commercial item and does not exceed $6.5 million ($12 million for certain commercial items described in FAR 13.500(e)), the agency should plan to use streamlined procurement procedures. FAR 12.203 states:

> Contracting officers shall use the policies unique to the acquisition of commercial items prescribed in this part in conjunction with the policies and procedures for solicitation, evaluation and award prescribed in Part 13, Simplified Acquisition Procedures; Part 14, Sealed Bidding; or Part 15, Contracting by Negotiation, as appropriate for the particular acquisition. The contracting officer may use the streamlined procedure for soliciting offers for commercial items prescribed in 12.603. For acquisitions of commercial items exceeding the simplified acquisition threshold but not exceeding $6.5 million ($12 million for acquisitions as described in 13.500(e)), including options, contracting activities shall employ the simplified procedures authorized by Subpart 13.5 to the maximum extent practicable.

This gives the contracting officer complete freedom in selecting any existing procurement procedure. However, because the goal is to attract commercial sellers, it would be expected that the use of procedures described in Parts 14 and 15 would be minimized.

Unless the streamlined procedure of FAR 12.603 is used, the contracting officer must use Standard Form 1449, Solicitation/Contract/Order for Commercial Items, when issuing written solicitations and awarding contracts and placing orders for commercial items. This form may also be used for documenting receipt, inspection, and acceptance of commercial items, FAR 12.204.

FAR 12.202(b) requires that the government's needs be described in "sufficient detail for potential offerors of commercial items to know which commercial products or services to offer." In *National Aeronautics & Space Admin.*, Comp. Gen. Dec. B-274748.3, 97-1 CPD ¶ 159, the GAO held that, although the use of functional or performance specifications is appropriate, the agency must advise offerors of its specific ideas of what features would satisfy its needs. Generally, it is desirable to

permit suppliers to submit commercial product literature instead of specially written technical proposals. FAR 12.205 provides the following guidance:

> (a) Where technical information is necessary for evaluation of offers, agencies should, as part of market research, review existing product literature generally available in the industry to determine its adequacy for purposes of evaluation. If adequate, contracting officers shall request existing product literature from offerors of commercial items in lieu of unique technical proposals.

FAR 12.205 also suggests that commercial sellers be permitted to propose on more than one product:

> (b) Contracting officers should allow offerors to propose more than one product that will meet a Government need in response to solicitations for commercial items. The contracting officer shall evaluate each product as a separate offer.

FAR 12.205(c) permits the contracting officer to tailor the response time for the submission of the offer to meet the needs of the commercial marketplace. Thus, it permits response times of less than 30 days when appropriate.

FAR 12.301(b) provides two standard solicitation provisions, described as follows:

> (1) The provision at 52.212-1, Instructions to Offerors — Commercial Items. This provision provides a single, streamlined set of instructions to be used when soliciting offers for commercial items and is incorporated in the solicitation by reference (see Block 27a, SF 1449). The contracting officer may tailor these instructions or provide additional instructions tailored to the specific acquisition in accordance with 12.302.
>
> (2) The provision at 52.212-3, Offeror Representations and Certifications — Commercial Items. This provision provides a single, consolidated list of representations and certifications for the acquisition of commercial items and is attached to the solicitation for offerors to complete. This provision may not be tailored except in accordance with Subpart 1.4. Use the provision with its Alternate I in solicitations issued by DoD, NASA, or the Coast Guard. Use the provision with its Alternate II in solicitations for which small disadvantaged business procurement mechanisms are authorized on a regional basis.

The FAR also permits the use of a "streamlined" procedure combining the synopsis and solicitation into a single document with a response time no longer than is necessary to give potential offerors a reasonable opportunity to respond to the solicitation. This allows greatly shortening the statutory requirements for standard procurement that require a 15-day synopsis period and a 30-day offer period. See *American Artisan Prod.*, Comp. Gen. Dec. B-281409, 98-2 CPD ¶ 155 (contracting officer's decision to allow 15-day response time for commercial item acquisition reasonable based on prior experience with previous procurement) and *Gibbco LLC*, Comp. Gen. Dec. B-401890, 2009 CPD ¶ 255 (protester provided no information showing that the requirement for the submission of proposals within 22 days for this commercial item acquisition was

unreasonable). The guidance on the use of this fast procedure is set forth in FAR 12.603.

b. Terms and Conditions

In order to attract commercial sellers, commercial item procurements should be planned to use the least intrusive terms and conditions possible. The FAR guidance is aimed at minimizing the contract language and simplifying the contract. FAR 12.301(a) provides that contracts include only those clauses —

> (1) Required to implement provisions of law or executive orders applicable to the acquisition of commercial items; or
>
> (2) Determined to be consistent with customary commercial practice.

Traditionally, FAR Part 12 required that contracts for commercial items be either firm-fixed price or fixed-price with economic price adjustment. As of 2007, FAR 12.207(b) provides that time-and-materials contract or labor-hour contract may be used for the acquisition of commercial services when —

> (i) The service is acquired under a contract awarded using —
>
> > (A) Competitive procedures (e.g., the procedures in 6.102, the set-aside procedures in Subpart 19.5, or competition conducted in accordance with Part 13);
> >
> > (B) The procedures for other than full and open competition in 6.3 provided the agency receives offers that satisfy the Government's expressed requirement from two or more responsible offerors; or
> >
> > (C) The fair opportunity procedures in 16.505, if placing an order under a multiple award delivery-order contract; and
>
> (ii) The contracting officer —
>
> > (A) Executes a determination and findings (D&F) for the contract, in accordance with paragraph (b)(2) of this section (but see paragraph (c) of this section for indefinite-delivery contracts), that no other contract type authorized by this subpart is suitable;
> >
> > (B) Includes a ceiling price in the contract or order that the contractor exceeds at its own risk; and
> >
> > (C) Authorizes any subsequent change in the ceiling price only upon a determination, documented in the contract file, that it is in the best interest of the procuring agency to change the ceiling price.

FAR 12.207(b)(2) provides that before entering into a T&M or LH contract for commercial services, the contracting officer must execute a Determination and Finding (D&F), which contains sufficient facts and rationale to justify that no other contract type authorized by this subpart is suitable. At a minimum it should consist of —

(i) Include a description of the market research conducted (see 10.002(e));

(ii) Establish that it is not possible at the time of placing the contract or order to accurately estimate the extent or duration of the work or to anticipate costs with any reasonable degree of certainty;

(iii) Establish that the requirement has been structured to maximize the use of firm-fixed-price or fixed-price with economic price adjustment contracts (e.g., by limiting the value or length of the time-and-material/labor-hour contract or order; establishing fixed prices for portions of the requirement) on future acquisitions for the same or similar requirements; and

(iv) Describe actions planned to maximize the use of firm-fixed-price or fixed-price with economic price adjustment contracts on future acquisitions for the same requirements.

If the T&M/LH contract, with options, exceeds three years, the D&F must be approved by the head of the contracting activity. See FAR 12.207(b)(3) and FAR 16.601(d)(1)(ii).

One of the major elements of the policy favoring the procurement of commercial items was the elimination of as many contract clauses as was practicable. The FASA amended a number of laws to state that they did not apply to the procurement of commercial items and added 41 U.S.C. § 430 requiring the FAR to include a list of laws that were not applicable to contracts and subcontracts for commercial items. Subsequently, § 4203 of the Clinger-Cohen Act of 1996 enacted 41 U.S.C. § 431 requiring that the FAR list laws that are not applicable to the procurement of COTS items.

FAR 52.212-4 provides a standard contract clause, Contract Terms and Conditions — Commercial Items, which contains 20 specific provisions to be used in contracts for commercial items. These provisions are greatly shortened versions of the standard clauses used in government procurement, such as the termination clauses, the inspection clauses, the changes clause, and the disputes clause. The contracting officer is authorized to "tailor" certain of these provisions but only to reflect commercial practices, FAR 12.302. However, the following clauses, which implement statutory requirements, may not be tailored:

(1) Assignments;
(2) Disputes;
(3) Payment (except as provided in subpart 32.11);
(4) Invoice;
(5) Other compliances; and
(6) Compliance with laws unique to Government contracts.

Tailoring may be needed to attract some sellers of commercial products. FAR 12.213

contains the following guidance to contracting officers on the subject of tailoring:

> It is a common practice in the commercial marketplace for both the buyer and seller to propose terms and conditions written from their particular perspectives. The terms and conditions prescribed in this part seek to balance the interests of both the buyer and seller. These terms and conditions are generally appropriate for use in a wide range of acquisitions. However, market research may indicate other commercial practices that are appropriate for the acquisition of the particular item. These practices should be considered for incorporation into the solicitation and contract if the contracting officer determines them appropriate in concluding a business arrangement satisfactory to both parties and not otherwise precluded by law or Executive order.

FAR 52.212-5 provides a standard clause, Contract Terms and Conditions Required to Implement Statutes or Executive Orders — Commercial Items, that sets forth the mandatory clauses that must be included in these procurements. This clause may not be tailored. The contracting officer must check the appropriate provisions in this clause in accordance with the instructions in FAR 12.503. Paragraph (e) (1) of the clause specifies the extent to which flow down is required in subcontracts for commercial items. See the guidance in FAR 12.504, which lists some statutes that remain applicable even though they are not specified in the clause. Contractors should be aware that other statutes of general applicability in the United States are also not listed in this clause.

Being a subset of commercial items, any laws listed in FAR 12.503 and FAR 12.504 are also inapplicable to contracts or subcontracts for the acquisition of COTS items, FAR 12.505. In addition, FAR 12.505 implements § 4203 of the Clinger-Cohen Act of 1996 (41 U.S.C. § 431) with respect to the inapplicability of certain laws to contracts and subcontracts for the acquisition of COTS items. This provision is intended to reduce the burden on contractors that provide COTS EPA-designated products that contain recovered materials and contractors that provide construction material or end products that are COTS items manufactured in the United States.

D. Early Exchanges with Potential Offerors

Successful acquisition planning requires exchanges of information between the procuring agency and potential offerors to ensure that the agency fully understands the products and services that are available and that the potential offerors fully understand the need that the agency is attempting to fulfill with the proposed procurement. Such exchanges permit the procurement to be structured in the way that will promote the most effective competition among informed offerors. However, the adoption of the procurement integrity provisions in the Office of Procurement Policy Act of 1989, 41 U.S.C. § 423, applied significant restraints to such exchanges, with the result that many

agencies did not permit meaningful exchanges in the acquisition planning process. Two steps have been taken to correct this situation. First, the statutory procurement integrity provisions were substantially modified by the Clinger-Cohen Act of 1996, Pub. L. No. 104-106. Second, the rewrite of FAR Part 15 specifically addressed this problem and added a new provision encouraging exchanges for the purpose of improving procurements. FAR 15.201 now provides the following:

> Exchanges with industry before receipt of proposals.
>
> (a) Exchanges of information among all interested parties, from the earliest identification of a requirement through receipt of proposals, are encouraged. Any exchange of information must be consistent with procurement integrity requirements (see 3.104). Interested parties include potential offerors, end users, Government acquisition and supporting personnel, and others involved in the conduct or outcome of the acquisition.
>
> (b) The purpose of exchanging information is to improve the understanding of Government requirements and industry capabilities, thereby allowing potential offerors to judge whether or how they can satisfy the Government's requirements, and enhancing the Government's ability to obtain quality supplies and services, including construction, at reasonable prices, and increase efficiency in proposal preparation, proposal evaluation, negotiation, and contract award.
>
> (c) Agencies are encouraged to promote early exchanges of information about future acquisitions. An early exchange of information among industry and the program manager, contracting officer, and other participants in the acquisition process can identify and resolve concerns regarding the acquisition strategy, including proposed contract type, terms and conditions, and acquisition planning schedules; the feasibility of the requirement, including performance requirements, statements of work, and data requirements; the suitability of the proposal instructions and evaluation criteria, including the approach for assessing past performance information; the availability of reference documents; and any other industry concerns or questions. Some techniques to promote early exchanges of information are —
>
> (1) Industry or small business conferences;
>
> (2) Public hearings;
>
> (3) Market research, as described in part 10;
>
> (4) One-on-one meetings with potential offerors (any that are substantially involved with potential contract terms and conditions should include the contracting officer; also see paragraph (f) of this section regarding restrictions on disclosure of information);
>
> (5) Presolicitation notices;
>
> (6) Draft RFPs;
>
> (7) RFIs;
>
> (8) Presolicitation or preproposal conferences; and
>
> (9) Site visits.
>
> (d) The special notices of procurement matters at 5.205(c), or electronic notices, may be used to publicize the Government's requirement or solicit information from industry.

(e) RFIs may be used when the Government does not presently intend to award a contract, but wants to obtain price, delivery, other market information, or capabilities for planning purposes. Responses to these notices are not offers and cannot be accepted by the Government to form a binding contract. There is no required format for RFIs.

(f) General information about agency mission needs and future requirements may be disclosed at any time. After release of the solicitation, the contracting officer shall be the focal point of any exchange with potential offerors. When specific information about a proposed acquisition that would be necessary for the preparation of proposals is disclosed to one or more potential offerors, that information shall be made available to the public as soon as practicable, but no later than the next general release of information, in order to avoid creating an unfair competitive advantage. Information provided to a particular offeror in response to that of feror's request shall not be disclosed if doing so would reveal the potential offeror's confidential business strategy, and is protected under 3.104 or subpart 24.2. When conducting a presolicitation or preproposal conference, materials distributed at the conference should be made available to all potential offerors, upon request.

This guidance permits exchanges with industry by program and technical personnel as well as contracting officers. It also describes a broader range of communication techniques than was provided for in the prior regulation. Thus, it greatly enhances the ability of agencies to perform fully effective acquisition planning. See NIH Policy Manual, 6315-1 Initiation, Review, Evaluation, and Award of Research & Development (R&D) Contracts (2004):

NIH encourages exchanges of information among all interested parties, from the earliest identification of a requirement through receipt of proposals. Any exchange of information must be consistent with procurement integrity requirements (see FAR 3.104). An early exchange of information among industry and the program manager, contracting officer, and other participants in the acquisition process can identify and resolve concerns regarding the acquisition strategy, including:

-proposed contract type, terms and conditions, and acquisition planning schedules;

-the feasibility of the proposal instructions and evaluation criteria; including the approach for assessing past performance information;

-the availability of reference documents; and

-any other industry concerns or questions.

There are also statutory requirements for notification of potential offerors of proposed procurements before a solicitation is issued, 15 U.S.C. § 637(e) and 41 U.S.C. § 416(a). The primary vehicle used is a synopsis of the proposed procurement in the governmentwide point of entry (GPE) located at http://www.fedbizopps.gov. While these notice requirements provide only minimal times for potential offerors to provide information as to their capabilities to the agency, they are the only mandatory part of this exchange of information process.

This section discusses all the techniques that are available to agencies to obtain

full information for acquisition planning. Prior to the analysis of each technique, the current limitations imposed by the procurement integrity statute and its implementing regulations will be considered and the statutory synopsis requirement will be discussed.

1. *Types of Exchanges*

a. Solicitations for Planning Purposes

One technique for conducting market research is the use of solicitations for information or planning purposes. FAR 15.201(e) permits requests for information (RFIs) to be used in this manner as follows:

> RFIs may be used when the Government does not presently intend to award a contract, but wants to obtain price, delivery, other market information, or capabilities for planning purposes. Responses to these notices are not offers and cannot be accepted by the Government to form a binding contract. There is no required format for RFIs.

Some agencies require that solicitations for information or planning purposes may be used only when approved at a level above the contracting officer. See, for example, DEAR 915-201(e) (the head of contracting activity).

b. One-on-One Meetings

One-on-one meetings commonly known as "due diligence sessions" is a technique that promotes a fuller exchange of information with potential contractors during the acquisition planning process. FAR 15.201(c) provides:

> (4) One-on-one meetings with potential offerors (any that are substantially involved with potential contract terms and conditions should include the contracting officer; also see paragraph (f) of this section regarding restrictions on disclosure of information);

During due diligence, potential contractors have access to members of the acquisition team and program staff so that contractors may learn as much as possible about the agency's requirement.

The guidance on these meetings is contained in FAR 15.201(f) as follows:

> General information about agency mission needs and future requirements may be disclosed at any time. After release of the solicitation, the contracting officer must be the focal point of any exchange with potential offerors. When specific information about a proposed acquisition that would be necessary for the preparation of proposals is disclosed to one or more potential offerors, that information must be made available to the public as soon as practicable, but no later than the next general release of information, in

order to avoid creating an unfair competitive advantage. Information provided to a particular offeror in response to its request must not be disclosed if doing so would reveal the potential offeror's confidential business strategy, and is protected under 3.104 or subpart 24.2.

Although this guidance is somewhat confusing, a clear distinction should be made between meetings that take place before the issuance of an RFP and those that occur after its issuance. Before the issuance of the RFP, agency technical and program personnel are permitted to meet with potential offerors to exchange information regarding "mission needs and future requirements" as long as they do not provide information on the specifics of elements of a procurement. If specific information is to be provided, the contracting officer should be made part of the exchange and care must be exercised to ensure that other potential contractors are given the same information. Although not covered by this guidance, it appears clear that agency technical and program personnel can obtain information from potential contractors in the course of performing market research.

After the issuance of an RFP, far greater care must be exercised to avoid unfair treatment of offerors. In general, the best course of action is to limit exchanges to the receipt of inquiries from potential offerors. Answers to such inquiries can be given if the inquiry will not have an impact on any other potential offeror. If the answer will impact other offerors, it should be given to all offerors at the same time whenever possible. Agency personnel should not assume that the guidance in ¶ (f) above permits such answers to be given to other offerors at the time of the "next general release of information" unless it is clearly established that this will not give one offeror a competitive advantage.

c. Draft Solicitations and Specifications

Several agencies use draft solicitations or draft specifications as a means of improving their clarity when the procurement is complex or of a high dollar amount, AFARS 5115.201(c)(6)(i) (Draft RFPs may be used when there are concerns with the statement of work or specifications or when there are significant technical risks and cost drivers); NFS 1815.201 (draft RFPs mandatory for all competitive negotiated procurements over $10 million).

To be useful, a draft solicitation must be as complete as possible, and sufficient time should be allowed to permit prospective offerors to respond meaningfully, NAVSEA Source Selection Guide, Part 2 (January 24, 2001).

A draft solicitation should invite comment on all aspects of the solicitation. NASA's guidance is set forth in NFS 1815.201, which provides:

> DRFPs shall invite comments from potential offerors on all aspects of the draft solicitation, including the requirements, schedules, proposal instructions, and evaluation approaches. Potential offerors should be specifically requested to identify unnecessary or inefficient requirements. If the DRFP contains Government-unique standards, potential offerors should be invited to identify voluntary consensus standards that meet the Government's requirements as alternatives to Government-unique standards cited as requirements, in accordance with FAR 11.101 and OMB Circular A-119. Comments should also be requested on any perceived safety, occupational health, security (including information technology security), environmental, export control, and/or other programmatic risk issues associated with performance of the work. When considered appropriate, the statement of work or the specifications may be issued in advance of other solicitation sections.

When issuing draft solicitations or specifications, potential offerors should be advised that the draft solicitation or specification is not a solicitation and the agency is not requesting proposals.

When draft solicitations or specifications are circulated for comment, they should be sent to all prospective offerors, and an announcement of their availability should be published through fedbizopps, FAR 5.205(c). Sufficient time should be given to potential offerors to submit meaningful comments, and the agency should take steps to assure all submitters that their comments have been given full consideration.

d. Sources-Sought Synopsis

Another technique for identifying potential sources is the issuance of a sources sought synopsis in fedbizopps. FAR 5.205 states that contracting officers may transmit to the GPE advance notices of their interest in potential R&D programs whenever market research does not produce a sufficient number of concerns to obtain adequate competition. This provision further states that advance notices will enable potential sources to learn of R&D programs and provide these sources with an opportunity to submit information that will permit evaluation of their capabilities. Under the FAR, such advance notices are called "Research and Development Sources Sought." Although the FAR appears to limit this technique for identifying potential sources to research and development contracts, it has been used for all types of procurement.

If an agency uses a sources-sought synopsis, it must make its essential requirements clear to potential offerors and allow them an opportunity to demonstrate their ability to comply before rejecting them as potential sources. In *M.D. Thompson Consulting, LLC*, Comp. Gen. Dec. B-297616, 2006 CPD ¶ 41, the GAO sustained a protest finding that

the agency notice of intent to modify the contract to extend performance on a sole-source basis did not comply with the requirement for an accurate description of the services to be furnished. The agency had provided a bare-bones description of the requirement which was not sufficient to allow a prospective contractor to make an informed business judgment as to whether to request a copy of the solicitation. The GAO stated:

> By providing an inadequate description of its sole-source procurement in the synopsis, DOE restricted competition in violation of statute and regulation. Moreover, DOE compounded the shortcomings of this particular notice by providing no information on the availability of a statement of work and by stating in the synopsis that the notice "is for informational purposes only and is not a request for proposals or other information." Cf. 41 U.S.C. sect. 416(b)(4); 15 U.S.C. sect. 637(f); FAR sect. 5.207(c)(15). The protesters and the Small Business Administration (SBA) argue, and we agree, that the language of the synopsis discouraged, and may have been intended to discourage, responses.

Similarly, in *Information Ventures, Inc.*, Comp. Gen. Dec. B-293518, 2004 CPD ¶ 76, the GAO found that the synopsis did not accurately describe the agency's requirement, stating:

> [T]he notice, while not entirely clear, indicates a need for a contractor to "plan and convene a conference" (described later in the notice as involving over 4,000 participants), and to provide training for conference participants on the Get Connected Toolkit. However, the requisition, including the scope of work, dated November 20, 2003, which presumably served as the basis for the notice, provides a markedly different description of the work here. Specifically, the requisition shows that the agency actually wanted a contractor to provide a geriatrics specialist and a conference coordinator to prepare a one-day training course in using the Get Connected Toolkit. This training course was to be offered during the course of the American Society of Aging (ASA)/NCOA conference on April 14, 2004, and the agency anticipated providing training to up to 60 individuals. See AR, Tab D, Statement of Work at 2-10. In our view, the agency's actual requirements are significantly different than "planning and convening a conference" for 4,000 people, as the notice advised. In light of the misleading notice used here, Information Ventures, as well as other potential contractors, was denied any realistic opportunity to compete for the agency's requirements.

For other cases sustaining a protest on the grounds that the description of the requirement in the synopsis was inaccurate, see *Sabreliner Corp.*, Comp. Gen. Dec. B-288030, 2001 CPD ¶ 170 (synopsis was inaccurate in that the actual requirement was to upgrade the engines to a military configuration not a commercial configuration); *Pacific Sky Supply Co.*, Comp. Gen. Dec. B-225420, 87-1 CPD ¶ 206 (sole-source synopsis identified only 2 of 15 items included in the solicitation); and *Masstor Sys. Corp.*, 64 Comp. Gen. 118 (B-215046), 84-2 CPD ¶ 598 (agency rejected a potential source for failing to demonstrate compliance with a requirement that was neither set forth in the sources-sought synopsis nor otherwise made known to the vendor). The government should not, however, include proprietary information in the sources-sought synopsis. In *Research, Analysis & Dev., Inc. v. United States*, 8 Cl. Ct. 54 (1985), the plaintiff submitted an unsolicited proposal pertaining to a novel concept in state-of-the-art aircraft sensor technology. The proposal included the proper restrictive proprietary

legend. After having agreed to maintain the confidentiality of the information, the agency issued a sources-sought synopsis requesting responses regarding the feasibility of a sensor system concept identical to that proposed by the plaintiff. The court held that the disclosure in the Commerce Business Daily (now fedbizopps) of the proprietary information associated with the unsolicited proposal violated the government's implied-in-fact contractual obligation to protect the data and entitled the company to damages. See also *Totolo/King (J.V.) v. United States*, 87 Fed. Cl. 680 (2009) (disclosure of a bond estimate in the sources-sought synopsis would conflict with the government's right and legal obligation to keep a project estimate confidential).

The results of a sources-sought synopsis may bear on the GAO's review of an agency's reasonableness in choosing specifications. In *Motorola, Inc*., Comp. Gen. Dec. B-247913.2, 92-2 CPD ¶ 240, the protester challenged the agency's choice of procuring on a nondevelopmental item (NDI) basis. In concluding that the agency had a reasonable basis for its selection of NDI-only specifications, the GAO stated that through a sources-sought synopsis, the agency learned that there were offerors who would have an NDI available either by making minor modifications to existing items or by developing an item that would meet the agency's specifications and that such items would be available by the time the agency would award the contract. Thus, the GAO found that the agency had a sufficient basis to conclude that an NDI procurement was feasible.

Similarly, the results of a sources-sought synopsis may support the GAO's finding that an agency reasonably awarded on a sole-source basis. In *Polaris, Inc*., Comp. Gen. Dec. B-218008, 85-1 CPD ¶ 401, the GAO held that an agency had properly awarded a sole-source contract because it had made a significant effort to determine whether other firms could meet the agency's needs. The agency had issued a sources-sought synopsis and received responses from six potential offerors which indicated that none could meet all its requirements. The GAO stated that the agency had properly concluded that the protester could not meet it needs because it had merely restated the agency's requirements in its response. Similarly, the results of a sources-sought synopsis may support an agency's determination not to set aside a procurement. In *E.L. Enters*., Comp. Gen. Dec. B-271251.2, 96-2 CPD ¶ 29, the GAO upheld the agency's determination not to set aside a procurement, finding that the agency had made reasonable efforts to identify potential Indian concern offerors through a sources-sought synopsis. One firm responded to the synopsis, but the capability statement showed that the firm had limited corporate history and had never performed the services. The GAO will not consider a protest against a procuring agency issuing a potential sources-sought announcement. The GAO considers only protests against solicitations already issued by agencies and awards made or proposed to be made under those solicitations, *Pancor Corp.*, Comp.

Gen. Dec. B-234168, 89-1 CPD ¶ 328.

2. Disclosure Prohibitions

There are several sanctions on disclosing or obtaining information related to the procurement process. 18 U.S.C. § 1905 imposes criminal sanctions on any government employee that discloses trade secrets and other proprietary data obtained from any person or organization. The procurement integrity provisions of the Office of Procurement Policy Act of 1989, 41 U.S.C. § 423, as amended in 1996, prohibit any person from disclosing "contractor bid or proposal information" or "source selection information" before contract award, 41 U.S.C. § 423(a). There may also be improper conduct involved in obtaining information about a competitor.

a. Disclosure of Confidential Information

18 U.S.C. § 1905 provides:

> Whoever, being an officer or employee of the United States or of any department or agency thereof, any person acting on behalf of the Office of Federal Housing Enterprise Oversight, or agent of the Department of Justice as defined in the Antitrust Civil Process Act (15 U.S.C. 1311B1314), publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than $1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment.

The conviction of a government employee under 18 U.S.C. § 1905 for improper disclosure of information was affirmed in *United States v. Wallington*, 889 F.2d 573 (5th Cir. 1989) (Act not overly broad to constitute a valid criminal statute).

b. Disclosure of Bid or Proposal Information or Source Selection Information

The Procurement Integrity Act, 41 U.S.C. § 423(a) as amended by the Clinger-Cohen Act of 1996, prohibits a "person" from knowingly disclosing "contractor bid or proposal information" or "source selection information" before award of a contract.

The "persons" covered are defined in the Act, 41 U.S.C. § 423(a)(2), as any person who

> (A) is a present or former official of the United States, or a person who is acting or has acted for or on behalf of, or who is advising or has advised the United States with respect to, a Federal agency procurement; and
>
> (B) by virtue of that office, employment, or relationship has or had access to contractor bid or proposal information or source selection information.

The term "official" is defined in 41 U.S.C. § 423(f)(7) as (1) an officer as defined in 5 U.S.C. § 2104, (2) an employee as defined in 5 U.S.C. § 2105, and (3) a member of the uniformed forces as defined in 5 U.S.C. § 2101(3). FAR 3.104-1 adds to this the category of "special Government employees" as defined in 18 U.S.C. § 202.

The persons covered by the Act are those who have either "acted" or "advised" regarding a federal agency procurement and have obtained information through that contact with the procurement. Neither the statute nor the implementation of this part of the Act in FAR 3.104-3(a) contains any guidance on the meaning of "acted" or "advised," with the apparent effect that this rule applies to persons who have acted or advised no matter how small their contact with the procurement.

The Act applies only to a "federal agency procurement," which is defined in 41 U.S.C. § 423(f)(4) to mean only acquisitions using competitive procedures. This provision is implemented in FAR 3.104-3(a). However, FAR 3.104-4(a) contains a broader statement: "Except as specifically provided for in this subsection, no person or other entity may disclose contractor bid or proposal information or source selection information to any person other than a person authorized, in accordance with applicable agency regulations or procedures, by the agency head or the contracting officer to receive such information." This paragraph substantially broadens the scope of the Act by making it improper to disclose contractor bid or proposal information or source selection information on sole source procurements or contract modifications. It correctly reflects the fact that 18 U.S.C. § 1905 prohibits disclosure of proprietary information.

The term "contractor bid or proposal information," defined in 41 U.S.C. § 423(f)(1) and repeated verbatim in FAR 3.104-1:

> (1) Cost or pricing data (as defined by 10 U.S.C. 2306a(h)) with respect to procurements subject to that section, and section 304A(h) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 254b(h)), with respect to procurements subject to that section.
>
> (2) Indirect costs and direct labor rates.

(3) Proprietary information about manufacturing processes, operations, or techniques marked by the contractor in accordance with applicable law or regulation.

(4) Information marked by the contractor as "contractor bid or proposal information" in accordance with applicable law or regulation.

(5) Information marked in accordance with 52.215-1(e).

The term "source selection information" is defined in 41 U.S.C. § 423(f)(2), and repeated verbatim in FAR 2.101:

any of the following information that is prepared for use by an agency for the purpose of evaluating a bid or proposal to enter into an agency procurement contract, if that information has not been previously made available to the public or disclosed publicly:

(1) Bid prices submitted in response to an agency invitation for bids, or lists of those bid prices before bid opening.

(2) Proposed costs or prices submitted in response to an agency solicitation, or lists of those proposed costs or prices.

(3) Source selection plans.

(4) Technical evaluation plans.

(5) Technical evaluations of proposals.

(6) Cost or price evaluations of proposals.

(7) Competitive range determinations that identify proposals that have a reasonable chance of being selected for award of a contract.

(8) Rankings of bids, proposals, or competitors.

(9) Reports and evaluations of source selection panels, boards, or advisory councils.

(10) Other information marked as "Source Selection Information — See FAR 2.101 and 3.104" based on a case-by-case determination by the head of the agency or the contracting officer, that its disclosure would jeopardize the integrity or successful completion of the Federal agency procurement to which the information relates.

Section 4304(h) of the Act contains a number of "savings provisions," as follows:

Savings Provisions. — This section does not —

(1) restrict the disclosure of information to, or its receipt by, any person or class of persons authorized, in accordance with applicable agency regulations or procedures, to receive that information;

(2) restrict a contractor from disclosing its own bid or proposal information or the recipient from receiving that information;

(3) restrict the disclosure or receipt of information relating to a Federal agency procurement after it has

been canceled by the Federal agency before contract award unless the Federal agency plans to resume the procurement;

(4) prohibit individual meetings between a Federal agency official and an offeror or potential offeror for, or a recipient of, a contract or subcontract under a Federal agency procurement, provided that unauthorized disclosure or receipt of contractor bid or proposal information or source selection information does not occur;

(5) authorize the withholding of information from, nor restrict its receipt by, Congress, a committee or subcommittee of Congress, the Comptroller General, a Federal agency, or an inspector general of a Federal agency;

(6) authorize the withholding of information from, nor restrict its receipt by, the Comptroller General of the United States in the course of a protest against the award or proposed award of a Federal agency procurement contract; or

(7) limit the applicability of any requirements, sanctions, contract penalties, and remedies established under any other law or regulation.

These provisions are implemented at FAR 3.104-4(e) and (f). It seems clear that these rules should not prevent open communication between contracting agencies and potential offerors regarding the work to be procured and the procurement strategy before solicitations are issued as long as specific finalized source selection plans and technical evaluation plans are not revealed.

II. ELEMENTS OF THE ACQUISITION PLAN

The acquisition plan must identify all actions essential to the conduct of a successful procurement and establish milestones for their performance. The acquisition plan answers the "who-what-when-where-why-how" of the acquisition strategy planning process. FAR 7.105 provides the following general guidance regarding the elements of the acquisition plan:

In order to facilitate attainment of the acquisition objectives, the plan must identify those milestones at which decisions should be made (see paragraph (b)(18) below). The plan must address all the technical, business, management, and other significant considerations that will control the acquisition. The specific content of plans will vary, depending on the nature, circumstances, and stage of the acquisition. In preparing the plan, the planner must follow the applicable instructions in paragraphs (a) and (b) below, together with the agency's implementing procedures. Acquisition plans for service contracts or orders must describe the strategies for implementing performance-based acquisition methods or must provide rationale for not using these methods (see subpart 37.6).

FAR 7.105(a) contains a brief description of the elements of the acquisition plan under the category "Acquisition background and objectives," while FAR 7.105(b) describes additional elements under the category "Plan of action." The Acquisition background and objectives section considers what the government is buying, how it will

evaluate price and other cost factors, where the work is to be performed, and the risks involved. The Plan of action section describes the steps necessary to procure the identified articles or services. Although the elements are discussed separately, they are interrelated. In this section, the topics are covered in the sequence they are listed in the FAR.

A. Background and Objectives

Eight specific factors are identified in FAR 7.105(a) for consideration in developing the procurement goals. This part of the regulation need not be regarded as an outline that the acquisition plan must follow but, rather, as issues that must be addressed.

1. Statement of Need

FAR 7.105(a)(1) states:

> Statement of need. Introduce the plan by a brief statement of need. Summarize the technical and contractual history of the acquisition. Discuss feasible acquisition alternatives, the impact of prior acquisitions on those alternatives, and any related in-house effort.

The need for the acquisition is identified and documented by the program or technical personnel in the agency who prepare the budget justification. Generally, the need will have been fully justified during the budget process and can merely be restated in the acquisition plan. If the acquisition planning is being done prior to preparing the budget, the agency will have to analyze its needs in a thorough manner as part of the acquisition plan.

This part of the plan should include the technical and contractual history of the procurement. The technical history of the product or service being procured should identify what specifications have been used in the past and any difficulties that have been encountered in performance against those specifications. The summary of the contractual history is normally done by the contracting officer and should identify each previous procurement that impacts the current planning. This is a key element in the planning process because it identifies how the current procurement fits in the overall conduct of the agency's business. The contractual history also identifies those cases where the procurement is part of an ongoing program, such as the development of a new product. In such cases, the agency normally will have adopted an acquisition plan for the entire program, and the planning for each step in the program will merely verify that

the overall plan is still valid. On the other hand, the contractual history may identify previous procurements that have been unsuccessful — indicating that a new approach is needed. Thus, the contractual history is a key starting point for the preparation of the plan.

This section of the plan should include a discussion of feasible acquisition alternatives. For instance, the agency should consider and discuss performance in-house by government employees, performance under an agreement with another government agency, or performance by a contractor under an existing contract. The agency should also discuss the impact of prior acquisitions on the alternatives (i.e., whether an alternative is related to a prior or similar effort, whether multiple contracts were awarded previously and proved ineffective, etc.) as well as whether there is any related in-house effort. This element of the plan calls for innovative thinking, especially if the acquisition techniques used in the past have not been fully successful. Some aspects of the determination of the strategy are covered in the specific issues addressed below.

2. Applicable Conditions

This part of the plan identifies the constraints that must be imposed on the end product of the procurement, as set forth in FAR 7.105(a)(2):

> *Applicable conditions*. State all significant conditions affecting the acquisition, such as —
>
> (i) Requirements for compatibility with existing or future systems or programs and
>
> (ii) Any known cost, schedule, and capability or performance constraints.

Precise identification of significant conditions early in the procurement process enables the agency to explore steps that can be taken to reduce or eliminate constraints that could have a detrimental impact on the procurement being planned. For example, if a product to be procured must be fully compatible with items in the agency's inventory, the agency may have to provide detailed drawings in the procurement package or induce the original manufacturer to license other sources in order to obtain sufficient competition to ensure a reasonable price. In such a case identification of this constraint would lead to the adoption of a strategy that would make detailed drawings available to a number of competitors through purchase of the rights or reverse engineering or establish an agreement with the original manufacturer to license additional sources.

Of course, identification of a constraint does not guarantee that there is a strategy that will completely overcome it. Many constraints must be accepted as an inherent

element of the procurement. However, early identification of such constraints is beneficial because it assists all members of the planning team in recognizing the limitations that must be accepted in the conduct of the procurement being planned.

3. Cost

One of the major considerations in acquisition planning is the overall cost to the government. Acquisition techniques should be chosen to induce contractors to provide products and services at the lowest possible cost commensurate with high quality and timely performance. The costs considered should be both the initial acquisition cost of the product or service and the operating or use costs because the amount to be paid to a contractor may not be the only, or even the major, expenditure by the government in using the work obtained. Thus, it is important for the government to consider more than the contract price in determining what award is most advantageous to the government. FAR 7.105(a)(3) states:

> *Cost*. Set forth the established cost goals for the acquisition and the rationale supporting them, and discuss related cost concepts to be employed, including, as appropriate, the following items:
>
> (i) *Life-cycle cost*. Discuss how life-cycle cost will be considered. If it is not used, explain why. If appropriate, discuss the cost model used to develop life-cycle cost estimates.
>
> (ii) *Design-to-cost*. Describe the design-to-cost objective(s) and underlying assumptions, including the rationale for quantity, learning-curve, and economic adjustment factors. Describe how objectives are to be applied, tracked, and enforced. Indicate specific related solicitation and contractual requirements to be imposed.
>
> (iii) *Application of should-cost*. Describe the application of should-cost analysis to the acquisition (see 15.407-4).

This part of the plan contains the agency's best analysis of the expected cost of the procurement and some of the techniques that will be used to ensure that this cost is reasonable and attainable.

a. Acquisition Cost

The plan must contain the agency's estimate of the amount of funds that will be needed to support the contract effort. This is usually done through the development of an independent government cost estimate (IGCE). An IGCE is the government's own estimated cost/price of the proposed acquisition. The IGCE serves as the basis for reserving funds for the contract as part of acquisition planning. The traditional use of the IGCE is to determine the reasonableness of a contractor's cost and technical proposals.

Although § 3004 of FASA requires an IGCE before the development or production of a new military program, there is no similar statutory or regulatory requirement for supplies or services. However, the IGCE has become common practice and is often a required element of a proper contract file for supplies or services over the simplified acquisition threshold. The IGCE is prepared by either the program office or contracting officer. The estimate (including work sheets) is to remain confidential, and the government may not provide this information to contractors. See, e.g., Department of Commerce NOAA Independent Government Cost Estimate Guide (2007); EPA Guide for Preparing Independent Government Cost Estimates; Department of State's Foreign Service Handbook 6 FAH-2 H-350; and Department of Army Procurement Advisory Notice 07-01 (Feb. 7, 2007). For standard materials readily available on the commercial market, catalog or market survey prices may suffice for the estimate. The below template may assist in the development of the IGCE when catalog or market prices are not available.

Independent Government Cost Estimate

1. PROJECT TITLE				
2. PROJECT MANAGER	Period of Performance			
	FROM		TO	
DESCRIPTION OF COST ELEMENTS				
1. DIRECT LABOR (List Labor Categories)	ESTIMATED HOURS	RATED PER HOUR ($)	ESTIMATED COST ($)	TOTAL ESTIMATED COST ($)
			$0.00	
			$0.00	
			$0.00	
			$0.00	
			$0.00	
			$0.00	
	TOTAL DIRECT LABOR			$0.00
2. OVERHEAD	RATE (%)	TOTAL LABOR ($)	ESTIMATED COST ($)	TOTAL ESTIMATED COST ($)
				$0.00
3. MATERIALS/SERVICES (Excluding Information Technology (IT)			ESTIMATED COST ($)	TOTAL ESTIMATED COST ($)
				$0.00
4. INFORMATION TECHNOLOGY SUPPORT			ESTIMATED COST ($)	TOTAL ESTIMATED COST ($)
TOTAL IT SUPPORT				$0.00

5. TRAVEL		ESTIMATED COST ($)	TOTAL ESTIMATED COST ($)
			$0.00
6. SUBCONTRACTOR (S) CONSULTANT (S)		ESTIMATED COST ($)	TOTAL ESTIMATED COST ($)
TOTAL SUBCONTRACTOR (S) CONSULTANT(S)			$0.00
7. OTHER DIRECT COSTS		ESTIMATED COST (S)	TOTAL ESTIMATED COST ($)
			$0.00
8. TOTAL ESTIMATED COST			$0.00
TYPED NAME AND TITLE		SIGNATURE	
OFFICE/DIVISION/BRANCH		DATE	

Each period of performance requires an IGCE - (e.g., base award and all option periods).

The higher the degree of accuracy of the IGCE, the more smoothly the procurement will proceed because funds will be available as necessary to execute it. Thus, good acquisition planning demands that the agency devote sufficient effort to arriving at an accurate cost estimate.

b. Life-Cycle Cost

The plan must contain a discussion of how life-cycle cost logic will be used in the procurement. FAR 7.101 defines life-cycle cost to mean "the total cost to the government of acquiring, operating, supporting, and (if applicable) disposing of the items being acquired," but the FAR contains no guidance on the application of this technique. The cost of ownership of an asset or service is incurred throughout its whole

life and does not all occur at the point of acquisition.

DOD Directive 5000.01, The Defense Acquisition System, May 12, 2003, and DOD Instruction 5000.02, Operation of the Defense Acquisition System, Dec. 8, 2008, provide guidance on life-cycle cost. For a defense acquisition program, life-cycle cost consists of research and development costs, investment costs, operating and support costs, and disposal costs over the entire life-cycle. The Instruction requires each program to have a life-cycle sustainment plan from the inception of the program through deployment of the system. The plan must be continually updated as the program progresses and must consider "supply; maintenance; transportation; sustaining engineering; data management; configuration management; HSI; environment, safety (including explosives safety), and occupational health; protection of critical program information and anti-tamper provisions; supportability; and interoperability."

In instances where the cost of operating and maintaining the acquired product will be much greater than the initial acquisition cost, conducting a procurement without factoring in life-cycle costs can greatly increase the ultimate costs to the government. For example, it may be more expensive to purchase equipment with a low initial price that requires significantly more personnel or energy to operate than does higher-priced equipment. Similarly, low-priced equipment that will be expensive to maintain may not be the best buy for the agency. Generally, these life-cycle costs are included in a procurement in one of two ways: by including specific contract provisions establishing design goals or stating mandatory contract requirements for such factors as operating costs, maintainability, and reliability; or by making life-cycle costs a part of the evaluation process in competitive source selections when the agency has a methodology to evaluate such costs during source selection.

Factoring life-cycle costs into a procurement by using clauses containing mandatory contract requirements forces the contractor to consider the cost in computing the contract price. Thus, a warranty clause calling for the equipment to function over a specified period of time would induce the contractor to include in its price either the cost of repair of equipment that did not meet the warranty or the cost of designing and manufacturing equipment that had the required life. Similarly, a clause requiring the contractor to reimburse the government for all energy costs over a certain required amount would motivate the contractor to include such costs in the price if its equipment did not meet the requirement. Such clauses are the most direct way of factoring life-cycle costs into the procurement process because they ensure that the offered prices include each offeror's evaluation of the cost impact of the requirement. It is difficult, however, for agencies to formulate a complete set of contract clauses covering all life-

cycle costs anticipated in the use of a product.

Another way to deal with life-cycle costs is to include contract clauses establishing goals, such as maintenance labor hours per aircraft flight hour or fuel consumption of vehicles. In order to ensure that such goals are effective, agencies frequently specify contractual penalties for missing the goal or incentives for making the goal. Alternatively, these goals can be taken into account in subjective award-fee determinations. Such clauses generally have a less direct impact on the contractor than a clause requiring full reimbursement of the government for failure to meet the life-cycle cost requirement.

The use of evaluation factors in the source selection process is the other way of addressing life-cycle costs. If sufficient information is available, the agency can make a reasonable estimate of the life-cycle cost of each competitor and add that to the offered prices to determine whose price is lowest, *Columbia Inv. Group*, Comp. Gen. Dec. B-214324, 84-2 CPD ¶ 632, or the estimate can be used to assist the source selection official in making a best value determination, *Storage Tech. Corp*., Comp. Gen. Dec. B-215336, 84-2 CPD ¶ 190. In *Ingalls Shipbuilding, Inc*., Comp. Gen. Dec. B-275830, 97-1 CPD ¶ 180, the GAO found that the agency reasonably evaluated offerors' approaches to life-cycle cost reduction and concluded that awardee's proposal offered the highest likelihood of reducing life-cycle ownership costs. But see *Sikorsky Aircraft Co*., Comp. Gen. Dec. B-299145, 2007 CPD ¶ 45, finding that the Air Force failed to reasonably perform the required Most Probable Life-Cycle Cost evaluation required by its own solicitation. The solicitation provided that for purposes of the source selection, cost/price would be calculated on the basis of the Most Probable Life Cycle Cost, including both contract and operations and support (O&S) costs. Thus, the solicitation provided for O&S costs to directly impact the overall evaluated cost. In addition, the solicitation requested detailed information quantifying the required maintenance for the proposed aircraft. The Air Force nevertheless normalized the cost of maintenance when calculating O&S costs, thereby ignoring the potentially lower cost of the protesters' asserted low maintenance helicopters. Similarly, see *The Boeing Co*., Comp. Gen. Dec. B-311344, 2008 CPD ¶ 114, where the RFP made clear that the Most Probable Life-Cycle Cost was a key cost/price metric for source selection. In finding the agency's evaluation of military construction costs in calculating the offerors' most probable life-cycle costs for their proposed aircraft to be unreasonable, the GAO stated:

> An agency's life-cycle cost evaluation, like other cost analyses, requires the exercise of informed judgment concerning the extent to which proposed costs or prices represent a reasonable estimation of future costs. Our review of the agency's cost analysis is limited to the determination of whether the evaluation was reasonable and consistent with the terms of the RFP. See *Cessna Aircraft Co*., B-261953.5, Feb. 5, 1996,

96-1 CPD ¶ 132 at 21. The agency's analysis need not achieve scientific certainty; rather, the methodology employed must be reasonably adequate to provide some measure of confidence that the agency's conclusions about the most probable costs under an offeror's proposal are realistic in view of other cost information reasonably available to the agency at the time of its evaluation. See *Information Ventures, Inc.*, B-297276.2 et al., Mar. 1, 2006, 2006 CPD ¶ 45 at 7.

Another possible technique is to make a subjective evaluation of life-cycle costs in the evaluation of the technical competence of the offeror. Such evaluation techniques will be far more accurate if the agency has valid information on the prospective life-cycle costs of the offered equipment — such as its energy usage or maintenance costs. See *Lockheed Aeronautical Sys. Co.*, Comp. Gen. Dec. B-252235.2, 93-2 CPD ¶ 80, sustaining a protest because the agency had based its award decision on a life-cycle cost analysis prepared by the winning contractor but that analysis used equipment reliability factors that were not being offered by the contractor.

Care must be used in specifying a particular product or performance technique on the basis of a life-cycle cost analysis. See *Moore Heating & Plumbing, Inc.*, Comp. Gen. Dec. B-247417, 92-1 CPD ¶ 483, granting a protest when the agency used a specification that prohibited buried cable in the installation of a heat distribution system on the basis that it would raise the life-cycle cost because of potential repair costs. When the protester was able to demonstrate that the agency's analysis was flawed, the GAO ruled that the specification was restrictive.

c. Design-to-Cost

When the acquisition is for the designated development of a new product, the plan must also contain a discussion of the use of design-to-cost techniques. FAR 7.101 defines "design-to-cost" as:

> a concept that establishes cost elements as management goals to achieve the best balance between life-cycle cost, acceptable performance, and schedule. Under this concept, cost is a design constraint during the design and development phases and a management discipline throughout the acquisition and operation of the system or equipment.

The purpose of this technique is to focus the contractor on the need to design an item that can be procured and used in the future at an affordable cost. The FAR contains no further guidance on how to use design-to-cost techniques in the procurement process.

d. Should-Cost Analysis

Should-cost analysis is a selective form of cost analysis used primarily on major

procurements. This process is described in FAR 15.407-4(a), as follows:

> (1) Should-cost reviews are a specialized form of cost analysis. Should-cost reviews differ from traditional evaluation methods because they do not assume that a contractor's historical costs reflect efficient and economical operation. Instead, these reviews evaluate the economy and efficiency of the contractor's existing work force, methods, materials, equipment, real property, operating systems, and management. These reviews are accomplished by a multifunctional team of Government contracting, contract administration, pricing, audit, and engineering representatives. The objective of should-cost reviews is to promote both short and long-range improvements in the contractor's economy and efficiency in order to reduce the cost of performance of Government contracts. In addition, by providing rationale for any recommendations and quantifying their impact on cost, the Government will be better able to develop realistic objectives for negotiation.

DOD PGI 215.407-4 provides that DOD contracting activities should consider performing a program should-cost review before award of a definitive contract for a major system as defined by DoDI 5000.2. Should-cost analysis has been used most often on major contracts for the manufacture of high-priced equipment. It requires a detailed industrial engineering analysis of the specific methods used by the contractor to manufacture the product and a determination of more cost-effective methods that will reduce the costs. In this regard it is significantly different than conventional cost analysis because it challenges not the offeror's projections of current costs but, rather, the necessity for incurring those costs.

4. Capability or Performance

FAR 7.105(a)(4) provides the following guidance on capability or performance:

> Capability or performance. Specify the required capabilities or performance characteristics of the supplies or the performance standards of the services being acquired and state how they are related to the need.

The requirement for a specific statement of the key performance characteristics of the supplies or services being acquired should assist the agency in identifying restrictive provisions in the statement of work that may preclude potential contractors from participating in the procurement. When such provisions are identified, an agency can address possible steps that can be taken to eliminate them. The guidance on restrictive specifications is reviewed below in the discussion of specifications.

This requirement should also assist the agency in determining whether the proposed contract specification contains too many detailed requirements that will preclude offerors from proposing innovative ways to meet the agency's needs with fewer resources. See FAR Subpart 37.6 requiring that service contracts be performance based to the maximum extent practicable. Thus, FAR 37.602 calls for service contract

work statements to "[d]escribe the work in terms of the required results rather than either 'how' the work is to be accomplished or the number of hours to be provided."

5. Delivery or Performance-Period Requirements

FAR 7.105(a)(5) states:

> Delivery or performance-period requirements. Describe the basis for establishing delivery or performance-period requirements (see Subpart 11.4). Explain and provide reasons for any urgency if it results in concurrency of development and production or constitutes justification for not providing for full and open competition.

The guidance in FAR Subpart 11.4 gives contracting officers a number of factors to consider in establishing the delivery schedule or performance period. FAR 11.401(a) also contains the following cautionary language as to establishing schedules that are too tight:

> The time of delivery or performance is an essential contract element and shall be clearly stated in solicitations. Contracting officers shall ensure that delivery or performance schedules are realistic and meet the requirements of the acquisition. Schedules that are unnecessarily short or difficult to attain —
>
> (1) Tend to restrict competition,
>
> (2) Are inconsistent with small business policies, and
>
> (3) May result in higher contract prices.

The agency should also consider whether any contractual provisions will be used to provide enhancement or enforcement of the performance or delivery schedule. The two most commonly used techniques are liquidated damages and delivery incentives. Liquidated damages are used quite frequently on construction contracts and occasionally on other types of contracts. By establishing a fixed amount of damages for each day of delay, they provide the government with a preestablished remedy for delay and limit the contractor's liability for such delay. FAR 11.502 provides the following guidance on liquidated damages:

> (a) The contracting officer must consider the potential impact on pricing, competition, and contract administration before using a liquidated damages clause. Use liquidated damages clauses only when —
>
> (1) The time of delivery or timely performance is so important that the Government may reasonably expect to suffer damage if the delivery or performance is delinquent; and
>
> (2) The extent or amount of such damage would be difficult or impossible to estimate accurately or prove.
>
> (b) Liquidated damages are not punitive and are not negative performance incentives (see 16.402-2).

> Liquidated damages are used to compensate the Government for probable damages. Therefore, the liquidated damages rate must be a reasonable forecast of just compensation for the harm that is caused by late delivery or untimely performance of the particular contract. Use a maximum amount or a maximum period for assessing liquidated damages if these limits reflect the maximum probable damage to the Government. Also, the contracting officer may use more than one liquidated damages rate when the contracting officer expects the probable damage to the Government to change over the contract period of performance.

There are two standard clauses for liquidated damages in fixed-price contracts — Liquidated Damages — Supplies, Services, or Research and Development, FAR 52.211-11, and Liquidated Damages — Construction, FAR 52.211-12. These clauses provide that the damages do not apply to excusable delays. See Chapter 10 of *Cibinic, Nagle & Nash, Administration of Government Contracts (4th ed. 2006)* for an in-depth discussion of liquidated damages.

Delivery incentives are used when the government wants to induce the contractor to perform earlier than required. FAR 16.402-3 provides:

> (a) Delivery incentives should be considered when improvement from a required delivery schedule is a significant Government objective. It is important to determine the Government's primary objectives in a given contract (e.g., earliest possible delivery or earliest quantity production).
>
> (b) Incentive arrangements on delivery should specify the application of the reward-penalty structure in the event of Government-caused delays or other delays beyond the control, and without the fault or negligence, of the contractor or subcontractor.

6. *Tradeoffs*

FAR 7.105(a)(6) provides the following guidance on tradeoffs:

> *Trade-offs*. Discuss the expected consequences of trade-offs among the various cost, capability or performance, and schedule goals.

In arriving at an acquisition strategy, the agency must make explicit decisions to determine the best balance among cost, performance, and schedule. The agency should discuss which of these goals is most important and how they will impact the procurement in comparison with the other goals. The tradeoffs required to be addressed here are different than the cost/technical tradeoff performed as part of a best value basis for award. This section should address tradeoffs between competing government interests such as schedule adjustments and affect on performance, budget versus technical capabilities, and quicker delivery of equipment resulting in higher cost.

The January 2006 report of the Defense Acquisition Performance Assessment

Project (DAPA) concluded that "the budget, acquisition and requirements processes [of the Department of Defense] are not connected organizationally at any level below the Deputy Secretary of Defense." As a result, DOD officials often fail to consider the impact of requirements decisions on the acquisition and budget processes, or to make needed tradeoffs between cost, schedule and requirements on major defense acquisition programs. To address this concern, § 201 of the Weapon Reform Act of 2009, Pub. L. No. 111-23 requires consultation between the budget, requirements and acquisition stovepipes — including consultation in the joint requirements process — to ensure the consideration of trade-offs between cost, schedule, and performance early in the process of developing major weapon systems.

7. Risks

FAR 7.105(a)(7) states:

> *Risks*. Discuss technical, cost, and schedule risks and describe what efforts are planned or underway to reduce risk and the consequences of failure to achieve goals. If concurrency of development and production is planned, discuss its effects on cost and schedule risks.

GSA's Acquisition Planning Wizard provides the following guidance for identifying and mitigating risk:

> Identify and describe any risks (and also rate as High, Moderate, or Low) associated with the project, e.g., —
>
> 1. Schedule
> 2. Cost
> 3. Funding/budget availability
> 4. Technical obsolescence
> 5. Technical feasibility
> 6. Risk implicit in a particular contract type
> 7. Dependencies between a new project and other projects or systems
> 8. The number of simultaneous high risk projects to be monitored
> 9. Project management risk
> 10. Operational
>
> Describe actions to manage and mitigate risk for each risk identified during the acquisition. Techniques may include, but are not limited to —
>
> 1. Prudent project management, monitoring progress, costs, schedules, etc.

2. Use of modular contracting
3. Thorough acquisition planning tied to budget planning by the program, finance and contracting offices
4. Continuous collection and evaluation of risk-based assessment data
5. Prototyping prior to implementation
6. Post implementation reviews to determine actual project cost, benefits and returns
7. Focusing on risks and returns using quantifiable measures
8. Earned Value Management
9. Milestone Deliverables

There has been significant criticism of DOD major weapon systems programs for adopting requirements that impose undue risks that can not be achieved - resulting in substantial delays and cost increases. See, for example, *Defense Acquisitions: Assessment of Selected Weapon Programs*, GAO-1-388SP, March 2010, reviewing 42 ongoing programs and commenting on the extent to which they have conformed to the initiatives of the department to ensure that they were "knowledge-based." This "knowledge-based" requirement has been recommended by GAO for many years. It is based on the premise that a major program should not be permitted to proceed into development of a new system until all of the technology necessary to meet the requirement has been proven. DOD Instruction 5000.02, Operation of the Defense Acquisition System, implements this concept by inserting a Technology Development Phase in the acquisition process where all unproven technology that is specified for a system must "provide for two or more competing teams producing prototypes of the system and/or key system elements," with these prototypes "demonstrated in a relevant environment, or, preferably in an operational environment."

8. Acquisition Streamlining

Acquisition streamlining is an effort to reduce the costs of doing the acquisition by eliminating unnecessary procedures and practices. FAR 7.101 contains the following definition:

> "*Acquisition streamlining*," means any effort that results in more efficient and effective use of resources to design and develop, or produce quality systems. This includes ensuring that only necessary and cost-effective requirements are included, at the most appropriate time in the acquisition cycle, in solicitations and resulting contracts for the design, development, and production of new systems, or for modifications to existing systems that involve redesign of systems or subsystems.

FAR 7.105(a)(8) states:

Acquisition streamlining. If specifically designated by the requiring agency as a program subject to acquisition streamlining, discuss plans and procedures to

(i) Encourage industry participation by using draft solicitations, presolicitation conferences, and other means of stimulating industry involvement during design and development in recommending the most appropriate application and tailoring of contract requirements;

(ii) Select and tailor only the necessary and cost-effective requirements; and

(iii) State the timeframe for identifying which of those specifications and standards, originally provided for guidance only, shall become mandatory.

The FAR guidance focuses on the first element of streamlining — the adoption of contract specifications and other solicitation provisions that are clearly understood by the potential competitors and that permit open competition. Open exchanges with industry during the planning process are also encouraged by FAR 15.201. This FAR guidance does not address the need to reduce the complexity and cost of many procurements that require the preparation of extensive technical and management plans, the evaluation of those plans by numerous government evaluators, the coordination of such evaluations, and the ultimate extensive decision process. However, this type of acquisition streamlining is highly necessary if an agency is to adopt a truly streamlined acquisition process. This issue is extensively discussed in Chapter 2.

In contrast to the numerous over-complex government processes, commercial contracting practices utilize a highly streamlined solicitation, which is generally only one quarter the size of a standard government services solicitation. The standard times can be compressed, proposals and evaluations are highly streamlined, and commercial pricing is obtained. See FAR Part 12.

B. Plan of Action

This section covers 21 specific factors that are identified in FAR 7.105(b) as being elements of most acquisition plans. This part of the regulation need not be regarded as an outline that the acquisition plan must follow but, rather, as issues that must be addressed.

1. Sources

FAR 7.105(b)(1) states:

(1) *Sources*. Indicate the prospective sources of supplies or services that can meet the need. Consider required sources of supplies or services (see Part 8) and sources identifiable through databases including the

Governmentwide database of contracts and other procurement instruments intended for use by multiple agencies available at http://www.contractdirectory.gov. Include consideration of small business, veteran-owned small business, HUBZone small business, and small disadvantaged business, and women-owned small business concerns (see Part 19), and the impact of any bundling that might affect their participation in the acquisition (see 7.107) (15 U.S.C. 644(e)). When the proposed acquisition strategy involves bundling, identify the incumbent contractors affected by the bundling. Address the extent and results of the market research and indicate their impact on the various elements of the plan (see Part 10).

One of the most critical tasks in the acquisition planning process is the determination of the sources that are available to meet the government's needs. As discussed earlier, this is an essential element of the market research effort that agencies must undertake — with major emphasis on finding commercial sources that can meet the government's needs efficiently. However, as indicated above, there are other aspects to the determination of sources. For some products and services there are mandatory sources. In addition, there are statutory policies requiring procurement from small business concerns and small disadvantaged business concerns.

a. Mandatory Sources

Various statutes and regulations require agencies to attempt to satisfy their needs for goods and services from specific sources prior to contracting with commercial sources. FAR Part 8 contains detailed guidance on mandatory sources. See also DFARS Part 208 for guidance on mandatory sources for defense procurement.

FAR 8.002 ranks mandatory sources in order of priority. Existing agency inventory is the first source considered for supplies. If the needed supply is not available from existing inventory, FAR 8.002(a)(1) directs the agency to consider other sources in the following order: other agencies (excess supplies), Federal Prison Industries, the Committee for Purchase from People Who Are Blind or Severely Disabled, government wholesale supply sources, mandatory federal supply schedules, optional federal supply schedules, and commercial sources. If the agency's requirement is for services, sources are considered in the following sequence: the Committee for Purchase from People Who Are Blind or Severely Disabled, mandatory federal supply schedules, optional federal supply schedules, Federal Prison Industries, and commercial sources, FAR 8.002(a)(2). The following discussion examines these mandatory sources of supply.

(1) Excess Personal Property

The administrator of the GSA is authorized to prescribe policies and methods to promote utilization of excess personal property by the federal agencies pursuant to 40

U.S.C. § 483. This statute requires agencies to utilize excess personal property of other agencies to the fullest extent possible. The statute also charges agencies with the duty of monitoring excess property and either transferring or disposing of it as promptly as possible. The GSA maintains catalogs of available excess property, issues bulletins, and provides other assistance to facilitate acquisition of excess personal property. FAR 8.102 requires procurement personnel to make positive efforts to satisfy agency requirements by obtaining and using excess personal property before initiating a contract action.

(2) Government Printing Office

Virtually all printing, binding, and blankbook work for Congress, the Executive Office of the President, the judiciary (except the Supreme Court), and every executive department, independent office, and establishment of the government must be done by or through the Government Printing Office (GPO), absent a waiver from the Joint Committee on Printing, 44 U.S.C. § 501. Section 207 of the Legislative Branch Appropriations Act of 1993, Pub. L. No. 102-392, prohibits, with limited exceptions, the use of appropriated funds by the executive branch agencies for the procurement of printing other than by or through the GPO. Section 207 was amended by the Legislative Branch Appropriations Act of 1995, Pub. L. No. 103-283, and added "duplicating" to the definition of "printing." In response to OMB Memorandum M-02-7 (May 2001) announcing that executive departments and agencies should not be required to procure printing through GPO and advising agencies to select printing and duplicating services based on best quality, cost, and time of delivery, Congress enacted § 117 of Pub. L. No. 107-229, as amended by § 4 of Pub. L. No. 107-240. This legislation prohibits agencies from using appropriated funds to implement or comply with OBM Memorandum M-0207 and prohibits the use of any appropriated funds to pay for the printing of the President's Budget. See *Letter to Chairman, Committee on Appropriations*, Comp. Gen. Dec. B-300192, Nov. 13, 2002, where the GAO upheld the general rule that all printing and binding for the government "shall be done" through the GPO and found that failure to abide by § 117 would constitute a violation of the Anti-Deficiency Act. In *Bureau of Land Management, Payment of Pocatello Field Office Photocopying Costs*, Comp. Gen. Dec. B-290901, 2003 CPD ¶ 2, the GAO held that photocopying services procured by another BLM field office from a commercial source in violation of 44 U.S.C. § 501 were not authorized and could not be paid for with federal funds.

FAR 8.802 mandates compliance with the regulations of the Congressional Joint Committee on Printing and vests responsibility for obtaining waivers and dealing with

the Joint Committee in certain officials.

Individual printing orders costing not more than $1,000 are, under certain conditions, not required to be printed by the GPO, Pub. L. No. 102-392, Title II § 207(a), codified at 44 U.S.C. § 501 note.

(3) Government Wholesale Supply Sources

The administrator of the GSA is authorized to operate supply centers and procure and supply personal property for executive agencies, 40 U.S.C. § 481. Pursuant to this authority, the GSA operates supply distribution facilities and maintains an inventory of stock items that constitute a mandatory source for executive agencies located within the United States. See 41 C.F.R. § 101-26.301. The GSA publishes a supply catalog that lists all items available from GSA stock. The GSA also has an electronic catalog, "GSA Advantage!," which is an on-line ordering system that allows agencies to search through all GSA sources of supply and select the item that best meets their requirements.

Other wholesale supply sources include the defense supply centers of the Defense Logistics Agency, 41 C.F.R. § 101-26.6, and the inventory control points of the military departments, 41 C.F.R. § 101-26.606. For example, under DLA, gasoline, fuel oil, and kerosene may be purchased from the Defense Energy Support Center, 41 C.F.R. § 101-26.602-3. The Department of Veterans Affairs is a wholesale source for nonperishable items, 41 C.F.R. § 101-26.704.

(4) General Services Administration Motorpools

The Federal Property and Administrative Services Act of 1949 authorizes the General Services administrator to "consolidate, take over, acquire, or arrange for the operation by any executive agency of" motor vehicles, 40 U.S.C.§ 491. The Act authorizes the GSA to enter into rental or other arrangements and to utilize government-owned vehicles. The Act provides that requisitioning agencies should be charged for services rendered at prices calculated to recover all elements of cost.

The procedures for the leasing, from commercial concerns, of motor vehicles that comply with the Federal Motor Vehicle Safety Standards and applicable state motor vehicle safety regulations are covered in FAR Subpart 8.11. Under these procedures, FAR 8.1102 provides that contracting officers must obtain a written certification before preparing solicitations for leasing of motor vehicles that —

(1) The vehicles requested are of maximum fuel efficiency and minimum body size, engine size, and equipment (if any) necessary to fulfill operational needs and meet prescribed fuel economy standards;

(2) The head of the requiring agency, or a designee, has certified that the requested passenger automobiles (sedans and station wagons) larger than Type IA, IB, or II (small, subcompact, or compact) are essential to the agency's mission;

(3) Internal approvals have been received;

(4) The General Services Administration has advised that it cannot furnish the vehicles.

(5) Federal Prison Industries

Federal Prison Industries (FPI), also referred to as UNICOR, is a wholly owned government corporation created by Congress in 1934 to administer industrial operations in federal penal and correctional institutions. FPI is authorized to produce commodities for consumption in penal institutions or for sale to the government but is prohibited from selling to the public, 18 U.S.C. §§ 4121-4129. Until 2001 the legislation that created UNICOR remained unchanged. It required federal agencies to purchase FPI products to meet their requirements as long as FPI's prices were competitive. UNICOR's mandatory source status ended in 2002. As amended, 10 U.S.C. § 2410n states that if the product is not comparable in price, quality, or time of delivery to products available from the private sector that best meet the Department's needs, competitive procedures shall be used for the procurement. This is implemented in the FAR. The purchase of FPI supplies are mandatory where, after market research, the agency determines that the FPI items are comparable to private sector items in terms of price, quality, and time of delivery, FAR 8.602(a)(3). If the item is not found to be comparable, agencies are to acquire items meeting their needs through competitive procedures and to include FPI in the solicitation process, FAR 8.602(a)(4)(i), (ii). See *Gentex Corp.*, Comp. Gen. Dec. B-400328, 2008 CPD ¶ 186 (protest that agency should have provided for cost analysis under OMB Circular A-76 based on award to FBI denied as no statute or regulation requires an agency to conduct an A-76 study and competition, or otherwise adjust its evaluation to account for any FPI competitive advantages simply because FPI is a potential or actual competitor).

Section 827 of the National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, further amended 10 U.S.C. § 2410n. Effective March 31, 2008, § 827 requires DoD contracting activities to use competitive procedures when procuring products for which FPI has significant market share (defined as being greater than 5% in any Federal Supply Code (FSC)). In using these procedures, FPI must be included in the solicitation process. See DFARS 208.602-70. The objective of the rule is to provide for

competition in the acquisition of items for which FPI has a significant market share. The rule is expected to benefit small business concerns that offer items for which FPI has a significant market share, by permitting those concerns to compete for additional DoD contract awards.

Federal Prison Industries maintains a list of supplies manufactured and services performed by FPI (http://www.unicor.gov).

(6) Surplus Strategic And Critical Materials

The General Services administrator has the authority to purchase strategic and critical materials for government stockpiles and for use or resale to stimulate exploration, development, and mining of these materials under Exec. Order No. 10480, 18 Fed. Reg. 4939 (1953), which delegates presidential authority as contained in 50 U.S.C. App. § 2093.

FAR 8.003 requires government agencies to satisfy their requirements for strategic and critical materials from or through surplus holdings that are maintained by the Defense National Stockpile Center. Under Part 8, the Defense National Stockpile Center transfers material to federal agencies, which in turn provide it to their contractors as government furnished material.

(7) Committee for Purchase From People Who Are Blind or Severely Disabled

The Javits-Wagner-O'Day Act, now known as the AbilityOne Program, mandates that commodities or services on the Procurement List required by government entities be procured from a nonprofit agency employing persons who are blind or have other severe disabilities, if that commodity or service is available within the normal period required by that government entity, 41 U.S.C. §§ 46-48. The Committee for Purchase From People Who Are Blind or Severely Disabled (Committee) is the federal agency authorized to administer the program. It has designated two Central Nonprofit Agencies, National Industries for the Blind and NISH, to assist with program implementation. This Act is implemented in FAR Subpart 8.7.

The Procurement List may be accessed at: http://www.abilityone.gov/. Many items on the Procurement List are identified in the General Services Administration Supply Catalog and GSA's Customer Service Center Catalogs with a black square and the

words "NIB/NISH Mandatory Source," and in similar catalogs issued by the Defense Logistics Agency and the Department of Veterans Affairs. GSA, DLA, and VA are central supply agencies from which other federal agencies are required to purchase certain supply items on the Procurement List.

The Committee determines the suitability of adding a commodity or service to the Procurement List based on the employment potential for persons who are blind or have other severe disabilities, the qualifications and capability of the nonprofit agency, and whether or not a proposed addition to the Procurement List is likely to have a severe adverse impact on the current contractor for the specific commodity or service, 41 C.F.R. §§ 51-2.4. The Committee is also responsible for determining fair market prices for commodities and services on the Procurement List, 41 C.F.R. §§ 51-2.7. The fair market price is derived at by negotiations between the contracting activity and the nonprofit agency that will produce or provide the commodity or service to the government, assisted by the appropriate central nonprofit agency.

Ordering offices may acquire supplies or services on the Procurement List from commercial sources only if the acquisition is specifically authorized in a purchase exception granted by the designated central nonprofit agency, FAR 8.706. The central nonprofit agency will grant an exception when the AbilityOne participating nonprofit agencies cannot provide the supplies or services within the time required, and commercial sources can provide them significantly sooner in the quantities required. The central nonprofit agency will also grant an exception when the quantity required cannot be produced or provided economically by the AbilityOne participating nonprofit agencies, FAR 8.706 and 41 C.F.R. §§ 51-5.4.

(8) Federal Supply Schedules

Administered by the GSA, the Federal Supply Schedule (FSS) program has been designed to provide agencies with a simple process for acquiring commonly used supplies and services in varying quantities at volume discounts. Orders placed pursuant to a multiple-award schedule (MAS) are considered to be issued pursuant to full and open competition, 10 U.S.C. § 2302(2)(C); 41 U.S.C. § 259(b)(3). Although included under FAR Part 8, Required Sources of Supplies and Services, these schedules are non-mandatory, *Murray-Benjamin Elec. Co., LP*, Comp. Gen. Dec. B-298481, 2006 CPD ¶ 129.

When using a schedule, ordering activities are to place orders with the schedule

contractor who can provide the supply or service that represents the best value. Before placing an order, an ordering activity must consider reasonably available information about the supply or service offered under MAS contracts by surveying at least three schedule contractors through the GSA Advantage! on-line shopping service, or by reviewing the catalogs or pricelists of at least three schedule contractors, FAR 8.405-1.

FSS orders may not cover supplies or services not covered by a schedule contract, *OMNIPLEXWorld Servs. Corp.*, Comp. Gen. Dec. B-291105, 2002 CPD ¶ 199. The rule requires that all labor categories to perform required services be included in the schedule contract. See, for example, *CDM Group, Inc.*, Comp. Gen. Dec. B-291304.2, 2002 CPD ¶ 221, finding that the agency properly rejected the protester's quotation that was based on labor categories not included in its FSS contract. However, agencies have reasonable discretion in interpreting the scope of schedules. See, for example, *Information Ventures, Inc.*, Comp. Gen. Dec. B-291952, 2003 CPD ¶ 101, denying a protest that the services required by the agency were not available under the FSS.

The General Services Administration has eased this scope problem by including blanket schedule item numbers (SINs) on some of the schedules to be used when an agency needs services that are listed under several different SINs. This permits award to a contractor with a contract listing only the blanket SIN. See *Avalon Integrated Servs. Corp.*, Comp. Gen. Dec. B-290185, 2002 CPD ¶ 118, finding that it was "irrelevant" that a contractor who held an FSS contract for the blanket SIN used by the agency did not also hold a schedule contract for other SINs under which services were sought. There are also "corporate schedule contracts" covering broad scopes of work. See *Planned Systems Int'l, Inc.*, Comp. Gen. Dec. B-292319.3, 2003 CPD ¶ 198, permitting use of this schedule. It appears that these techniques will not permit award for work by categories of labor that are not included in these broad schedules. See *Symplicity Corp.*, Comp. Gen. Dec. B-291902, 2003 CPD ¶ 89, granting a protest where the agency failed to consider whether the services offered by the task order awardee were covered by its FSS contract.

(9) Helium

FAR 8.5 implements the requirements of the Helium Act, 50 U.S.C. § 167a et seq., concerning the acquisition of liquid or gaseous helium by federal agencies or by government contractors or subcontractors for use in the performance of a government contract. It requires that to the extent that supplies are readily available, all major helium requirements purchased by a government agency or used in the performance of a

government contract must be purchased from federal helium suppliers, FAR 8.502. See also 43 C.F.R. Part 3195. The Bureau of Land Management maintains a list of Federal Helium Suppliers at http://www.nm.blm.gov.

b. Small and Disadvantaged Businesses

It is the policy of the government to place a "fair proportion" of contracts with small businesses, 15 U.S.C. § 631(a). The FAR implements this policy stating that the government should provide maximum practicable opportunities in its acquisitions to small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns, FAR 19.201(a). FAR Part 19 contains detailed guidance on requirements to procure from small businesses and small disadvantaged businesses.

(1) Structuring Procurements

During the acquisition planning process, agencies must structure their procurements to carry out these policies. FAR 19.202-1 contains the following guidance:

> Small business concerns shall be afforded an equitable opportunity to compete for all contracts that they can perform to the extent consistent with the Government's interest. When applicable, the contracting officer shall take the following actions:
>
> (a) Divide proposed acquisitions of supplies and services (except construction) into reasonably small lots (not less than economic production runs) to permit offers on quantities less than the total requirement.
>
> (b) Plan acquisitions such that, if practicable, more than one small business concern may perform the work, if the work exceeds the amount for which a surety may be guaranteed by SBA against loss under 15 U.S.C. 694b.
>
> (c) Ensure that delivery schedules are established on a realistic basis that will encourage small business participation to the extent consistent with the actual requirements of the Government.
>
> (d) Encourage prime contractors to subcontract with small business concerns (see Subpart 19.7).
>
> (e)(1) Provide a copy of the proposed acquisition package to the SBA procurement center representative (or, if a procurement center representative is not assigned, see 19.402(a)) at least 30 days prior to the issuance of the solicitation if —
>
> > (i) The proposed acquisition is for supplies or services currently being provided by a small business and the proposed acquisition is of a quantity or estimated dollar value, the magnitude of which makes it unlikely that small businesses can compete for the prime contract;
> >
> > (ii) The proposed acquisition is for construction and seeks to package or consolidate discrete construction projects and the magnitude of this consolidation makes it unlikely that small businesses

can compete for the prime contract; or

(iii) The proposed acquisition is for a bundled requirement. (See 10.001(c) (2)(i) for mandatory 30-day notice requirement to incumbent small business concerns.) The contracting officer shall provide all information relative to the justification of contract bundling, including the acquisition plan or strategy, and if the acquisition involves substantial bundling, the information identified in 7.107(e). When the acquisition involves substantial bundling, the contracting officer shall also provide the same information to the agency Office of Small and Disadvantaged Business Utilization.

(2) The contracting officer also must provide a statement explaining why the —

(i) Proposed acquisition cannot be divided into reasonably small lots (not less than economic production runs) to permit offers on quantities less than the total requirement;

(ii) Delivery schedules cannot be established on a realistic basis that will encourage small business participation to the extent consistent with the actual requirements of the Government;

(iii) Proposed acquisition cannot be structured so as to make it likely that small businesses can compete for the prime contract;

(iv) Consolidated construction project cannot be acquired as separate discrete projects; or

(v) Bundling is necessary and justified.

(3) The 30-day notification process shall occur concurrently with other processing steps required prior to the issuance of the solicitation.

(4) If the contracting officer rejects the SBA representative's recommendation made in accordance with 19.402(c)(2), the contracting officer shall document the basis for the rejection and notify the SBA representative in accordance with 19.505.

FAR 19.202-2 requires contracting officers to make every effort to locate small business sources. This goal is accomplished by (1) making every reasonable effort to find additional small business concerns prior to issuing solicitations, unless lists are already excessively long and only some of the concerns on the list will be solicited (this effort should include contacting the SBA procurement center representative); and (2) publicizing solicitations and contract awards through the governmentwide point of entry (see subparts 5.2 and 5.3).

Agencies have been criticized for not coordinating with the Small Business Administration when they remove work from the small-business program. See, for example, *Letter to the Air Force and Army concerning Valenzuela Eng'g, Inc.*, Comp. Gen. Dec. B-277979, 98-1 CPD ¶ 51. In that case, the Air Force had ordered services using the Economy Act from an Army task order contract instead of renewing or recompeting for the work on the small business set-aside basis that had been used in the past. The GAO ruled that this violated FAR 19.202-1(e) because Economy Act purchases were acquisitions requiring coordination. See also *TRS Research*, Comp.

Gen. Dec. B-290644, 2002 CPD ¶ 159 (agency's failure to coordinate the current consolidation of requirements with the SBA procurement center representative was inconsistent with the requirements of the Act and implementing regulations).

There has also been substantial criticism of contracting agencies for not following these policies when they "bundled" their contract requirements in order to achieve efficiencies. As a result, the Small Business Reauthorization Act of 1997, Pub. L. No. 105-135, contains provisions requiring federal agencies to "avoid unnecessary and unjustified bundling of contract requirements that precludes small business participation in procurements as prime contractors," 15 U.S.C. § 631. 15 U.S.C. § 632(o)(2), defines bundling as:

> consolidating 2 or more procurement requirements for goods or services previously provided or performed under separate smaller contracts into a solicitation of offers for a single contract that is likely to be unsuitable for award to a small-business concern due to —
>
> (A) the diversity, size, or specialized nature of the elements of the performance specified;
>
> (B) the aggregate dollar value of the anticipated award;
>
> (C) the geographical dispersion of the contract performance sites; or
>
> (D) any combination of the factors described in subparagraphs (A), (B), and (C).

See also FAR 2.101 and 13 C.F.R. § 125.2(d)(1)(i). The term "separate smaller contract" is defined as "a contract that has been performed by 1 or more small business concerns or was suitable for award to 1 or more small business concerns." 15 U.S.C. § 632(o)(3); 13 C.F.R. § 125.2(d)(1)(ii). See *Vox Optma, LLC*, Comp. Gen. Dec. B-400451, 2008 CPD ¶ 212 (no consolidation found where two of the contract actions identified — a task order under which protester was a subcontractor and work performed by a second subcontractor under the same task order — were under a contract executed by an entirely different activity); *USA Info. Sys., Inc*., Comp. Gen. Dec. B-291417, 2002 CPD ¶ 224 (solicitation does not represent a "consolidation" of two or more requirements, inasmuch as the record establishes that all of the requirements here were previously provided under the one predecessor contract); and *Outdoor Venture Corp*., Comp. Gen. Dec. B-299675, 2007 CPD ¶ 138 (not considered consolidation of two or more requirements where requirement is currently being procured as a packaged system under one contract).

A procurement that is exclusively set aside for small business concerns cannot constitute improper bundling under the Small Business Act, *Phoenix Scientific Corp*., Comp. Gen. Dec. B-286817, 2001 CPD ¶ 24; *Health & Human Services Group*, Comp.

Gen. Dec. B-294703, 2005 CPD ¶ 6.

When a proposed acquisition involves bundled requirements, the agency must first conduct market research to determine whether the bundling is necessary and justified, given the potential impact on small business participation, by ascertaining whether the government will derive measurably substantial benefits from the bundling and quantifying these benefits, 15 U.S.C. § 644(e)(2); FAR 7.107(a). In addition, the agency must, at least 30 days before issuing a solicitation, provide its acquisition package to the SBA procurement representative for review and also provide a statement why the (1) proposed acquisition cannot be divided into reasonably smaller lots for small businesses, (2) delivery schedules cannot be established that will encourage small business participation, (3) proposed acquisition cannot be structured so to make it likely that small businesses can compete for the prime contract, (4) consolidated construction project cannot be acquired as separate discrete projects, or (5) bundling is necessary and justified, FAR 19.202-1(e). Furthermore, within the same 30 days, an agency must notify any affected incumbent small business concerns of the government's intention to bundle the requirement, FAR 10.001(c)(2). See *Sigmatech, Inc*., Comp. Gen. Dec. B-296401, 2005 CPD ¶ 156, sustaining a protest on the basis that the Army failed to perform a bundling analysis as required FAR 7.107(a), (b), or comply with the requirements of FAR 19.202-1 in providing notice of bundling to the SBA. The record further showed that the agency failed to provide notice to Sigmatech (the incumbent small business concern) of its intent to bundle the requirements and thus failed to comply with FAR 10.001(c)(2). The requirements that agencies perform a bundling analysis and notify the SBA when requirements are bundled is applicable to Blanket purchase agreements (BPAs) and orders placed against FSS contracts, FAR 8.404(a).

The key requirement is that the agency must find measurably substantial benefits to justify bundling, with the limitation that reduction of administrative or personnel costs are not a sufficient justification unless the cost savings are expected to be at least 10% of the estimated contract value (including options) of the bundled requirements, FAR 7.107.

Measurably substantial benefits may include individually or in any combination or aggregate: cost savings or price reduction, quality improvements that will save time or enhance performance or efficiency, reduction in acquisition cycle times, better terms and conditions, and any other benefits, FAR 7.107(b). The agency must quantify the identified benefits and explain how their impact would be measurably substantial. The benefits must be equivalent to 10% of the estimated contract or order value (including options) if the value is $86 million or less; or 5% for estimated contracts (including

options) over $86 million, FAR 7.107(b). See *Nautical Eng'g, Inc*., Comp. Gen. Dec. B-309955, 2007 CPD ¶ 204 (justification reasonably relied on two different benefits to the government: decreased maintenance and repair costs quantified as a savings of 5.29% and an 18% increase in time that the cutters will be performing their duties); and *B.H. Aircraft Co*., Comp. Gen. Dec. B-295399.2, 2005 CPD ¶ 138 (substantial benefit of $28.3 million over five years, which was an amount well above the amount necessary to justify bundling).

For acquisition planning purposes, when the proposed acquisition strategy involves "substantial bundling," defined as bundling resulting in a contract or order that meets the following dollar amounts: $7.5 million or more for the Department of Defense; $5.5 million or more for NASA, GSA, and DOE; and $2 million or more for all other agencies (FAR 7.104(d)(2)), FAR 7.107(e) provides that the acquisition strategy must additionally —

> (1) Identify the specific benefits anticipated to be derived from bundling;
>
> (2) Include an assessment of the specific impediments to participation by small business concerns as contractors that result from bundling;
>
> (3) Specify actions designed to maximize small business participation as contractors, including provisions that encourage small business teaming;
>
> (4) Specify actions designed to maximize small business participation as subcontractors (including suppliers) at any tier under the contract, or order, that may be awarded to meet the requirements;
>
> (5) Include a specific determination that the anticipated benefits of the proposed bundled contract or order justify its use; and
>
> (6) Identify alternative strategies that would reduce or minimize the scope of the bundling, and the rationale for not choosing those alternatives.

Challenges to bundling may also be made under the Competition in Contracting Act (CICA), 10 U.S.C. § 2304 and 41 U.S.C. § 253. Under CICA, requirements may be determined to be bundled whenever aggregated requirements are found to be unduly restrictive of competition. The reach of the restrictions against total package or bundled procurements in CICA is broader than the reach of restrictions against bundling under the Small Business Act, *Phoenix Scientific Corp*., Comp. Gen. Dec. B-286817, 2001 CPD ¶ 24. CICA generally requires that solicitations include specifications which permit full and open competition and contain restrictive provisions and conditions only to the extent necessary to satisfy the needs of the agency, 10 U.S.C. § 2305(a)(1)(A), (B); 41 U.S.C. § 253a(a)(2)(B). Because procurements conducted on a bundled or total package basis can restrict competition, the GAO will sustain a challenge to the use of such an approach where it is not necessary to satisfy the agency's needs, *Better Serv*.,

Comp. Gen. Dec. B-265751.2, 96-1 CPD ¶ 90. The determination of a contracting agency's needs and the best method for accommodating them are matters primarily within the agency's discretion, *Specialty Diving, Inc*., Comp. Gen. Dec. B-285939, 2000 CPD ¶ 169. Because of the restrictive impact of bundling, protests challenging a bundled solicitation will be sustained, unless an agency has a reasonable basis for its contention that bundling is necessary, *National Customer Eng'g*, Comp. Gen. Dec. B-251135, 93-1 CPD ¶ 225.

Administrative convenience is not a legal basis to justify bundling of requirements, if the bundling of requirements restricts competition, *EDP Enters., Inc*., Comp. Gen. Dec. B-284533.6, 2003 CPD ¶ 93 (protest of bundling of food services in the same RFP with base, vehicle, and aircraft maintenance services for administrative convenience sustained); *Vantex Serv. Corp*., Comp. Gen. Dec. B-290415, 2002 CPD ¶ 131 (protest of bundling of portable latrine rental services with waste removal services, each of which is classified under a different North American Industrial Classification System code and is generally performed by a different set of contractors sustained); and *National Customer Eng'g*, Comp. Gen. Dec. B-251135, 93-1 CPD ¶ 225 (bundling computer hardware and software maintenance restricted competition because it clearly excluded companies that performed only one of these types of maintenance). But see *AirTrak Travel*, Comp. Gen. Dec. B-292101, 2003 CPD ¶ 117, finding that the grouping of travel locations by geographic region and issuing a single consolidated procurement were not based solely on administrative convenience. There, the GAO stated that the underlying purposes behind the agency's single procurement included the legitimate requirement to reengineer the antiquated and costly DOD travel process, in part by consolidating the process and structuring geographical groupings to allow for more small business participation.

Bundling is proper in order to have a single contractor be responsible for work that is integrated by its nature. The need for integration of the work is generally viewed as a technical determination that the GAO will not challenge. See for example, *Outdoor Venture Corp*., Comp. Gen. Dec. B-299675, 2007 CPD ¶ 138 (need for proven integration and compatibility of systems); *USA Information Sys., Inc*., Comp. Gen. Dec. B-291417, 2002 CPD ¶ 224 (single web-based information retrieval system for on-line documentation as opposed to obtaining information from multiple vendors found reasonable); *Phoenix Tech. Servs. Corp*., Comp. Gen. Dec. B-274694.2, 97-2 CPD ¶ 142 (engineering support services for all aspects of two different aircraft); *Magnavox Elec. Sys. Co*., Comp. Gen. Dec. B-258037, 94-2 CPD ¶ 227 (missiles containing a new mid-course guidance system as a single system); *Titan Dynamics Simulations, Inc*., Comp. Gen. Dec. B-257559, 94-2 CPD ¶ 139 (pyrotechnic simulators along with the

new system for which the simulators are to be used); *Resource Consultants, Inc.*, Comp. Gen. Dec. B-255053, 94-1 CPD ¶ 59 (modifications of interrelated simulators in a single contract); and *Space Vector Corp.*, 73 Comp. Gen. 24 (B-253295.2), 93-2 CPD ¶ 273 (three launch vehicles in a single procurement).

Bundling will be found to be reasonable if a consolidation will result in significant cost savings or efficiencies, *Teximara, Inc.*, Comp. Gen. Dec. B-293221.2, 2004 CPD ¶ 151 (aligning areas that are integrally linked maximizes cross-utilization and cross-training opportunities between service areas). See also *Nautical Eng'g, Inc.*, Comp. Gen. Dec. B-309955, 2007 CPD ¶ 204 (consolidation of dockside and shipside maintenance and repair work found reasonable to achieve maintenance and repair cost savings and increased operational time); *2B Brokers*, Comp. Gen. Dec. B-298651, 2006 CPD ¶ 178 (consolidation of transportation coordination and freight transportation services would increase optional effectiveness and improve shipment efficiency); *B.H. Aircraft Co.*, Comp. Gen. Dec. B-295399.2, 2005 CPD ¶ 138 (bundled performance-based logistics supply chain management contract found reasonable to alleviate shortages of parts, increase availability of needed parts and maintain the military readiness of the aircraft); *Reedsport Mach. & Fabrication*, Comp. Gen. Dec. B-293110.2, 2004 CPD ¶ 91 (combination of two motor life boats reasonable in order to generate sufficient repair work to meet the $10,000 minimum amount under the contemplated IDIQ contract and to achieve economies of scale); *S&K Elecs.*, Comp. Gen. Dec. B-282167, 99-1 CPD ¶ 111 (single procurement for all desktop IT requirements — rather than continuing to rely on the current fragmented approach of using different sources for hardware/software and services—will result in significant quality improvements as a result of (1) having a single contractor responsible for infrastructure interoperability and product compatibility, (2) eliminating the confusion, delays and denials of responsibility for service interruptions or installation problems, and (3) facilitating consistent, timely upgrades and refreshment of technology); *National Airmotive Corp.*, Comp. Gen. Dec. B-280194, 98-2 CPD ¶ 60 (maintenance of several jet engines); *Building Sys. Contractors, Inc.*, Comp. Gen. Dec. B-266180, 96-1 CPD ¶ 18 (new energy management control system with the replacement of the heating, ventilating and air-conditioning system); *Tucson Mobilephone, Inc.*, Comp. Gen. Dec. B-256802, 94-2 CPD ¶ 45 (procurement and installation of new telecommunications equipment); *Iowa-Illinois Cleaning Co.*, Comp. Gen. Dec. B-260463, 95-1 CPD ¶ 272 (custodial and mechanical maintenance services for single building); *Resource Consultants, Inc.*, Comp. Gen. Dec. B-255053, 94-1 CPD ¶ 59 (combining several tasks to support a modification to a weapon training system); *Ryder Aviall, Inc.*, Comp. Gen. Dec. B-249920, 92-2 CPD ¶ 438 (both parts and labor for engine overhaul); *Delta*

Oaktree Prods., Comp. Gen. Dec. B-248903, 92-2 CPD ¶ 230 (various types of graphic arts services); *LaQue Center for Corrosion Tech.*, Inc., Comp. Gen. Dec. B-245296, 91-2 CPD ¶ 577 (corrosion control services for life of product); *Institutional Electro-Methods, Inc*., 70 Comp. Gen. 53 (B-239141.2), 90-2 CPD ¶ 363 (modification kits and engineering services for many modifications to an aircraft engine); *Massa Prods. Corp*., Comp. Gen. Dec. B-236892, 90-1 CPD ¶ 38 (manufacturing of a number of similar transducers); *Great Lakes Towing Co*., Comp. Gen. Dec. B-235023, 89-1 CPD ¶ 570 (maintenance and repair of vessel); *Eastman Kodak Co*., 68 Comp. Gen. 57 (B-231952), 88-2 CPD ¶ 455 (photocopiers and related services); *Korean Maint. Co*., 66 Comp. Gen. 12 (B-223780), 86-2 CPD ¶ 379 (custodial services for several buildings); and *Southwest Marine, Inc*., Comp. Gen. Dec. B-204136, 82-2 CPD ¶ 60 (overhaul of two ships).

Bundling is most frequently rejected when there is no strong relationship among the items that are included in the package. For example, in *TRS Research*, Comp. Gen. Dec. B-290644, 2002 CPD ¶ 159, the GAO sustained a protest on the basis of improper bundling where the agency had consolidated nine IDIQ contracts into a single requirement for intermodal container equipment requirements worldwide. The nine previous IDIQ contracts varied in scope; although some vendors were awarded some of the same items, no two of the nine vendors were awarded contracts requiring exactly the same equipment. The agency contended that awarding a single contract to one contractor would cure performance problems experienced under the previous fragmented and inefficient approach, which required the administration of nine different IDIQ contracts. The agency argued that since the master license agreement sought to include all of the agency's intermodal container equipment requirements, the master license agreement and the nine resulting IDIQ contracts should be viewed as constituting one single broad procurement requirement for intermodal container equipment. The GAO disagreed, stating that the master license agreement was not a statement of a single procurement requirement, but instead functioned more as a list of a range of multiple procurement requirements and to read it so broadly could shield "from meaningful review the very sort of arbitrary consolidation of requirements that the Act's restrictions on bundling are intended to prevent." See also *Pemco Aeroplex, Inc*., Comp. Gen. Dec. B-280397, 98-2 CPD ¶ 79, finding improper bundling where the Air Force combined the overhaul and repair of five different systems or subsystems into a single contract. Similarly, in *Richard M. Milburn High School*, Comp. Gen. Dec. B-244933, 91-2 CPD ¶ 496, the GAO rejected the packaging of five different types of training programs where only one required college accreditation.

(2) SET-ASIDES

The major method of ensuring that the government's small-business policies are implemented is the set-aside. FAR 19.501 contains the following guidance:

> (a) The purpose of small business set-asides is to award certain acquisitions exclusively to small business concerns. A "set-aside for small business" is the reserving of an acquisition exclusively for participation by small business concerns. A small business set-aside may be open to all small businesses. A small business set-aside of a single acquisition or a class of acquisitions may be total or partial.
>
> (b) The determination to make a small business set-aside may be unilateral or joint. A unilateral determination is one that is made by the contracting officer. A joint determination is one that is recommended by the Small Business Administration (SBA) procurement center representative (or, if a procurement center representative is not assigned, see 19.402(a)) and concurred in by the contracting officer.
>
> (c) For acquisitions exceeding the simplified acquisition threshold, the requirement to set aside an acquisition for HUBZone small business concerns (see 19.1305 takes priority over the requirement to set aside the acquisition for small business concerns.
>
> (d) The small business reservation and set-asides requirements at 19.502-2 do not preclude award of a contract to a service-disabled veteran-owned small business concern under Subpart 19.14.
>
> (e) The contracting officer shall review acquisitions to determine if they can be set aside for small business, giving consideration to the recommendations of agency personnel having cognizance of the agency's small business programs. The contracting officer shall document why a small business set-aside is inappropriate when an acquisition is not set aside for small business, unless a HUBZone or service-disabled veteran-owned small business set-aside or HUBZone or service-disabled veteran-owned small business sole source award is anticipated. If the acquisition is set aside for small business based on this review, it is a unilateral set-aside by the contracting officer. Agencies may establish threshold levels for this review depending upon their needs.
>
> (f) At the request of an SBA procurement center representative, (or, if a procurement center representative is not assigned, see 19.402(a)) the contracting officer shall make available for review at the contracting office (to the extent of the SBA representative's security clearance) all proposed acquisitions in excess of the micro-purchase threshold that have not been unilaterally set aside for small business.
>
> (g) To the extent practicable, unilateral determinations initiated by a contracting officer shall be used as the basis for small business set-asides rather than joint determinations by an SBA procurement center representative and a contracting officer.
>
> (h) All solicitations involving set-asides must specify the applicable small business size standard and NAICS code (see 19.303).
>
> (i) Except as authorized by law, a contract may not be awarded as a result of a small business set-aside if the cost to the awarding agency exceeds the fair market price.

In accordance with these regulations, contracts should be designated for set-aside in the acquisition planning process in three circumstances: (1) the procurement is for $150,000 or less but over $3,000, (2) the procurement is for a product or service that

has been acquired previously through a set-aside, and (3) the procurement is for a product or service where competition can be obtained from two or more small businesses. This "rule of two" is implemented with the following guidance in FAR 19.502-2:

> (a) Each acquisition of supplies or services that has an anticipated dollar value exceeding $3,000 ($15,000 for acquisitions as described in 13.201(g)(1)), but not over $150,000 ($300,000 for acquisitions described in paragraph (1) of the Simplified Acquisition Threshold definition at 2.101), is automatically reserved exclusively for small business concerns and shall be set aside for small business unless the contracting officer determines there is not a reasonable expectation of obtaining offers from two or more responsible small business concerns that are competitive in terms of market prices, quality, and delivery. If the contracting officer does not proceed with the small business set-aside and purchases on an unrestricted basis, the contracting officer shall include in the contract file the reason for this unrestricted purchase. If the contracting officer receives only one acceptable offer from a responsible small business concern in response to a set-aside, the contracting officer should make an award to that firm. If the contracting officer receives no acceptable offers from responsible small business concerns, the set-aside shall be withdrawn and the requirement, if still valid, shall be resolicited on an unrestricted basis. The small business reservation does not preclude the award of a contract with a value not greater than $150,000 under Subpart 19.8, Contracting with the Small Business Administration, under 19.1007(c), Solicitations equal to or less than the ESB reserve amount, or under 19.1305, HUBZone set-aside procedures.
>
> (b) The contracting officer shall set aside any acquisition over $150,000 for small business participation when there is a reasonable expectation that (1) offers will be obtained from at least two responsible small business concerns offering the products of different small business concerns (but see paragraph (c) of this subsection); and (2) award will be made at fair market prices. Total small business set-asides shall not be made unless such a reasonable expectation exists (but see 19.502-3 as to partial set-asides). Although past acquisition history of an item or similar items is always important, it is not the only factor to be considered in determining whether a reasonable expectation exists. In making R&D small business set-asides, there must also be a reasonable expectation of obtaining from small businesses the best scientific and technological sources consistent with the demands of the proposed acquisition for the best mix of cost, performances, and schedules.

The-set aside provisions of FAR 19.502-2(b) apply to competitions of task and delivery orders issued under multiple award, IDIQ contracts, *Delex*, Comp. Gen. Dec. B-400403, 2008 CPD ¶ 181 (Navy required to set aside the delivery order for the small business IDIQ contract holders); but not to orders issued under federal supply schedule contracts, GSA Acquisition Alert 2008-07 (Oct. 28, 2008).

A contracting officer's determination under FAR 19.502-2 concerns a matter of business judgment within the contracting officer's discretion that will not be disturbed absent a showing that it was unreasonable, *Quality Hotel Westshore*, Comp. Gen. Dec. B-290046, 2002 CPD ¶ 91; *Neal R. Gross & Co.*, Comp. Gen. Dec. B-240924.2, 91-1 CPD ¶ 53. The Court of Federal Claims similarly holds such determinations to be a matter of business judgment and within the contracting officer's discretion, *Rhinocorps Ltd. Co. v. United States*, 87 Fed. Cl. 261 (2009).

FAR 19.502-2 does not require the use of any particular method for assessing the availability of small business, *MCS Mgmt., Inc. v. United States*, 48 Fed. Cl. 506 (2000); *American Artisan Prods., Inc*., Comp. Gen. Dec. B-292380, 2003 CPD ¶ 132. The decision whether to set aside a procurement may be based on an analysis of factors such as the prior procurement history, the recommendations of appropriate small business specialists, and market surveys that include responses to sources sought announcements, *SAB Co*., Comp. Gen. Dec. B-283883, 2000 CPD ¶ 58; *PR Newswire*, Comp. Gen. Dec. B-279216, 98-1 CPD ¶ 118. See, for example, *FlowSense, LLC*, Comp. Gen. Dec. B-310904, 2008 CPD ¶ 56 (agency reasonably determined there were no SDVOSB firms with the capabilities and capital to procure the necessary bonding and to perform the work associated with the project based on information contained in a database, which showed that the firm's total annual revenue was substantially below the estimated value of the contract which brought into question the firm's capacity to perform); and *MCS Mgmt., Inc*., Comp. Gen. Dec. B-285813, 2000 CPD ¶ 187 (agency reasonably considered annual revenues and size of past contracts when examining whether small businesses were capable of performing contract for a set-aside solicitation). Because a decision whether to set aside a procurement is a matter of business judgment within the contracting officer's discretion, the GAO review generally is limited to ascertaining whether that official abused his or her discretion, *Admiral Towing & Barge Co*., Comp. Gen. Dec. B-291849, 2003 CPD ¶ 164. The GAO will not question a small business set-aside determination where the record shows that the evidence before the contracting officer was adequate to support the reasonableness of the conclusion that small business competition reasonably could be expected, *National Linen Serv*., Comp. Gen. Dec. B-285458, 2000 CPD ¶ 138; *Commonwealth Home Health Care, Inc*., Comp. Gen. Dec. B-400163, 2008 CPD ¶ 140. In making set-aside decisions, agencies need not make either actual determinations of responsibility or decisions tantamount to determinations of responsibility; rather, they need only make an informed business judgment that there is a reasonable expectation of receiving acceptably priced offers from small business concerns that are capable of performing the contract, *ViroMed Labs*., Comp. Gen. Dec. B-298931, 2006 CPD ¶ 4.

There have been a number of cases where the GAO found the agency's decision not to set aside reasonable. See, for example, *Information Ventures, Inc*., Comp. Gen. Dec. B-400604, 2008 CPD ¶ 232, where the GAO found reasonable an agency determination not to set aside based on the contracting officer's review of the information provided by small business concerns in their responses to the sources sought notice and review of the procurement history. The GAO further stated that the record confirms that the agency's small business specialist and the SBA's PCR were integrated in the contracting

officer's decision-making process and they both concurred with his business judgment that the requirement should be competed on an unrestricted basis. See also *EMMES Corp*., Comp. Gen. Dec. B-402245, 2010 CPD ¶ 53 (market research and publication of sources sought notice indicated agency was not likely to receive proposals from at least two small businesses); *The Protective Group, Inc*., Comp. Gen. Dec. B-310018, 2007 CPD ¶ 208 (record showed agency was familiar with body armor marketplace, and responses from firms participating in industry day conference with agency demonstrated that it was not likely to receive proposals from at least two responsible small businesses); *International Filter Mfg., Inc*., Comp. Gen. Dec. B-299368, 2007 CPD ¶ 70 (market research, a review of the drawings, and consultation with small business representative was sufficient to demonstrate that far less than 50% of the total cost of the kit could be manufactured by small businesses); *Shirlington Limousine & Transport, Inc*., Comp. Gen. Dec. B-299241, 2007 CPD ¶ 52 (agency reasonably considered the responses it had received from two similar, although substantially smaller in scope, solicitations noting that in neither case did it receive two acceptable proposals); *American Artisan Productions, Inc*., Comp. Gen. Dec. B-292380, 2003 CPD ¶ 132 (agency reasonably concluded—based on market surveys and concurrence of the SBA—that it could not expect to receive proposals from at least two responsible small business offerors at fair market prices); *Quality Hotel Westshore*, Comp. Gen. Dec. B-290046, 2002 CPD ¶ 91(determination not to set aside procurement reasonable where based on a market survey, request for interest targeted at small businesses, and concurrence of the SBA and the agency's small business specialist); *Belleville Shoe Mfg. Co*., Comp. Gen. Dec. B-287237, 2001 CPD ¶ 87 (set-aside not required where record supports finding that firm had never produced boots of the type and quantity required under the solicitation); *MCS Mgmt., Inc*., Comp. Gen. Dec. B-285813, 2000 CPD ¶ 187 (set-aside not required where there was no indication that small business concerns could perform food service contracts of the scope and complexity required under the solicitation); *CardioMetrix*, Comp. Gen. Dec. B-276912, 97-2 CPD ¶ 45 (procurement history for the same services showed that it was unlikely that at least two small businesses would submit offers at a fair market price); *Ruchman & Assocs., Inc*., Comp. Gen. Dec. B-275974, 97-1 CPD ¶ 155 (research and visit to other federal and private-sector entities showed that none were utilizing a small business to perform such work); and *CardioMetrix*, Comp. Gen. Dec. B-261327, 95-2 CPD ¶ 96 (agency's determination not to set aside reasonable where it had twice attempted to procure the follow-on services under a small-business set-aside but had to cancel the procurements because the agency did not receive a reasonably priced offer from a small business).

Cases where the GAO found the agency's decision to set aside reasonable include,

Med-South, Inc., Comp. Gen. Dec. B-401214, 2009 CPD ¶ 112 (in addition to surveying the market and contacting the OSDBU, the contracting officer reviewed GAO decisions challenging similar solicitation for home oxygen including one where the GAO upheld the decision to set aside the procurement for small business); *Logistics Health, Inc*., Comp. Gen. Dec. B-400157, 2008 CPD ¶ 160 (determination made based on market research which indicated that there were a large number of small and large business vendors providing these services and pricing for the services would be competitively based); *Encompass Group, LLC*, Comp. Gen. Dec. B-296602; 2005 CPD ¶ 159 (protester's argument that there are no small business manufacturers of the bulk fabric does not show that the agency was unreasonable in concluding that it would obtain two or more offers from small business manufacturers of the sheets, pillow cases and blankets); *Moog Inc*., Comp. Gen. Dec. B-294600, 2004 CPD ¶ 230 (agency reasonably determined that it could expect to receive offers from at least two responsible small business concerns at a fair market price where work was previously performed by a small business and the RFP did not require source approval to perform services); *Stewart Title Co. of Illinois*, Comp. Gen. Dec. B-283291, 99-2 CPD ¶ 71 (acquisition was of the same size and type as the successful set-asides in the southeast, and there was no apparent reason to expect a different outcome merely due to geography); *PR Newswire*, Comp. Gen. Dec. B-279216, 98-1 CPD ¶ 118 (development of technological advances in industry strongly suggested that small business may now have capability to perform the contract); and *American Medical Response of Conn*., Comp. Gen. Dec. B-278457, 98-1 CPD ¶ 44 (determination based on knowledge of previous participation in a procurement for the same services by at least two business concerns that had submitted at fair market prices).

The GAO will sustain a protest if it determines that an agency's decision not to set aside is unreasonable. See *Rochester Optical Mfg. Co*., Comp. Gen. Dec. B-292247, 2003 CPD ¶ 138, where the agency made insufficient efforts to ascertain small business interest and capability to perform the requirement. See also *Delex*, Comp. Gen. Dec. B-400403, 2008 CPD ¶ 181, sustaining a protest finding unreasonable the agency's analysis of the procurement history in its determination not to set aside the task order for small businesses. The agency explained that the procurement history showed that the protester did not submit a proposal for the predecessor task order requirement; that while the protester had expressed interest in the last five delivery order acquisitions under the IDIQ contract, it submitted proposals for only three of the five acquisitions; and that in a previous delivery-order competition under this IDIQ contract where only the protester and one other contract holder submitted proposals, the protester's proposal was evaluated as unsatisfactory, leaving the agency with only the option of making

award to the other contract holder. The GAO reasoned:

> [w]ith respect to the predecessor delivery order for this requirement, we agree with Delex that a small business could reasonably decide not to compete with the large business contract-holders for this work, and that an agency should not rely on the results of an unrestricted competition to determine the likelihood that a small business will participate in a set-aside competition. With respect to the five previous acquisitions, we again agree with Delex. We know of no requirement that a small business participate in every acquisition for which it is eligible to compete, especially when several of these acquisitions are occurring over a short period of time. Finally, we are concerned about the Navy's reliance on Delex's submission of an unsatisfactory proposal 2 years ago, as opposed to other more recent, and perhaps more relevant events.

Similarly, in *Thermal Solutions, Inc.*, Comp. Gen. Dec. B-259501, 95-1 CPD ¶ 178, the GAO found that an agency's decision not to set aside a procurement for small disadvantaged businesses (SDBs) was unreasonable. The decision not to set aside the procurement was based on prior SDB set-aside procurements for dissimilar work and prior procurements for similar work that were not set aside for SDBs. The GAO found that the agency received expressions of interest from five undisputed SDBs, and reasoned that SDBs often cannot effectively compete with non-SDB firms and, thus, may not submit offers on contracts that they are otherwise capable of performing. See also *Bollinger & ACCU-Lab Med. Testing*, Comp. Gen. Dec. B-270259, 96-1 CPD ¶ 106 (agency improperly withdrew set-aside by relying on the procurement history instead of investigating the numerous small-business responses to the CBD announcement and performing a current market study). In *LBM, Inc.*, Comp. Gen. Dec. B-290682, 2002 CPD ¶ 157, the contract for transportation motor pool services at Fort Polk, LA, had been a small business set-aside for ten years. When it came up for renewal the Army decided to include it under the Logistical Joint Administrative Management Support Services (LOGJAMSS) IDIQ contracts. The GAO sustained the protest, rejecting the Army's argument that it was a protest of the proposed award of a task order under a LOGJAMSS contract—thereby divesting the GAO of jurisdiction pursuant to the FASA —by explaining that it was a protest of whether work that had been previously set aside exclusively for small businesses could be transferred to LOGJAMSS. The GAO stated that this was a challenge to the terms of the underlying LOGJAMSS solicitation and was within its bid protest jurisdiction. It added that the FASA "was not intended to, and does not, preclude protests that timely challenge the transfer and inclusion of work in ID/IQ contracts without complying with applicable laws or regulations" and explained that Small Business Act requirements "were applicable to acquisitions prior to the enactment of [the] FASA, and nothing in that statute authorizes the transfer of acquisitions to ID/IQ contracts in violation of those laws and regulations." In *Dep't of the Army—Modification of Recommendation*, Comp. Gen. Dec. B-290682.2, 2003 CPD ¶ 123, the agency requested that the GAO modify its recommendation in LBM to recognize that the agency, having decided to acquire the services exclusively from small

businesses, could limit the competition to those small businesses who hold IDIQ contracts for the services at issue. The GAO denied the request on the ground that CICA provides for full and open competition among eligible small businesses for acquisitions required to be set-aside for small businesses.

The agency must also consider making a partial set-aside in cases where a total set-aside is not possible. A partial set-aside would reserve a portion of a procurement for small businesses if they matched the highest price on the non-set-aside portion of the procurement. FAR 19.502-3 contains the following guidance:

> (a) The contracting officer shall set aside a portion of an acquisition, except for construction, for exclusive small business participation when —
>
> (1) A total set-aside is not appropriate (see 19.502-2);
>
> (2) The requirement is severable into two or more economic production runs or reasonable lots;
>
> (3) One or more small business concerns are expected to have the technical competence and productive capacity to satisfy the set-aside portion of the requirement at a fair market price;
>
> (4) The acquisition is not subject to simplified acquisition procedures; and
>
> (5) A partial set-aside shall not be made if there is a reasonable expectation that only two concerns (one large and one small) with capability will respond with offers unless authorized by the head of a contracting activity on a case-by-case basis. Similarly, a class of acquisitions, not including construction, may be partially set aside. Under certain specified conditions, partial set-asides may be used in conjunction with multiyear contracting procedures.

The determination as to whether a particular acquisition should be partially set aside for small business is left to the discretion of the contracting officer. As with a total set-aside, that determination must be reasonably supported. See *Digital Sys. Group, Inc*., Comp. Gen. Dec. B-258262.2, 95-1 CPD ¶ 30, finding that, although the agency's original rationale concerning the rejection of a partial set-aside was incomplete, its responses to the protest provided sufficient basis to support its decision. Specifically, the contracting officer considered a partial set-aside on the basis of agency size but rejected it because an agency's size was unrelated to its functional needs. The agency determined that functional needs determined the appropriate software, and because GSA could not ascertain those needs, a set-aside was not viewed as feasible. See also *Vox Optima, LLC*, Comp. Gen. Dec. B-400451, 2008 CPD ¶ 212, denying the protester's argument that since the solicitation contemplates the award of multiple IDIQ contracts, the requirement is necessarily severable into two or more lots, and thus is suitable for a partial set-aside. The GAO stated that the determination as to whether a particular acquisition should be partially set aside is left to the discretion of the contracting officer, provided the determination is reasonable. The GAO found that the agency

reasonably determined not to set aside a portion of the work because there were no firms capable of performing the full-spectrum of services required by the agency. See, however, *Belleville Shoe Mfg. Co*., Comp. Gen. Dec. B-287237, 2001 CPD ¶ 87, finding that the agency improperly failed to consider whether a partial set-aside was required.

Under the Small Business Competitiveness Demonstration Program, established by Pub. L. No. 100-656 and extended indefinitely by the Small Business Reauthorization Act of 1998, Pub. L. No. 105-135, agencies are directed not to use set-asides for four types of procurement as long as they meet certain percentage goals through open competition: (1) construction, (2) refuse systems and related procurements, (3) architectural and engineering services, and (4) nuclear ship repair. FAR Subpart 19.10 contains guidance on the implementation of this program. The program is based on the premise that small businesses in these industries can obtain a fair proportion of the work in a competitive environment. As long as selected agencies maintain awards in these industries at a level of at least 40% small business those agencies will use full and open competition rather than set-asides on all contracts expected to exceed $30,000. Contracts for amounts of $30,000 or less will continue to be set aside for emerging small businesses (ESBs) provided that the contracting officer determines that there is a reasonable expectation of obtaining offers from two or more responsible ESBs that will be competitive in terms of price, quality, and delivery, FAR 19.1007(c)(1). ESBs are defined as small businesses whose size is no greater than 50% of the small-business size standard applicable to the North American Industry Classification System code for the industry, FAR 19.1002. If the contracting officer proceeds with the ESB set-aside and receives a quotation from only one ESB at a reasonable price, the contracting officer must make the award, FAR 1007(c)(2). See *Cromartie Constr. Co*., Comp. Gen. Dec. B-271788, 96-2 CPD ¶ 48. The determination of price reasonableness is within the discretion of the agency, and the GAO will not disturb such a determination unless it is unreasonable or there is fraud or bad faith on the part of contracting officers. See *Olsen Envtl. Servs., Inc*., Comp. Gen. Dec. B-241475, 91-1 CPD ¶ 126, finding that the contracting officer had a rational basis for determining that the price submitted by the ESB was unreasonably high.

The program also requires participating agencies to target for expansion 10 industry categories with which they have had low small business involvement for special efforts to increase that involvement, FAR 19.1004. The participating agencies include: Departments of Agriculture, Defense, Energy, Health and Human Services, the Interior, Transportation, and Veterans Affairs; the Environmental Protection Agency; the General Services Administration; and the National Aeronautics and Space

Administration. Each participating agency, in consultation with the SBA, must designate its own targeted industry categories for enhanced small business participation, FAR 19.1005(b). For a list of each participating agency's targeted industry categories, refer to the participating agency's regulations see DFARS 219.1005(b) and NFS 1819.1005(b).

(3) Small Business Programs and Preferences

There is one overarching small business program and five subsidiary programs. Four of the subsidiary programs have minimum goals set forth in 15 U.S.C. § 644:

Program	Goal
All small business concerns	23%
Small business concerns owned and controlled by service-disabled veterans	3%
Qualified HUBZone small business concerns	3%
Small business concerns owned and controlled by socially and economically disadvantaged individuals	5%
Small business concerns owned and controlled by women	5%
Veteran-owned small business concerns	No stated goal

These goals are government-wide goals with some flexibility in the statute for agencies to have different goals. See 15 U.S.C. § 644(g)(1), stating:

> Notwithstanding the Government-wide goal, each agency shall have an annual goal that presents, for that agency, the maximum practicable opportunity for small business concerns, small business concerns owned and controlled by service-disabled veterans, qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women to participate in the performance of contracts let by such agency. The Administration and the Administrator of the Office of Federal Procurement Policy shall, when exercising their authority pursuant to paragraph (2), insure that the cumulative annual prime contract goals for all agencies meet or exceed the annual Government-wide prime contract goal established by the President pursuant to this paragraph.

The traditional technique for ensuring that small businesses obtain their fair share of government procurements is the set-aside, as discussed in the previous section. In addition, FAR Part 19 sets forth supplemental procedures for three of the subsidiary categories—service-disabled veterans, HUBZone small business concerns, and small

business concerns owned and controlled by socially and economically disadvantaged individuals. There are no supplemental procedures for either veteran-owned small businesses or women-owned small businesses.

There is parity among each of the small business subcategories. The 2010 Small Business Jobs Act, P.L. 111-240, § 1347, re-established equality among each of the small business subcategories that competes for government contracts. The Act makes a technical revision to the 1953 Small Business Act by replacing the word "shall" in the Historically Underutilized Business Zone statute with the word "may." The old language in the Small Business Act stated that a procurement officer shall award contracts based on limited competition to HUBZone small businesses. But, the statutes creating the service-disabled veteran-owned small business program and the Small Business Administration's 8(a) Business Development Program used the word "may" when referring to set-aside contracts. The GAO and the U.S. Court of Federal Claims had determined the difference in "shall" and "may" unambiguously established a preference for HUBZone firms (see *Mission Critical Solutions v. United States*, 91 Fed. Cl. 386 (2010) and Comp. Gen. Dec. B-401057, 2009 CPD ¶ 93, *recons. denied*, 2009 CPD ¶ 148).

(A) Service-Disabled Veteran-Owned Smallbusiness Procurement Program

The Veterans Benefits Act, Pub. L. No. 108-183, § 308 (2003) amended the Small Business Act, 15 U.S.C. § 657(f) to establish the Service-Disabled Veteran-Owned Small Business Concern (SDVOSBC) Program. The program is implemented in FAR Subpart 19.14. The language of the Act is discretionary and permits, but does not require, a contracting officer to restrict competition to SDVOSBCs if certain conditions are satisfied, *DAV Prime, Inc*., Comp. Gen. Dec. B-311420, 2008 CPD ¶ 90.

An agency is required to make reasonable efforts to ascertain whether an acquisition is suitable for a set-aside to an SDVOSBC before it can proceed with a small business set-aside, *MCS Portable Serv*., Comp. Gen. Dec. B-299291, 2007 CPD ¶ 55 (Air Force failed to make reasonable efforts to ascertain whether the acquisition was suitable for an SDVOSBC set-aside when it disregarded an SDVOSBC's expression of interest). In *IBV, Ltd*., Comp. Gen. Dec. B-311244, 2008 CPD ¶ 47, the GAO stated that while the record showed that at least two SDVOSBC firms were available and interested in competing on this requirement, this is only the first of two considerations that go into a set-aside decision. In addition, the contracting officer must

have a reasonable expectation that award will be made at a fair market price. The GAO found the contracting officer's concern that the SDVOSBCs would not propose fair market pricing was confirmed by the pricing of those proposals. The SDVOSBC proposals received were priced at more than double the independent government estimate, and all exceeded the RFP's estimated price range.

FAR 19.1405 permits competitions restricted to service-disabled veteran-owned small business, as follows:

> (a) The contracting officer may set-aside acquisitions exceeding the micro-purchase threshold for competition restricted to service-disabled veteran-owned small business concerns when the requirements of paragraph (b) of this section can be satisfied. The contracting officer shall consider service-disabled veteran-owned small business set-asides before considering service-disabled veteran-owned small business sole source awards (see 19.1406).
>
> (b) To set aside an acquisition for competition restricted to service-disabled veteran-owned small business concerns, the contracting officer must have a reasonable expectation that —
>
> > (1) Offers will be received from two or more service-disabled veteran-owned small business concerns; and
> >
> > (2) Award will be made at a fair market price.
>
> (c) If the contracting officer receives only one acceptable offer from a service-disabled veteran-owned small business concern in response to a set-aside, the contracting officer should make an award to that concern. If the contracting officer receives no acceptable offers from service-disabled veteran-owned small business concerns, the service-disabled veteran-owned set-aside shall be withdrawn and the requirement, if still valid, set aside for small business concerns, as appropriate (see Subpart 19.5).

FAR 19.1406 permits sole source awards to service-disabled veteran-owned small business concerns as follows:

> (a) A contracting officer may award contracts to service-disabled veteran-owned small business concerns on a sole source basis (see 19.501(d) and 6.302-5), provided —
>
> > (1) Only one service-disabled veteran-owned small business concern can satisfy the requirement;
> >
> > (2) The anticipated award price of the contract (including options) will not exceed —
> >
> > > (i) $6 million for a requirement within the NAICS codes for manufacturing; or
> > >
> > > (ii) $3.5 million for a requirement within any other NAICS code;
> >
> > (3) The service-disabled veteran-owned small business concern has been determined to be a responsible contractor with respect to performance; and
> >
> > (4) Award can be made at a fair and reasonable price.

To be considered a service-disabled veteran, the veteran must have an adjudication

letter from the Veterans Administration, a Department of Defense Form 214, Certificate of Release or Discharge from Active Duty, or a Statement of Service from the National Archives and Records Administration, stating that the veteran has a service-connected disability. There is no minimum disability rating. A veteran with a 0 to 100% disability rating is eligible to self-represent as a service-disabled veteran for federal contracting purposes. A contractor officer has no obligation to investigate or question a contractor's claim of SDVOSBC status prior to making an award, *Major Contracting Services, Inc*., Comp. Gen. Dec. B-400616, 2008 CPD ¶ 214.

The SBA is the designated authority for determining whether a firm is an eligible SDVOSBC, and it has established procedures for interested parties to challenge a firm's status as a qualified SDVOSBC, see 15 U.S.C. § 632(q), § 657b; 13 C.F.R. § 125.25, § 125.27 (2008); FAR 19.307; FAR 19.1403. If the SBA sustains the protest, and the contract has not yet been awarded, then the protested concern is ineligible for an SDVOSBC contract award, 13 C.F.R. § 125.27(g). See *Singleton Enters.—GMT Mech. (J.V.)*, Comp. Gen. Dec. B-310552, 2008 CPD ¶ 16 (agency properly rejected bid of joint venture under a solicitation set side for a SDVOSBC where the SBA had determined in another solicitation that the joint venture did not qualify as a SDVOSBC). However, there is no requirement that a contract be terminated if an awardee is found to be other than an SDVOSBC after award was made, *Major Contracting Servs., Inc*., Comp. Gen. Dec. B-400616, 2008 CPD ¶ 214; *Veteran Enter. Tech. Servs., LLC*, Comp. Gen. Dec. B-298201.2, 2006 CPD ¶ 108. If a contract has already been awarded, and the SBA sustains the protest, the contracting officer cannot count the award as an award to an SDVOSBC and the concern cannot submit another offer as an SDVOSBC on a future SDVOSBC procurement unless it overcomes the reasons for the protest, 13 C.F.R. § 125.27(g).

The Veterans First Contracting Program, created by the Veterans Benefits, Health Care, and Information Technology Act of 2006, 38 U.S.C. § 8127, and administered by the VA, provides the VA with independent authority to make sole-source contract awards to SDVOSBCs and veteran-owned small business firms, *In & Out Valet Co*., Comp. Gen. Dec. B-311141, 2008 CPD ¶ 71; *Apex Limited, Inc*., Comp. Gen. Dec. B-402163, 2010 CPD ¶ 35. Specifically, 38 U.S.C. § 8127(c) states:

> (c) Sole Source Contracts for Contracts Above Simplified Acquisition Threshold. — For purposes of meeting the goals under subsection (a), and in accordance with this section, a contracting officer of the Department [of Veterans Affairs] may award a contract to a small business concern owned and controlled by veterans using procedures other than competitive procedures if —
>
> > (1) such concern is determined to be a responsible source with respect to performance of such contract opportunity;

> (2) the anticipated award price of the contract (including options) will exceed the simplified acquisition threshold (as defined in section 4 of the Office of Federal Procurement Policy Act (41 U.S.C. 403)) but will not exceed $5,000,000; and
>
> (3) in the estimation of the contracting officer, the contract award can be made at a fair and reasonable price that offers best value to the United States.

The Veterans First Contracting Program also includes a statement of priority for VA contract awards, which grants first priority to sole-source or set-aside contracts for SDVOSB firms, second priority to sole-source or set-aside contracts for veteran-owned small business firms, and lower priority for all other categories of small business firms, 38 U.S.C. § 8127(i).

(B) HUBZONE EMPOWERMENT PROGRAM

The HUBZone Empowerment Contracting Program was enacted into law as part of the Small Business Reauthorization Act of 1997, Pub. L. No. 105-135. See 15 U.S.C. § 631 note. This program is designed to provide federal contracting opportunities for certain qualified small business concerns located in distressed communities. The purpose is to promote private-sector investment and employment opportunities in these communities. A concern may be determined to be a "qualified HUBZone small-business concern" if it is located in an "historically underutilized business zone," is owned and controlled by one or more U.S. citizens, and at least 35% of its employees reside in a HUB Zone. FAR Subpart 19.13 implements this policy.

With regard to the HUBZone program, 15 U.S.C. § 657a(b)(2)(B) states that, "[n]otwithstanding any other provision of law,"

> a contract opportunity shall be awarded pursuant to this section on the basis of competition restricted to HUBZone small business concerns if the contracting officer has a reasonable expectation that not less than 2 qualified HUBZone small business concerns will submit offers and that the award can be made at a fair market price.

Mirroring the statutory language, the applicable FAR provision states that a contracting officer "shall set aside acquisitions exceeding the simplified acquisition threshold for competition restricted to HUBZone small business concerns," FAR 19.305(a), when the contracting officer has a reasonable expectation that offers will be received from two or more HUBZone small business concerns and award will be made at a fair market price, FAR 19.1305(b). See *SWR, Inc.*, Comp. Gen. Dec. B-294266, 2004 CPD ¶ 219. An agency must make reasonable efforts to ascertain whether it will receive offers from at least two HUBZone small business concerns, *USA Fabrics, Inc.*,

Comp. Gen. Dec. B-295737, 2005 CPD ¶ 82; *Global Solutions Network, Inc.*, Comp. Gen. Dec. B-292568, 2003 CPD ¶ 174.

Contracting officers may also award sole-source contracts to HUBZone small businesses under essentially the same circumstances that are prescribed for service-disabled veteran-owned small businesses, FAR 19.1306. The contracting officer must determine that the HUBZone small business firm is the only such firm capable of doing the work, FAR 19.1306(a).

Another procedure that can be used to steer work to a HUBZone small business firm is a 10% evaluation preference, FAR 19.1307. This preference can be used by conducting a full competition among all types of firms and adding 10% to the prices of all competitors. The contracting officer must insert the clause at FAR 52.219-4, Notices of Price Evaluation Preference for HUBZone Small Business Concerns, in solicitations and contracts for acquisitions conducted using full and open competition. The clause is not to be used in acquisitions that do not exceed the simplified acquisition threshold. The preference is not to be used (1) in acquisitions expected to be less than or equal to the simplified acquisition threshold; (2) where price is not a selection factor so that a price evaluation preference would not be considered (e.g., Architect/Engineer acquisitions); and (3) where all fair and reasonable offers are accepted (e.g., the award of multiple award schedule contracts), FAR 19.1307(a).

FAR 19.1304 makes the HUBZone procedures inapplicable to —

> (a) Requirements that can be satisfied through award to —
>
> > (1) Federal Prison Industries, Inc. (see Subpart 8.6); or
> >
> > (2) Javits-Wagner-O'Day Act participating non-profit agencies for the blind or severely disabled (see Subpart 8.7);
>
> (b) Orders under indefinite delivery contracts (see Subpart 16.5);
>
> (c) Orders against Federal Supply Schedules (see Subpart 8.4);
>
> (d) Requirements currently being performed by an 8(a) participant or requirements SBA has accepted for performance under the authority of the 8(a) Program, unless SBA has consented to release the requirements from the 8(a) Program;
>
> (e) Requirements that do not exceed the micro-purchase threshold; or
>
> (f) Requirements for commissary or exchange resale items.

(C) 8(A) PROGRAM

The 8(a) Program is established under 15 U.S.C. § 637(a), which authorizes the Small Business Administration to contract with procuring agencies and award the work under those contracts to small disadvantaged businesses. The small disadvantaged businesses eligible for this work are designated by the SBA pursuant to their regulations in 13 CFR § 124.101-113. FAR 19.803 contains the following guidance on the designation of specific contracts for award under this program:

> Through their cooperative efforts, the SBA and an agency match the agency's requirements with the capabilities of 8(a) concerns to establish a basis for the agency to contract with the SBA under the program. Selection is initiated in one of three ways —
>
> (a) The SBA advises an agency contracting activity through a search letter of an 8(a) firm's capabilities and asks the agency to identify acquisitions to support the firm's business plans. In these instances, the SBA will provide at least the following information in order to enable the agency to match an acquisition to the firm's capabilities:
>
> (1) Identification of the concern and its owners.
>
> (2) Background information on the concern, including any and all information pertaining to the concern's technical ability and capacity to perform.
>
> (3) The firm's present production capacity and related facilities.
>
> (4) The extent to which contracting assistance is needed in the present and the future, described in terms that will enable the agency to relate the concern's plans to present and future agency requirements.
>
> (5) If construction is involved, the request shall also include the following:
>
> (i) The concern's capabilities in and qualifications for accomplishing various categories of maintenance, repair, alteration, and construction work in specific categories such as mechanical, electrical, heating and air conditioning, demolition, building, painting, paving, earth work, waterfront work, and general construction work.
>
> (ii) The concern's capacity in each construction category in terms of estimated dollar value (e.g., electrical, up to $100,000).
>
> (b) The SBA identifies a specific requirement for a particular 8(a) firm or firms and asks the agency contracting activity to offer the acquisition to the 8(a) Program for the firm(s). In these instances, in addition to the information in paragraph (a) of this section, the SBA will provide —
>
> (1) A clear identification of the acquisition sought; e.g., project name or number;
>
> (2) A statement as to how any additional needed equipment and real property will be provided in order to ensure that the firm will be fully capable of satisfying the agency's requirements;
>
> (3) If construction, information as to the bonding capability of the firm(s); and
>
> (4) Either —
>
> (i) If sole source request —

(A) The reasons why the firm is considered suitable for this particular acquisition; e.g., previous contracts for the same or similar supply or service; and

(B) A statement that the firm is eligible in terms of NAICS code, business support levels, and business activity targets; or

(ii) If competitive, a statement that at least two 8(a) firms are considered capable of satisfying the agency's requirements and a statement that the firms are also eligible in terms of the NAICS code, business support levels, and business activity targets. If requested by the contracting activity, SBA will identify at least two such firms and provide information concerning the firms' capabilities.

(c) Agencies may also review other proposed acquisitions for the purpose of identifying requirements which may be offered to the SBA. Where agencies independently, or through the self marketing efforts of an 8(a) firm, identify a requirement for the 8(a) Program, they may offer on behalf of a specific 8(a) firm, for the 8(a) Program in general, or for 8(a) competition (but see 19.800(e)).

Procurements under the 8(a) Program must be competitive if there are at least two eligible firms and it is anticipated that the contract price will exceed $6.5 million in the case of manufacturing contracts and $4 million in the case of all other acquisitions, FAR 19.805-1(a). These competitive procurements may use either sealed bidding or competitive negotiation procedures, FAR 19.805-2(a).

2. Competition

Competition is the most fundamental goal of acquisition planning because it is believed that obtaining competition is the best method of ensuring that the government will receive the supplies and services it needs at fair and reasonable prices. Competition also furthers the congressional goal of providing all qualified sources an opportunity to participate in the procurement process. Thus, there are strong statutory provisions requiring competition in new procurements. The FAR guidance goes further than these requirements, addressing the need to plan the procurement to ensure that competition is possible, to the greatest extent practicable, in subcontracts and subsequent procurements of components and spare parts.

FAR 7.105(b)(2) states:

Competition. (i) Describe how competition will be sought, promoted, and sustained throughout the course of the acquisition. If full and open competition is not contemplated, cite the authority in 6.302, discuss the basis for the application of that authority, identify the source(s), and discuss why full and open competition cannot be obtained.

(ii) Identify the major components or subsystems. Discuss component breakout plans relative to these major components or subsystems. Describe how competition will be sought, promoted, and sustained for these components or subsystems.

(iii) Describe how competition will be sought, promoted, and sustained for spares and repair parts. Identify the key logistic milestones, such as technical data delivery schedules and acquisition method coding conferences, that affect competition.

(iv) When effective subcontract competition is both feasible and desirable, describe how such subcontract competition will be sought, promoted, and sustained throughout the course of the acquisition. Identify any known barriers to increasing subcontract competition and address how to overcome them.

The extent of competition required by the procurement statutes has been the subject of extensive debate and a number of statutory changes. Prior to passage of the CICA, the statutes provided that specifications and invitations for bids (IFBs) for formal advertising (now sealed bidding) "permit such free and full competition as is consistent with the procurement of property and services needed by the agency concerned," 10 U.S.C. § 2305(a) (pre-CICA version). See also the prior version of 41 U.S.C. § 253. For negotiated procurement, the Armed Services Procurement Act required that proposals be solicited from "the maximum number of qualified sources consistent with the nature and requirements of the supplies or services to be procured," 10 U.S.C. § 2304(g) (pre-CICA version). In 1984 the CICA amended the procurement statutes to require that full and open competition be used in sealed bid and competitive proposal procurements except when specifically exempted, 10 U.S.C. § 2304(a)(1)(A) and 41 U.S.C. § 253(a)(1)(A). The CICA defined "full and open competition" to mean that "all responsible sources are permitted to submit sealed bids or competitive proposals on the procurement," 41 U.S.C. § 403(6).

Based on claims that receipt in some cases of inordinately large numbers of proposals placed an undue and unnecessary burden on procurements, attempts were made to narrow the statutory definition. One draft of the Clinger-Cohen Act of 1996 provided for "efficient competition." However, the requirement for full and open competition was not changed. Instead, § 4101 of the Act added a new provision to 10 U.S.C. § 2304(j) and 41 U.S.C. § 253(h), as follows:

> The Federal Acquisition Regulation shall ensure that the requirement to obtain full and open competition is implemented in a manner that is consistent with the need to efficiently fulfill the Government's requirements.

Efficiency in competition was addressed in § 4103 of the Act, which provides that the contracting officer can limit the number of proposals in the competitive range "to the greatest number that will permit an efficient competition among the offerors rated most highly," 10 U.S.C. § 2305(b)(4)(B) and 41 U.S.C. § 253b(d)(2).

The current statutes address competition in a confusing manner. They require that full and open competition be obtained through the use of "competitive procedures," and

provide that the agency "shall use the competitive procedure that is best suited under the circumstances of the procurement," 10 U.S.C. § 2304(a); 41 U.S.C. § 253(a)(1). Thus, in the planning process, agencies must first review the statutory competitive procedures to determine if any of them are appropriate. If no competitive procedure is usable, the statutes provide that agencies may use "procedures other than competitive procedures" if they are justified under any of seven stated exceptions, 10 U.S.C. § 2304(c); 41 U.S.C. § 253(c).

a. Competitive Procedures

The competition statutes define competitive procedures in an elliptical fashion. Competitive procedures are defined as "procedures under which an executive agency enters into a contract pursuant to full and open competition," 41 U.S.C. § 259(b). The Office of Federal Procurement Policy Act then provides that full and open competition "means that all responsible sources are permitted to submit sealed bids or competitive proposals," 41 U.S.C. § 403(6). The two standard competitive procedures where the agencies must obtain full and open competition are:

1. Sealed bids (previously formal advertising), 41 U.S.C. § 253(a)(2)(A) and 10 U.S.C. § 2304(a)(2)(A); and

2. Competitive proposals (formerly negotiation), 41 U.S.C. § 253(a)(2)(B) and 10 U.S.C. § 2304(a)(2)(B).

In addition, 41 U.S.C. § 259(b) and 10 U.S.C. § 2302(2) define "competitive procedures" to include five alternative procurement procedures, as follows:

1. Procurement of architectural or engineering services conducted in accordance with title IX of this Act (40 U.S.C. § 541 et seq.);

2. The competitive selection of basic research proposals resulting from a general solicitation and the peer review or scientific review (as appropriate) of such proposals;

3. The procedures established by the Administrator for the multiple awards schedule program of the General Services Administration if —

(A) Participation in the program has been open to all responsible sources; and

(B) Orders and contracts under such procedures result in the lowest overall cost alternative to meet the needs of the Government;

4. Procurements conducted in furtherance of section 15 of the Small Business Act (15 U.S.C. § 644) as long as all responsible business concerns that are entitled to submit offers for such procurement are permitted to compete; and

(5) A competitive selection of research proposals resulting from a general solicitation and peer review or scientific review (as appropriate) solicited pursuant to section 9 of the Small Business Act (15 U.S.C. §

638).

When a procurement falls within one of these five categories, the amount of competition obtained will be determined by the special procedure for that category. These procurement procedures are generally used in preference to using one of the two standard competitive procedures. For example, if the procurement involves architect and engineer services, the procedures of 40 U.S.C. § 541 must be used. Similarly, most agencies now use general solicitations of opportunities and peer review selection procedures for both standard research procurements and research procurements that are set aside for small business. The General Services Administration multiple award schedule program is also used as a standard practice for specified categories of commercial products.

When one of these five alternative procedures is not applicable, the agency must select the most effective standard competitive procedure — sealed bidding or competitive negotiation. This will be discussed in detail below in the section on contracting considerations.

Although the statutes specifically require full and open competition to be attained in the procurement process, the five alternative procedures each contain their own rules as to the extent of competition required (including limitations in most instances). Thus, the explicit requirement for full and open competition applies mostly to procurements using sealed bids or competitive proposals. Because sealed bidding is inherently full and open, as those procurements are publicly announced, the degree of competition is a significant issue primarily in the competitive negotiation procedure. The key requirement is the definition of full and open competition, which provides that all responsible sources are permitted to submit sealed bids or competitive proposals on the procurement, 41 U.S.C. § 403(6). Only a few exceptions to this rule are permitted when competitive negotiation procedures are used.

(1) Inadvertently Omitting Sources

Under the previous statutory provisions, the GAO upheld awards if the government obtained "adequate competition" and stated that the adequacy of competition did not depend on whether every prospective bidder was afforded an opportunity to bid. See *Culligan, Inc*., 56 Comp. Gen. 1011 (B-189307), 77-2 CPD ¶ 242, which involved advertised procurement, and *John Bransby Productions, Ltd*., Comp. Gen. Dec. B-198360, 80-2 CPD ¶ 419, dealing with negotiated procurement. These decisions permitted an agency to omit a source from the procurement if it made reasonable efforts

to inform offerors generally of the proposed procurement and there was no probative evidence that the agency had a conscious or deliberate intent to impede the participation of the prospective bidders.

The GAO has continued this line of cases and will not require cancellation of a solicitation or an award merely because a prospective offeror was not furnished a copy of the solicitation, absent probative evidence of a conscious or deliberate effort to exclude the offeror. See *International Ass'n of Firefighters*, Comp. Gen. Dec. B-220757, 86-1 CPD ¶ 31, stating:

> Generally, the risk of nonreceipt of a solicitation amendment rests with the offeror. *Maryland Computer Services, Inc*., B-216990, Feb. 12, 1985, 85-1 CPD ¶ 187. The propriety of a particular procurement is determined on the basis of whether full and open competition was achieved and reasonable prices were obtained, *Metro Medical Downtown*, B-220399, Dec. 5, 1985, 85-2 CPD ¶ 631, and whether the agency made a conscious and deliberate effort to exclude an offeror from competing for the contract. *Reliable Service Technology*, B-217152, Feb. 25, 1985, 85-1 CPD ¶ 234.

See also *Kendall Healthcare Prods. Co*., Comp. Gen. Dec. B-289381, 2002 CPD ¶ 42 (firm did not take reasonable measures to obtain a copy of the solicitation when it choose not to review an amendment because it was listed under a classification code not reviewed by the firm); *Cutter Lumber Prods*., Comp. Gen. Dec. B-262223.2, 96-1 CPD ¶ 57 (inadvertent failure to solicit incumbent did not result in lack of full and open competition where 12 offers were received and awardee's price was lower than the other competitive prices as well as incumbent's prior contract price); *Transwestern Helicopters, Inc*., Comp. Gen. Dec. 235187, 89-2 CPD ¶ 95 (inadvertent failure to solicit incumbent did not result in a lack of full and open competition where agency made reasonable efforts to publicize and distribute the solicitation and received 25 bids); *Shemya Constructors*, Comp. Gen. Dec. B-232928.2, 89-1 CPD ¶ 108 (24 firms were solicited and there was no attempt by the agency to exclude the offeror from the competition); *Metro Med. Downtown*, Comp. Gen. Dec. B-220399, 85-2 CPD ¶ 631 (full and open competition was present despite failure to solicit firm through apparent oversight because Commerce Business Daily notice resulted in solicitation of 24 firms, of which four submitted offers); *Denver X-Ray Instruments, Inc.*, Comp. Gen. Dec. B-220963, 85-2 CPD ¶ 562 (no evidence that prospective offeror was deliberately excluded from competition). However, in *Trans World Maint., Inc*., 65 Comp. Gen. 401 (B-220947), 86-1 CPD ¶ 239, the GAO found that the agency failed to obtain full and open competition when it failed to solicit bids from the incumbent contractor, which had requested a copy of the solicitation at least four times before its issuance. In addition, the CBD notice did not indicate the date of the IFB or of the bid opening. See also *Abel Converting, Inc. v. United States*, 679 F. Supp. 1133 (D.D.C. 1988), where the court

held that an agency's failure to solicit an incumbent contractor on a 33-item procurement would not be adequately remedied by the GAO's recommendation that the agency resolicit the 14 items on which it had received only one bid, because the agency had not received full and open competition. The court reasoned at 1141:

> While the GAO concluded that two bids constituted adequate competition on nineteen of the line items, the Court disagrees. When so few bidders participate in a solicitation, the absence of even one responsible bidder significantly diminishes the level of competition. This is particularly so when the absent bidder is the incumbent contractor since that contractor previously submitted the lowest bids. Because GSA's actions "prevented a responsible source from competing[,] … the CICA mandate for full and open competition was not met."

In *Republic Floors, Inc*., Comp. Gen. Dec. B-242962, 91-1 CPD ¶ 579, the GAO required resolicitation of the procurement because only two responsive bids were received and the agency had failed to send the protester two material solicitation amendments. The GAO reasoned that when so few firms participated in the competition, the absence of even one responsive firm due to the agency's regulatory violation so diminished the level of competition and undermined the CICA mandate for full and open competition that it constituted a compelling reason for resolicitation. See also *Qualimetrics, Inc*., Comp. Gen. Dec. B-262057, 95-2 CPD ¶ 228 (competition found inadequate even though numerous proposals were received because no other offeror proposed to supply the identical equipment that incumbent manufactured and solicitation was for multiple-award federal supply schedule contract); *Davis Enters*., Comp. Gen. Dec. B-249514, 92-2 CPD ¶ 389 (competition found inadequate where six bids were received and incumbent was not provided a copy of the solicitation); *Professional Ambulance Inc*., Comp. Gen. Dec. B-248474, 92-2 CPD ¶ 145 (competition found inadequate where incumbent was not provided a copy of the solicitation and only minimum competition (three offers) were received); and *Custom Envtl. Serv., Inc*., 70 Comp. Gen. 563 (B-242900), 91-1 CPD ¶ 578 (competition found inadequate where only one responsive bid was received and at least three other prospective bidders were eliminated from the bidding as a result of using an obsolete mailing list).

(2) Competition Excluding Particular Sources

41 U.S.C. § 253(b)(1) and 10 U.S.C. § 2304(b)(1) provide that executive agencies are permitted to exclude particular sources in order to establish or maintain alternate sources if the agency head determines that to do so:

> (A) would increase or maintain competition and would likely result in reduced overall costs for such procurement, or for any anticipated procurement, of property or services;

(B) would be in the interest of national defense in having a facility (or a producer, manufacturer, or other supplier) available for furnishing the property or service in a case of a national emergency or industrial mobilization;

(C) would be in the interest of national defense in establishing or maintaining an essential engineering, research, or development capability to be provided by an educational or other nonprofit institution or a federally funded research and development center.

The second and third of these reasons are similar to the former 10 U.S.C. § 2304(a)(16), which permitted the use of negotiated procurement to maintain multiple producers that were part of the mobilization base. The first reason gives statutory authority for developing a competitive second source by precluding an existing sole source contractor from participating in the second source competition or maintaining an alternate source by precluding the primary source from being awarded all of an agency's requirements. FAR 6.202(a) states the following justifications that may be used for excluding one or more sources:

Agencies may exclude a particular source from a contract action in order to establish or maintain an alternative source or sources for the supplies or services being acquired if the agency head determines that to do so would —

(1) Increase or maintain competition and likely result in reduced overall costs for the acquisition, or for any anticipated acquisition;

(2) Be in the interest of national defense in having a facility (or a producer, manufacturer, or other supplier) available for furnishing the supplies or services in case of a national emergency or industrial mobilization;

(3) Be in the interest of national defense in establishing or maintaining an essential engineering, research, or development capability to be provided by an educational or other nonprofit institution or a federally funded research and development center;

(4) Ensure the continuous availability of a reliable source of supplies or services;

(5) Satisfy projected needs based on a history of high demand; or

(6) Satisfy a critical need for medical, safety, or emergency supplies.

These provisions appear to allow agencies to create or maintain multiple sources for a product or service by excluding an existing source. If there are two or more sources performing at the time of the procurement, they could be used to allocate the new work between the sources. They are not applicable to single source situations, which are discussed below.

FAR 6.202(b) provides that a determination and findings (D&F) by an agency head or designee must support the decision to exclude particular sources. Class D&Fs are not permitted; thus, a D&F must be made for each individual procurement action. After

exclusion of particular sources, an agency is required to establish full and open competition using one of the competitive procedures, FAR 6.201.

(3) Small-Business and Labor-Surplus Setasides

Set-asides limiting competition to small competition to small business firms conducted under competitive procedures are authorized by 41 U.S.C. § 253(b)(2) and 10 U.S.C. § 2304(b)(2), which state that an agency

> may provide for the procurement of property or services covered by this section using competitive procedures, but excluding other than small business concerns in furtherance of sections 9 and 15 of the Small Business Act (15 U.S.C. §§ 639, 644).

The decision as to when to use these set-asides was discussed earlier in the discussion of required sources.

(4) Reprocurement After Default Termination

FAR 49.402-6 provides that after a default termination, reprocurements of no more than the amount of work remaining to be performed are not subject to the statutory competition requirements, but reprocurements over the remaining quantity of work are to be treated as new acquisitions. The FAR requires in the former case that the agency obtain competition to the maximum extent practicable. The GAO has held that in the case of a reprocurement after default, the statutes and regulations governing regular federal procurements are not strictly applicable, *Aerosonic Corp*., 68 Comp. Gen. 179 (B-232730), 89-1 CPD ¶ 45. See *Montage, Inc*., Comp. Gen. Dec. B-277923.2, 97-2 CPD ¶ 176, stating that an agency may properly exclude a defaulted contractor from a reprocurement for the resulting work, explaining that

> contracting officers are invested with wide latitude to determine how needed supplies or services are to be reprocured after the default of a contract. In the absence of a countervailing law or regulation, such a broad grant of discretion necessarily includes determining, in view of the circumstances of the default, whether or not to solicit or allow the defaulted contractor to compete in the reprocurement. The agency, with its particularized knowledge of the contractor's past performance (or failure to perform) on the requirement being reprocured, is clearly in the best position to make that determination. Although "competition to the maximum extent practicable" must be obtained in the reprocurement, that standard does not, in our view, mean that an agency must consider an offer from a defaulted contractor for the reprocurement of the very work for which it was defaulted. Accordingly, and in light of the broad authority accorded contracting officers by FAR 49.402-6, we will not review an agency's decision not to solicit a defaulted contractor.

See also *Derm-Buro. Inc*., Comp. Gen. Dec. B-400558, 2008 CPD ¶ 226 (reasonable to limit reprocurement competition to the only two firms on the qualified products list, and

not subject to first article testing); *Essan Metallix Corp*., Comp. Gen. Dec. B-310357, 2007 CPD ¶ 5 (reasonable to exclude protester from a reprocurement necessitated by the termination of its own contract); *Marvin Land Sys., Inc*., Comp. Gen. Dec. B-276434, 97-2 CPD ¶ 4 (reasonable to award sole-source reprocurement contract including an option to a firm that was in production at the time of the termination, when this was the only contractor that could meet the delivery schedule for the original contract quantities); *International Tech. Corp.,* Comp. Gen. Dec. B-250377.5, 93-2 CPD ¶ 102 (reasonable to award sole-source reprocurement contract for services with two option years because the reprocurement was conducted only 60 days after the original contract was awarded where prices would not have changed significantly in such a short period). Compare *Master Sec., Inc*., Comp. Gen. Dec. B-235711, 89-2 CPD ¶ 303, ruling that the inclusion of two one-year options in a sole-source reprocurement of a defaulted service contract violated the FAR requirement to obtain competition to the maximum extent practicable. In reaching this conclusion, the GAO used the same reasoning applied under the statutory requirements — because there was adequate time to obtain competition for this optional work, not obtaining such competition was improper.

There is no requirement that a reprocurement be conducted using precisely the same terms as in the original procurement. See, for example, *Vereinigte Gebudereinigungsgesellschaft*, Comp. Gen. Dec. B-280805, 98-2 CPD ¶ 117 (reprocurement may require proof of language capability prior to award although original procurement contained no such requirement); Bud *Mahas Constr., Inc*., 68 Comp. Gen. 622 (B-235261), 89-2 CPD ¶ 160 (reprocurement of small business set-aside contract need not be restricted to small businesses).

b. Other Than Competitive Procedures

"Other than competitive procedures" are not statutorily defined; 41 U.S.C. § 253(c) and 10 U.S.C. § 2304(c) merely list seven specific procurement situations where full and open competition is not required. Depending upon the circumstances, such procurements may be made on either a sole source basis or with limited competition.

(1) Only One Source Available

The first exception in 41 U.S.C. § 253(c) and 10 U.S.C. § 2304(c) states:

> (1) the property or services needed by the executive agency are available from only one responsible source or only from a limited number of responsible sources and no other type of property or services will satisfy

the needs of the executive agency;

This is the broadest and possibly most utilized exception to the requirement for full and open competition. It is intended to permit a sole-source procurement "only when truly warranted," Competition in Contracting Act: Report of Government Affairs Committee to Accompany S. 338, S. Rep. No. 8-50, 98th Cong., 1st Sess. 21 (1983). This section discusses the decisions contesting sole-source procurements under both the prior statutes and the current statute to determine the meaning of this exception.

(A) AGENCY DISCRETION

An agency determination that a proposed contractor is the only source capable of meeting the technical needs of the agency is subject to close scrutiny but will not be overturned if the agency has properly justified its needs and there is a reasonable basis for its determination, *Mine Safety Appliances Co*., Comp. Gen. Dec. B-233052, 89-1 CPD ¶ 127; *WSI Corp*., Comp. Gen. Dec. B-220025, 85-2 CPD ¶ 626. However, when a responsible source has expressed interest in the procurement, the agency must make reasonable efforts to permit the source to compete, *Neil R. Gross & Co*., 69 Comp. Gen. 292 (B-237434), 90-1 CPD ¶ 212. If such efforts fail, however, the GAO is reluctant to question agency decisions. See, for example, *Automated Prod. Equip. Corp*., Comp. Gen. Dec. B-210476, 84-1 CPD ¶ 269, where, despite observing that the agency's technical personnel were impressed with the protester's equipment demonstration, the GAO did not disturb the agency's determination that the protester did not supply sufficient data from which the agency could evaluate the functional equivalence of the protester's equipment. Similarly, in *Technology for Communications Int'l*, Comp. Gen. Dec. B-236922, 89-2 CPD ¶ 603, the GAO did not question an agency's determination that the protester, in response to a CBD notice seeking sources, did not submit sufficient technical data to justify permitting the protester to compete on the basis of developing a new product if it won the competition.

Nonetheless, the GAO has held that the availability of only one source has to be demonstrated convincingly, *Daniel H. Wagner Assocs*., 65 Comp. Gen. 305 (B-220633), 86-1 CPD ¶ 166. In most protests of sole-source awards, agencies have been able to meet this test. For example, in *Amray, Inc.*, Comp. Gen. Dec. B-209186, 83-2 CPD ¶ 45, the protester complained of a sole-source procurement for a scanning microscope on the grounds that it, too, could meet the agency's needs. In rejecting the protest, the GAO noted that the agency's technical personnel reviewed the literature published by various manufacturers, spoke to their representatives, including Amray's,

and reasonably determined the microscope to be unique. See also *Smith & Wesson, Inc.*, Comp. Gen. Dec. B-400479, 2008 CPD ¶ 215 (reasonable to sole-source pistol which was currently in use therein avoiding the need for retraining on a different model or the need to stockpile spare parts for a different model); *Kearfott Guidance & Navigation Corp.*, Comp. Gen. Dec. B-292895.2, 2004 CPD ¶ 123 (reasonable to determine that only one source had the unique, comprehensive overall knowledge of the critical elements of the guidance weapon system that could satisfy the agency's needs); *McKesson Automation Sys., Inc.*, Comp. Gen. Dec. B-290969.2, 2003 CPD ¶ 24 (reasonable to determine that only one responsible source could meet requirement for installation of a pharmacy robotic system); *Metric Sys. Corp.*, Comp. Gen. Dec. B-279622, 98-2 CPD ¶ 4 (reasonable to determine that only one source could complete the modification of an electronic warfare system to simulate advanced threats within the urgent time constraints of the procurement); *Datacom, Inc.*, Comp. Gen. Dec. B-274175, 96-2 CPD ¶ 199 (reasonable to determine that only one source would be able to produce a first article for approval and then production articles within the time in which the Air Force needed them); *Mnemonics, Inc.*, Comp. Gen. Dec. B-261476.3, 96-1 CPD ¶ 7 (reasonable to determine that only one source could supply critically required items under an expedited delivery schedule); *Navistar Marine Instrument Corp.*, Comp. Gen. Dec. B-262221, 95-2 CPD ¶ 232 (sole-source procurement proper where no other barometer had the ability to fit into a preexisting opening on the instrument control panel of the engine); *Nomura Enter., Inc.*, Comp. Gen. Dec. B-260977.2, 95-2 CPD ¶ 206 (sole-source contract for engineering support services related to howitzer proper because agency reasonably concluded that unacceptable delays would occur if award was made to another source); *Midwest Dynamometer & Eng'g Co.*, Comp. Gen. Dec. B-257323, 94-2 CPD ¶ 91 (reasonable to determine that only one source could furnish a dynamometer system meeting requirement for a system capable of running on existing software); *Litton Computer Servs.*, Comp. Gen. Dec. B-256225, 94-2 CPD ¶ 36 (reasonable to determine that only the developer of the original system had the necessary extensive system knowledge and experience to accomplish task); *Essex Electro Eng'rs, Inc.*, Comp. Gen. Dec. B-250437, 93-1 CPD ¶ 74 (procurement from only immediately available source justified to obtain backup electric power plants, which were in short supply because of Operation Desert Storm — even though units would be placed on standby status); *AGEMA Infrared Sys.*, Comp. Gen. Dec. B-240961, 91-1 CPD ¶ 4 (reasonable to determine that only one source was available where protester's equipment did not contain essential technical features needed by agency); *EG&G Astrophysics Research Corp.*, Comp. Gen. Dec. B-241171, 90-2 CPD ¶ 525 (agency had thoroughly reviewed protester's equipment and had reasonably determined it did not meet agency's needs); *Elbit Computers*, Ltd., Comp. Gen. Dec. B-

239038, 90-2 CPD ¶ 26 (determination that no other contractor could supply the equipment reasonable); *Abbott Labs*., Comp. Gen. Dec. B-230220, 88-1 CPD ¶ 468 (reasonable determination of agency requirement and no other source); and *C&S Antennas, Inc*., Comp. Gen. Dec. B-224549, 87-1 CPD ¶ 161 (agency determination that only one product was compatible with its needs reasonable even though protester was meeting similar needs of another agency).

An agency's legitimate need to standardize equipment may provide a reasonable basis for imposing restrictions of competition. See *Chicago Dyer Co.*, Comp. Gen. Dec. B-401888 2009 CPD ¶ 253 (agency's sole-source award of flatwork ironer based on interoperability need of already installed VA equipment); *Brinkmann Instruments, Inc*., Comp. Gen. Dec. B-309946, 2007 CPD ¶ 188 (agency's sole-source award based on need to acquire the same autotitrator previously fielded on the other nuclear submarines for purposes of standardization); *Advanced Med. Sys., Inc*., Comp. Gen. Dec. B-259010, Jan. 17, 1995, *Unpub*. (agency's need to standardize fetal monitors in order to maximize patient care); and *Sperry Marine, Inc*., Comp. Gen. Dec. B-245654, 92-1 CPD ¶ 111 (sole-source acquisition of particular radar system where agency needed to utilize the same radar system it had already deployed at training school).

Protest of sole source determinations have, however, been sustained if the facts indicate that other sources could satisfactorily meet the government's needs. In *Lockheed Martin Sys. Integration—Owego*, Comp. Gen. Dec. B-287190.2, 2001 CPD ¶ 110, the GAO sustained a protest to a sole-source award where the record showed that another potential vendor was given an incorrect understanding of the agency's requirements. In *Barnes Aerospace Group*, Comp. Gen. Dec. B-298864, 2006 CPD ¶ 204, the GAO sustained a challenge to a sole-source procurement because the presolicitation notice generated an expression of interest from a second source yet the J&A was prepared in advance of the notice and did not consider the viability of the second source. Similarly in *Precision Logistics, Inc.*, Comp. Gen. Dec. B-271429, 96-2 CPD ¶ 24, the GAO sustained a protest to a sole-source award for aircraft parts because, when offerors submitted alternate products, the government inordinately delayed evaluation of the products to determine their technical acceptability. See also *Support Servs. Int'l, Inc*., Comp. Gen. Dec. B-271559, 96-2 CPD ¶ 20 (protest sustained because the incumbent contractor was not solicited due to the agency's unreasonable determination that it could not be expected to perform satisfactorily); *Data Based Decisions, Inc*., Comp. Gen. Dec. B-232663, 89-1 CPD ¶ 87 (protest sustained because incumbent contractor was not solicited although able to compete for the work); *Design Pak, Inc*., Comp. Gen. Dec. B-212579, 83-2 CPD ¶ 336 (protest to a noncompetitive award sustained because the agency confused its requirements with the

characteristics of the sole-source contractor's product); and *Sidereal Corp*., Comp. Gen. Dec. B-210969, 83-2 CPD ¶ 92 (protest sustained because the protester had recently won contracts for equipment similar to that procured, thus demonstrating that meaningful competition was possible). In making a determination that only one contractor is capable of meeting an agency's needs, it is improper for an agency to rely on the putative sole-source contractor for technical advice and expertise. The agency should independently evaluate technical data and draw its own conclusions, *Aero Corp. v. Navy*, 558 F. Supp. 404 (D.D.C. 1983).

(B) Privately Developed Items

The determination to procure on a sole source basis may be justified under certain circumstances if the items being procured were developed at private expense. The following material discusses the circumstances that preclude or permit sole source procurement of privately developed items.

(I) PATENTED ITEMS

The mere fact that an item is patented will not justify a sole source procurement. The statutory basis for this rule is 28 U.S.C. § 1498(a), which gives patent owners the right to reasonable compensation if an invention is used "by or for the United States without license" but does not permit patent owners to enjoin the use of patents in such cases. In 38 Comp. Gen. 276 (B-136916) (1958), the GAO ruled that this statute requires the use of competitive procurement techniques when purchasing patented items, reasoning at 278:

> It is our view, however, that section 1498 appears clearly to constitute a modification of the patent law by limiting the rights of patentees insofar as procurement of supplies by the Government may be concerned, and by vesting in the Government a right to the use of any patents granted by it upon payment of reasonable compensation for such use. We believe that the statute is not consistent with any duty on the part of a contracting agency of the Government to protect the interests of patentees or licensees with respect to articles which it proposes to purchase, since the statute itself defines and provides an exclusive remedy for enforcement of the patentee's rights as to the Government. Any other interpretation would appear to us to impose an impossible burden upon Government procurement officials to determine the applicability and validity of any patents affecting any articles desired.

FAR 27.102(b) provides that generally the government will not refuse to award a contract on the grounds that the prospective contractor may infringe a patent. See also 53 Comp. Gen. 270 (B-177835) (1973), indicating that competitive negotiation could be used to obtain patented items if the circumstances for negotiation are present. The

traditional practice to overcome the competitive advantage accorded to an infringing competitor by this policy has been to include a Patent Indemnity clause (transferring the risk of patent infringement to the contractor) in the contract. This practice was approved by the GAO in *Barrier-Wear*, Comp. Gen. Dec. B-240563, 90-2 CPD ¶ 421, and was permitted by FAR 27.203-1(b)(2)(ii) prior to December 2007. At that time, a revised Part 27 of the FAR became effective, omitting any coverage of this issue, 72 Fed. Reg. 63045, Nov. 11, 2007. There is no indication in the current FAR that a Patent Indemnity clause cannot be used for this purpose.

(II) COPYRIGHTED ITEMS

Although 28 U.S.C. § 1498(b) contains substantially the same language relating to copyrights as in 28 U.S.C. § 1498(a), the presence of a copyright has been held to be a valid reason for sole-source procurement. FAR 27.102(e) provides that generally the government requires that contractors obtain permission from copyright owners before including copyrighted works, owned by others, in data to be delivered to the government. See *ALK Assocs*., Comp. Gen. Dec. B-237019, 90-1 CPD ¶ 113, upholding a sole-source procurement of copyrighted software because the agency needed the identical software to meet its needs. The GAO apparently reasoned that competitors could not recreate such software nor could the agency or its contractors take the software through eminent domain procedures (as can occur with patents). See also *Vorum Research Corp*., Comp. Gen. Dec. B-255393, 94-1 CPD ¶ 155 (protest against a sole-source procurement denied based, in part, on the grounds that some of the software needed to perform the contract was copyrighted); *Federal Computer Int'l Corp*., Comp. Gen. Dec. B-251132, 93-1 CPD ¶ 175 (protest against a sole-source procurement to maintain Xerox equipment denied because diagnostics, manuals, maintenance routines, software revisions, updates, modules, enhancements and source code were either copyrighted or maintained as trade secrets). The same logic probably explains the copyright provisions in ¶ (c)(2) of the Rights in Data — General clause in FAR 52.227-14 and ¶ (d) of the Rights in Technical Data — Noncommercial Items clause in DFARS 252.227-7013, stating that a contractor may not use copyrighted material in the performance of the contract without the consent of the contracting officer.

(III) ITEMS DESCRIBED BY PROPRIETARY DATA

Because there is no statute comparable to 28 U.S.C. § 1498 covering proprietary

data, it is the policy of the government to honor proprietary rights in technical data, FAR 27.102. This policy, now incorporated into 41 U.S.C. § 418a(a) and 10 U.S.C. § 2320(a)(1), states that procurement regulations may not impair "any other right in technical data otherwise established by law." However, 10 U.S.C. § 2320(c) (1) does permit the use of contract clauses calling for expiration of a contractor's proprietary rights to the technical data after no more than seven years. This policy is not discussed in the current guidance on technical data in DFARS Subpart 227.71, which was issued in 1995. It was implemented in the prior DFARS 227.473-1(c)(3), which was effective from 1988 through 1995 and called for negotiation of time limitations between one and five years. The government's policy of honoring proprietary rights in technical data does not prevent the government from meeting its needs with an independent development project.

In some cases the GAO has held that agencies should prepare data packages or use performance specifications to facilitate competitive procurement. The fact that the agency would incur substantial cost in drafting a specification that could be used for competitive procurement was not adequate justification for sole-source procurement in *Techniarts*, Comp. Gen. Dec. B-193263, 79-1 CPD ¶ 246. But see *Compressor Eng'g Corp*., Comp. Gen. Dec. B-213032, 84-1 CPD ¶ 180, stating that it would be unreasonable for the agency to bear the cost of testing parts that would facilitate a competitive procurement. In *Command, Control & Communications Corp*., Comp. Gen. Dec. B-210100, 83-2 CPD ¶ 448, the GAO rejected the agency's arguments that the urgency of its needs and the lack of proprietary data precluded a competitive award. Although the GAO recognized that the agency might have to satisfy its immediate needs on a sole-source basis, urgency could not justify acquisition of computer systems over a five-year period where the systems were not complex technologically and the agency acknowledged that other vendors could duplicate the system "if given enough time."

The GAO has sustained sole-source procurements where the product being procured could be described only by proprietary data, *Aerospace Eng'g & Support, Inc.*, Comp. Gen. Dec. B-258546, 95-1 CPD ¶ 18 (agency had previously failed in attempting to qualify a second source without access to the proprietary data); *Litton Computer Servs.*, Comp. Gen. Dec. B-256225, 94-2 CPD ¶ 36 (agency reasonably determined that only the developer of the original system had the necessary extensive system knowledge and experience to accomplish task); *TSI Microelectronics Corp*., Comp. Gen. Dec. B-243889, 91-2 CPD ¶ 172 (agency had found that it did not have sufficient data to generate a competitive procurement package); *Hydra Rig Cryogenics, Inc*., Comp. Gen. Dec. B-234029, 89-1 CPD ¶ 442; *Turbo Mech., Inc*., Comp. Gen. Dec. B-231807, 88-2 CPD ¶ 299; *Quality Diesel Engines, Inc.*, Comp. Gen. Dec. B-

210215, 83-2 CPD ¶ 1. In such cases the GAO generally will not question an agency's legal determination that the sole-source contractor has proprietary rights, *Fil-Coil Co*., Comp. Gen. Dec. B-198105, 80-2 CPD ¶ 304 (protester did not submit sufficient data to demonstrate that it had ability to manufacture acceptable part). Similarly, the Court of Federal Claim will uphold a sole-source contract where proprietary data rights preclude a competitive procurement, *FN Mfg., Inc. v. United States*, 44 Fed. Cl. 449 (1999). See also *Metric Sys. Corp. v. United States*, 42 Fed. Cl. 306 (1998) (declining to set aside sole-source contract for Mini-MUTES radar simulator for Air Force training under the one responsible source provision of CICA, noting that the awardee had the proprietary rights to the product).

The existence of proprietary software can also justify a sole-source procurement. See, for example, *MFVega & Assocs., LLC*, Comp. Gen. Dec. B-291605.3, 2003 CPD ¶ 65, holding that a contract to create a second-generation program management information system using the existing system was properly sole-sourced to the only contractor having access to the source codes of the software in the existing system. Similarly, in *Midwest Dynamometer & Eng'g Co*., Comp. Gen. Dec. B-257323, 94-2 CPD ¶ 91, it was held that the agency reasonably determined that only one source could furnish a dynamometer system meeting its requirement for a system capable of running on existing software. See also *Metric Sys. Corp*., Comp. Gen. Dec. B-279622, 98-2 CPD ¶ 4, where a sole-source procurement to upgrade a system was justified because only one company had experience with that system. Similarly, in *Bartlett Techs. Corp*., Comp. Gen. Dec. B-218786, 85-2 CPD ¶ 198, a sole source was justified because the protester's software was not compatible with the product currently being used by the agency. The necessity for compatibility also justified a sole-source procurement in *Card Tech. Corp*., Comp. Gen. Dec. B-275385, 97-1 CPD ¶ 76. However, a software specification is unduly restrictive if it prevents an offeror from proposing software that will perform as well as that specified, *Honeywell Information Sys., Inc.*, Comp. Gen. Dec. B-215224, 84-2 CPD ¶ 389. Compare *Lanier GmbH*, Comp. Gen. Dec. B-216038, 85-1 CPD ¶ 523, finding no undue restriction in the specifications for a computer system that merely required that it meet certain minimum requirements.

If an agency can overcome proprietary rights to software, it is expected to take steps to establish the basis for competitive procurement in the future. See, for example, *eFedBudget Corp*., Comp. Gen. Dec. B-298627, 2006 CPD ¶ 159, where the agency had entered into a license with the developer of a software system providing that the agency could only use the system for internal purposes and that the company would make all improvements to the program available to the agency. While the GAO agreed that this limitation on the agency's rights was a valid reason for an immediate sole

source procurement, it recommended that the agency explore methods of obtaining competition in the future, stating:

> [W]e recommend that the agency conduct a documented cost/benefit analysis reflecting the costs associated with obtaining competition, either through purchasing additional rights to the proprietary software or some other means, and the anticipated benefits. If the cost/benefit analysis reveals a practicable means to obtain competition, we recommend that the agency proceed with a competitive procurement.

Sole source procurements have been justified where as a practical matter, it was not feasible to create a nonproprietary data package. See *Kessler Int'l Corp*., Comp. Gen. Dec. B-230662, 88-2 CPD ¶ 27, where it was held that the agency reasonably determined that only one source could timely supply the needed part because it was a critical application part necessary for performing safety, mission, and readiness requirements. The government had no technical data package because the item had been developed at private expense under a nondevelopmental item contract. Similarly, in *Raytheon Co.-Integrated Defense Sys.*, Comp. Gen. Dec. B-400610, 2008 CPD ¶ 8, the GAO found unobjectionable an agency's awards of follow-on contracts for the continued development of a sophisticated weapon system. To justify the decision to proceed sole source the agency noted that the ongoing, concurrent hardware and software upgrades meant that the technical data package and government-purpose software licenses needed to support a competitive procurement were not available. Without the benefit of the technical data package and those licenses, the agency considered it likely that acquiring the services from some other source would result in unacceptable delays in meeting the government's requirements, because to integrate the new elements of the Aegis Modernization program, another contractor would need time to gain a working knowledge of the Aegis Weapon System software or to obtain direct assistance from the incumbent. In *Rack Eng'g Co*., Comp. Gen. Dec. B-194470, 79-2 CPD ¶ 385, the GAO upheld the Navy's sole-source procurement for interchangeable spare-parts cabinets because the supplier had already supplied 87% of the Atlantic Fleet Carrier Force's needs, reasoning that the cost of redesigning and retooling to meet the interchangeability requirement would necessarily preclude any other offerors from competing. Thus, the most economically sound alternative to ensure interchangeability was to procure sole source from the existing supplier. In *Worldwide Marine, Inc*., Comp. Gen. Dec. B-212640, 84-1 CPD ¶ 152, the GAO acknowledged there may have been some degree of agency negligence in failing to draft specifications but, nevertheless, held that faced with an urgent need for the purchase in question, the agency was justified in making a sole-source award to the only company that possessed adequate data to produce the item. See also *Piezo Crystal Co*., 69 Comp. Gen. 97 (B-236160), 89-2 CPD ¶ 477, and *Rotek, Inc*., Comp. Gen. Dec. B-240252, 90-2 CPD ¶ 341, upholding sole-source procurements justified by the agency's lack of a data

package and an urgent need for initial deliveries of the product. In *Masbe Corp*., Comp. Gen. Dec. B-260253.2, 95-1 CPD ¶ 253, the GAO upheld a sole-source procurement for a critical military aircraft engine part because the Air Force did not have adequate data to establish qualification requirements for the part (because this data was possessed by the original designer of the engine) and thus could not tell what variation in the configuration and manufacturing process led to acceptable performance. Similarly, in *KSD, Inc. v. United States*, 72 Fed. Cl. 236 (2006), a sole source procurement was upheld because the agency had induced the contractor to develop a new product using IR&D funds with the result that it had no access to the proprietary technical data resulting from the development work. The court found that the agency's action in negotiating away its data rights was not arbitrary and capricious. See also *Kearfott Guidance & Navigation Corp*., Comp. Gen. Dec. B-292895.2, 2004 CPD ¶ 123 (product was too complicated to permit reverse engineering as a means of obtaining competition and contractor that designed equipment had unique knowledge of its details); *Cubic Defense Sys., Inc. v. United States*, 45 Fed. Cl. 239 (1999) (agency did not have access to proprietary data and there was insufficient time to permit reverse engineering).

Sole-source procurements will not be sustained when a protester shows that competition can be obtained without the use of proprietary technical data. See, for example, *Marconi Dynamics, Inc*., Comp. Gen. Dec. B-252318, 93-1 CPD ¶ 475, granting a protest against a sole-source procurement after reviewing the protester's detailed analysis of its ability to perform engineering services using its own resources plus those of the procuring agency without any requirement to use proprietary technical data of the original equipment manufacturer. See also *Test Sys. Assocs., Inc*., 71 Comp. Gen. 33 (B-244007.2), 91-2 CPD ¶ 367, holding that a sole-source procurement to an incumbent contractor was not justified because there was no proprietary "unique data base" and no reason that a new contractor could not perform the work at a lower price than the incumbent. Similarly, in *Sabreliner Corp*., Comp. Gen. Dec. B-288030, 2001 CPD ¶ 170, a protest of a sole-source procurement was granted when the agency was unable to demonstrate that the selected contractor actually had proprietary data necessary to perform the engineering and overhaul work. In a subsequent protest of the next attempt to procure this overhaul work, *HEROS, Inc*., Comp. Gen. Dec. B-292043, 2003 CPD ¶ 111, the GAO granted the protest because the agency had not performed sufficient planning to determine if contractors could perform the work using information that was commercially available.

10 U.S.C. § 2305(d) and 41 U.S.C. § 253b(j) contain a requirement intended to foster subsequent competition when major systems are being procured. These statutes

address both development and manufacturing contracts for major systems and require that procedures be used by the contracting officer to ensure that the contracting parties address the issue of obtaining competition when buying replenishment parts, components or systems in the future. The latter statute states:

> (j) Planning for future competition. (1) (A) In preparing a solicitation for the award of a development contract for a major system, the head of an agency shall consider requiring in the solicitation that an offeror include in its offer proposals described in subparagraph (B). In determining whether to require such proposals, the head of the agency shall give due consideration to the purposes for which the system is being procured and the technology necessary to meet the system's required capabilities. If such proposals are required, the head of the agency shall consider them in evaluating the offeror's price. (B) The proposals that the head of an agency is to consider requiring in a solicitation for the award of a development contract are the following:
>
> > (i) Proposals to incorporate in the design of the major system items which are currently available within the supply system of the Federal agency responsible for the major system, available elsewhere in the national supply system, or commercially available from more than one source.
> >
> > (ii) With respect to items that are likely to be required in substantial quantities during the system's service life, proposals to incorporate in the design of the major system items which the United States will be able to acquire competitively in the future.
>
> (2) (A) In preparing a solicitation for the award of a production contract for a major system, the head of an agency shall consider requiring in the solicitation that an offeror include in its offer proposals described in subparagraph (B). In determining whether to require such proposals, the head of the agency shall give due consideration to the purposes for which the system is being procured and the technology necessary to meet the system's required capabilities. If such proposals are required, the head of the agency shall consider them in evaluating the offeror's price.
>
> > (B) The proposals that the head of an agency is to consider requiring in a solicitation for the award of a production contract are proposals identifying opportunities to ensure that the United States will be able to obtain on a competitive basis items procured in connection with the system that are likely to be reprocured in substantial quantities during the service life of the system. Proposals submitted in response to such requirement may include the following:
> >
> > (i) Proposals to provide to the United States the right to use technical data to be provided under the contract for competitive reprocurement of the item, together with the cost to the United States, if any, of acquiring such technical data and the right to use such data.
> >
> > (ii) Proposals for the qualification or development of multiple sources of supply for the item.
>
> (3) If the head of an agency is making a noncompetitive award of a development contract or a production contract for a major system, the factors specified in paragraphs (1) and (2) to be considered in evaluating an offer for a contract may be considered as objectives in negotiating the contract to be awarded.

See also 10 U.S.C. § 2320(e) stating:

> (e) The Secretary of Defense shall require program managers for major weapon systems and subsystems of major weapon systems to assess the long-term technical data needs of such systems and subsystems and establish corresponding acquisition strategies that provide for technical data rights needed to sustain such

systems and subsystems over their life cycle. Such strategies may include the development of maintenance capabilities within the Department of Defense or competition for contracts for sustainment of such systems or subsystems. Assessments and corresponding acquisition strategies developed under this section with respect to a weapon system or subsystem shall —

(1) be developed before issuance of a contract solicitation for the weapon system or subsystem;

(2) address the merits of including a priced contract option for the future delivery of technical data that were not acquired upon initial contract award;

(3) address the potential for changes in the sustainment plan over the life cycle of the weapon system or subsystem; and

(4) apply to weapon systems and subsystems that are to be supported by performance-based logistics arrangements as well as to weapons systems and subsystems that are to be supported by other sustainment approaches.

The 2001 DOD Guide, *Intellectual Property: Navigating Through Commercial Waters* (www.acq.osd.mil/dpap/Docs/intelprop.pdf), recognizes the difficulty of factoring this competition principle into the acquisition of products and services embodying proprietary technology at 3-4:

The need for competition has stimulated much of the desire to acquire technical data and assert patent rights. In the past, to ensure that the prices for spare parts for maintenance were fair, programs would acquire technical data packages (e.g., detailed design drawings, manufacturing data, and source code). The technical data packages would be used for follow-on competitive reprocurement of spares, year after year, to support fielded systems maintained by the military services and stockpiled by the Defense Logistics Agency and military depots. However, in recent years, this type of competition strategy has become obsolete; DOD has moved instead from form, fit and function specifications to contractor logistics support strategies and just-in-time inventory spares/parts supply. With this in mind, contracting officers and program managers should look to satisfy competition requirements through alternative strategies such as

* long-term initial competitive contracts,

* cycling technical insertion in shorter increments by using form, fit, and function specifications that enable new entrants, and

* dissimilar competition (see DOD Directives 5000.1 and 5000.2).

For complete coverage of the various methods to work around proprietary rights and obtain competition see Chapter 8 of Nash & Rawicz, *Intellectual Property in Government Contracts* (6th ed. 2008).

(C) Unsolicited Proposals

Unsolicited proposals can provide the basis for a determination that the property or services are available from only one source. See 41 U.S.C. § 253(d)(1)(A), stating:

> [I]n the case of a contract for property or services to be awarded on the basis of acceptance of an unsolicited research proposal, the property or services shall be considered to be available from only one source if the source has submitted an unsolicited research proposal that demonstrates a unique and innovative concept the substance of which is not otherwise available to the United States and does not resemble the substance of a pending competitive procurement.

10 U.S.C. § 2304(d)(1)(A) is substantively the same.

FAR Subpart 15.6 goes beyond these statutes and provides guidance on the handling of all unsolicited proposals for research work and other types of work. However, this regulation establishes unsolicited proposals as the least desirable manner of submitting new and innovative ideas to an agency for evaluation. See FAR 15.602, which states:

> It is the policy of the Government to encourage the submission of new and innovative ideas in response to Broad Agency Announcements, Small Business Innovation Research topics, Small Business Technology Transfer Research topics, Program Research and Development Announcements, or any other Government-initiated solicitation or program. When the new and innovative ideas do not fall under topic areas publicized under those programs or techniques, the ideas may be submitted as unsolicited proposals.

FAR 15.606-2(a) requires that each proposal be comprehensively evaluated, considering, at a minimum, the following factors:

> (1) Unique, innovative, and meritorious methods, approaches, or concepts demonstrated by the proposal;
>
> (2) Overall scientific, technical, or socioeconomic merits of the proposal;
>
> (3) Potential contribution of the effort to the agency's specific mission;
>
> (4) The offeror's capabilities, related experience, facilities, techniques, or unique combinations of these that are integral factors for achieving the proposal objectives;
>
> (5) The qualifications, capabilities, and experience of the proposed principal investigator, team leader, or key personnel critical to achieving the proposal objectives; and
>
> (6) The realism of the proposed cost.

FAR 15.607 contains limitations on award of contracts based on unsolicited proposals:

> (a) A favorable comprehensive evaluation of an unsolicited proposal does not, in itself, justify awarding a contract without providing for full and open competition. The agency point of contact shall return an unsolicited proposal to the offeror, citing reasons, when its substance —
>
> (1) Is available to the Government without restriction from another source;
>
> (2) Closely resembles a pending competitive acquisition requirement;
>
> (3) Does not relate to the activity's mission; or
>
> (4) Does not demonstrate an innovative and unique method, approach, or concept, or is otherwise not

deemed a meritorious proposal.

FAR 15.607(b) goes on to state that if the unsolicited proposal has received a favorable comprehensive evaluation and is not subject to the above impediments, the agency can procure the work covered by the proposal. If it is for research work, such procurement can be on a sole source basis in accordance with FAR 6.302-1(a)(2)(i):

> Supplies or services may be considered to be available from only one source if the source has submitted an unsolicited research proposal that —
>
> > (A) Demonstrates a unique and innovative concept (see definition at 2.101), or, demonstrates a unique capability of the source to provide the particular research services proposed;
> >
> > (B) Offers a concept or services not otherwise available to the Government; and
> >
> > (C) Does not resemble the substance of a pending competitive acquisition.

If the proposal is for other than research work, FAR 15.607(b) requires full and open competition unless one of the statutory exceptions is justified.

The GAO has held that these provisions do not require award of a contract to a submitter of an unsolicited proposal — they merely permit award if the proposal is unique and innovative. Even when the proposal is unique and innovative, agencies have the discretion not to award a sole-source contract, *S. T. Research Corp*., Comp. Gen. Dec. B-231752, 88-2 CPD ¶ 152; *University of Dayton Research Inst*., Comp. Gen. Dec. B-220589, 86-1 CPD ¶ 108. Further, the GAO "does not consider it appropriate to review a protest that an agency should procure from a particular firm on a sole-source basis," *Arctic Energies Ltd*., Comp. Gen. Dec. B-224672, 86-2 CPD ¶ 571. Thus, it is very difficult to challenge an agency decision to reject an unsolicited proposal.

It is appropriate not to issue a sole-source contract based on an unsolicited proposal where the data necessary for a competitive procurement are otherwise available to the government, *Saratoga Indus*., Comp. Gen. Dec. B-219341, 85-2 CPD ¶ 247 (information in the unsolicited proposal was available from previous specifications or from publicly available information); *Georgetown Air & Hydro Sys*., Comp. Gen. Dec. B-210806, 84-1 CPD ¶ 186 (unsolicited proposal incorporated information related to a forthcoming solicitation). In *LW Planning Group*, Comp. Gen. Dec. B-215539, 84-2 CPD ¶ 531, the government was found to have properly decided that the work in the unsolicited proposal required the work of an architect-engineer contractor and the work could therefore not be awarded to the submitter without following the A/E procedures.

It appears that a proposal could be unique and innovative even though it does not include proprietary information. FAR 15.609 permits unsolicited proposals to contain a legend on each page prohibiting the disclosure, outside the government, of such information or the use of such information for any purpose other than evaluation of the proposal. This regulation also establishes a procedure for government protection of the information even if the legends are not placed on the proposal. See, however, *Xerxe Group, Inc. v. United States*, 278 F.3d 1357 (Fed. Cir. 2002), not recognizing this element of the regulation and holding that the submitter of an unsolicited proposal lost all rights to each page of the proposal which did not contain a proprietary legend. It has also been held that the government does not violate a protectable trade secret by competitively soliciting for the item using data that were independently developed by the government, *Zodiac of North Am., Inc.*, Comp. Gen. Dec. B-220012, 85-2 CPD ¶ 595; *Sellers, Connor & Cuneo*, 53 Comp. Gen. 161 (B-177436), *recons. denied*, 74-1 CPD ¶ 126.

The submission of advertising materials does not constitute an unsolicited proposal, *Metric Sys. Corp*., Comp. Gen. Dec. B-271578, 96-2 CPD ¶ 8. In *Metric Systems*, the protester asserted that the brochure and pricing sheet it submitted to the Air Force constituted an unsolicited proposal and that the Air Force's use of that information to develop IFB specifications violated FAR 15.608(a) prohibitions. The GAO denied the protest, stating that an unsolicited proposal must be in the nature of a proposal for a contract, and that the brochure and pricing sheet did not meet this test because they did not include a signature of a person authorized to represent and contractually obligate the company, did not state the period of time for which the alleged proposal was to be valid or the type of contract preferred, and did not identify any proprietary data to be used only for evaluation purposes.

Many agencies now screen unsolicited research proposals to determine if they can be reviewed and considered under the broad agency announcement in effect at the time of receipt of the proposal. In most cases the proposal will fall within one of the categories of research covered by this announcement and can be treated as a research proposal.

(D) FOLLOW-ON CONTRACTS

Follow-on contracts are awards made to the contractor that has previously been awarded a design or manufacturing contract for the same item or that has previously performed the services being procured. The CICA enacted two special provisions on

this issue. Sole-source contracting for follow-on contracts for major systems or equipment is permitted by 41 U.S.C. § 253(d)(1)(B) in the following circumstances:

> [I]n the case of a follow-on contract for the continued development or production of a major system or highly specialized equipment when it is likely that award to a source other than the original source would result in
>
> > (i) substantial duplication of cost to the Government which is not expected to be recovered through competition, or
> >
> > (ii) unacceptable delays in fulfilling the executive agency's needs, such property may be deemed to be available only from the original source and may be procured through procedures other than competitive procedures.

The same provision is contained in 10 U.S.C. § 2304(d)(1)(B) with additional language making it applicable to follow-on contracts for "highly specialized services." The Acts require the agency to determine and document that the cost of the initial capital investment made by the developer of new items cannot be offset by savings that would result from openly competing the item.

The GAO has considered the issue of follow-on contracts in a variety of cases. In *Sprint Communications Co*., Comp. Gen. Dec. B-262003.2, 96-1 CPD ¶ 24, the agency justified a 15-month "bridge" contract on a sole-source basis to the original contractor to permit the award of several contracts designated to achieve significant economies of scale. In *International Harvester Co*., 61 Comp. Gen. 388 (B-205073), 82-1 CPD ¶ 459, involving a sole-source award to the company that developed and hand-built four prototypes, the GAO urged the Army to limit its first production run to the minimum number needed to validate a data package and to consider whether competing the remainder of its requirements would result in savings despite the initial tooling cost incurred by the incumbent contractor. See also *Univox Cal., Inc*., Comp. Gen. Dec. B-225449.2, 87-2 CPD ¶ 569, where the GAO permitted the limitation of competition to the two contractors that had developed competitive prototypes, but recommended that the agency quickly obtain technical data packages so that quantities in future years could be fully competed. Compare *Berkey Mktg. Cos.*, Comp. Gen. Dec. B-224481, 86-2 CPD ¶ 596, where the agency was permitted to continue buying "the only commercially available item within an acceptable price range that would meet the [agency's] minimum requirements"; and *SEAVAC Int'l , Inc*., Comp. Gen. Dec. B-231016, 88-2 CPD ¶ 134, where urgency justified the agency's continuing to buy services from the incumbent contractor. See also *Magnavox Elec. Sys. Co*., Comp. Gen. Dec. B-258076.2, 94-2 CPD ¶ 266, finding that a sole-source award on a follow-on contract was permissible because award to any other source would cause unacceptable delays. The GAO noted that another basis for awarding sole source to a follow-on contractor

would be if the award to any other source would result in substantial duplication of cost that would not be expected to be recovered through competition. Because the decision was based on unreasonable delay, the GAO did not address the question of duplication of costs. In *Nomura Enter., Inc*., Comp. Gen. Dec. B-260977.2, 95-2 CPD ¶ 206, the GAO found a sole-source award on a follow-on contract reasonable on the basis that unacceptable delays would occur if award was made to another source prior to the completion of current production due to massive amount of materials and equipment that would have to be transferred to the new contractor.

Mere prior experience of a contractor has been found to be insufficient grounds to support a sole-source procurement. In *Electronic Sys., U.S.A*., Inc., Comp. Gen. Dec. B-200947, 81-1 CPD ¶ 309, the GAO stated:

> A company's prior experience with the procuring agency which may facilitate the company's performance of the required services and enable it to better anticipate problems in the implementation of the system is not a legally adequate justification to support a sole-source procurement. Furthermore, the fact that a particular contractor may be able to perform the services with greater ease than any other contractor does not justify a noncompetitive procurement to the exclusion of others.

In another decision a sole-source procurement of repairs to an oil distribution system was improper when justified on the basis that the selected contractor had installed the original system and had previously made repairs to it, *Titan Atl. Constr. Corp*., Comp. Gen. Dec. B-200986, 81-2 CPD ¶ 12. See also *Metropolitan Radiology Assocs*., Comp. Gen. Dec. B-195559, 80-1 CPD ¶ 265, ruling that a sole-source procurement was not justified on the basis of a long-standing relationship with a single contractor.

Justifications for award of sole-source procurements to the prior contractor have been most successfully challenged by the submission of proof that the competitor is equally capable of performing the work. For example, in *CK Techs., Inc*., Comp. Gen. Dec. B-254271.2, 93-2 CPD ¶ 20, the GAO determined that the protester was capable of supplying the desired product, and the sole-source procurement was therefore improper. Similarly, sole source procurement was found improper in *Federal Data Corp*., Comp. Gen. Dec. B-196221, 80-1 CPD ¶ 167, where, after the agency's publication of intent to procure on a sole-source basis, the agency received alternative responses indicating the likelihood that other concerns could meet the government's needs. In *Aerospace Research Assocs*., Comp. Gen. Dec. B-201953, 81-2 CPD ¶ 36, a sole-source procurement for armored helicopter seats was improper because the agency was aware of two other contractors that could possibly "satisfy the Government's minimum needs without undue technical risk … within the required time" yet failed to contact them about the solicitation. See also *Consolidated Elevator Co*., 56 Comp. Gen.

434 (B-187624), 77-1 CPD ¶ 210, where sole-source awards for elevator maintenance to the manufacturers of the respective elevators were found to be improper because evidence showed that companies other than the manufacturers could meet the government's maintenance needs. Similarly, in *Berkshire Computer Prods*., Comp. Gen. Dec. B-240327, 91-1 CPD ¶ 464, sole-source awards to the original computer system contractor were found improper because the protester sold compatible equipment and software.

(2) Unusual and Compelling Circumstances

The second exception in 41 U.S.C. § 253(c) and 10 U.S.C. § 2304(c) states:

> (2) the agency's need for the property or services is of such an unusual and compelling urgency that the United States would be seriously injured unless the agency is permitted to limit the number of sources from which it solicits bids or proposals; This exception permits a procurement without full and open competition based on unusual and compelling urgency. This exception is narrowly construed because the acquisition planning process is intended to overcome all but the most compelling urgency situations. 10 U.S.C. § 2304(f)(5) and 41 U.S.C. § 253(f)(5) state that agencies may not enter into a contract for property or services using procedures other than competitive procedures on the basis of the lack of advance planning or concerns related to the amount of funds available to the agency for procurement functions.

Urgency has generally been found in circumstances where the agency has made reasonable efforts to obtain competition but has been unable to accomplish this goal because of insufficient time to fulfill critical agency requirements. For example, the need to continue weapon tests vital to the national security has met the urgency requirement, *Support Sys. Assocs*., Comp. Gen. Dec. B-232473, 89-1 CPD ¶ 11. Urgency was also found to exist in *Greenbrier Indus., Inc*., Comp. Gen. Dec. B-241304, 91-1 CPD ¶ 92, where the Marine Corps reasonably determined that only one company was capable of immediately supplying chemical protective suits for use in Operation Desert Shield; and *E. Huttenbauer & Son, Inc*., Comp. Gen. Dec. B-252320.2, 93-1 CPD ¶ 499, where the agency reasonably determined that only one known firm was capable of meeting urgent supply requirement caused by Operation Restore Hope in Somalia. In *Alektronics, Inc*., Comp. Gen. Dec. B-261431, 95-2 CPD ¶ 146, the GAO found reasonable a sole-source award of a critical military item where there was an inventory shortage and the awardee was the only approved source. Similarly, in *Gentex Corp*., Comp. Gen. Dec. B-233119, 89-1 CPD ¶ 144, the GAO agreed that the agency was justified in refusing to consider an untested competitive product in a weapons program; and in *Forster Enters., Inc*., Comp. Gen. Dec. B-237910, 90-1 CPD ¶ 363, the GAO permitted a sole-source contract to the only company with a qualified product for an unforeseen quantity of essential military items

needed during the period the protester was qualifying its product under a new contract. See also the following decisions finding that urgency justified other than full and open competition: *T-L-C Sys*., Comp. Gen. Dec. B-400369, 2008 CPD ¶ 195 (sole-source award on urgency reasonable where immediate replacement of failed fire alarms was necessary to prevent potential loss of life or property due to fire); *Eclypse Int'l Corp*., Comp. Gen. Dec. B-274507, 96-2 CPD ¶ 179 (sole-source award to only approved source reasonable for urgently required deployable circuit analyzers); *BlueStar Battery Sys. Corp*., Comp. Gen. Dec. B-270111.2, 96-1 CPD ¶ 67 (procurement restricted to two manufacturers that had supplied batteries to the Army under previous contracts); *All Points Int'l , Inc*., Comp. Gen. Dec. B-260134, 95-1 CPD ¶ 252 (only one contractor was capable of meeting requirement relating to the growing Cuban and Haitian refugee population at the U.S. Naval Facility); *Purdy Corp*., Comp. Gen. Dec. B-257432, 94-2 CPD ¶ 127 (no other source possessed or could reasonably access test stand that was needed quickly for examining discovered gearbox problem); *Logics, Inc.*, Comp. Gen. Dec. B-256171, 94-1 CPD ¶ 314 (agency solicited only known sources that had successfully manufactured filter assemblies because the agency encountered a critical supply shortage); *Sargent & Greenleaf, Inc*., Comp. Gen. Dec. B-255604.3, 94-1 CPD ¶ 208 (sole-source award to only qualified firm for limited quantities of security containers because existing mechanical locks placed classified information at risk); *Braswell Servs. Group, Inc*., Comp. Gen. Dec. B-245507, 92-1 CPD ¶ 72 (ship repair was urgent and critical to ship operations, and the ship's limited availability did not permit resolicitation on either a competitive basis or the basis of a limited competition); *Rotair Indus*., Comp. Gen. Dec. B-239503, 90-2 CPD ¶ 154 (competition limited to two sources with qualified products when the protester had not completed the qualification of its product and the agency could wait no longer); *Astron*, Comp. Gen. Dec. B-236922.2, 90-1 CPD ¶ 441 (sole source justified because there was insufficient time to test another nondevelopmental item); and *Racal Corp*., Comp. Gen. Dec. B-235441, 89-2 CPD ¶ 213 (contract awarded to the only contractor that could proceed without first-article testing because the agency had concluded that the risk of failure by another contractor was too great).

A finding of urgency has also been justified where the contractor currently performing the work provided an additional quantity while competition was being conducted for future requirements. In *Sun Dial & Panel Corp.*, Comp. Gen. Dec. B-277660, 97-2 CPD ¶ 146, the GAO stated that it was reasonable for the agency to make a sole-source award for a relatively small quantity of items on the basis of urgency until the agency could make an award for a larger quantity pursuant to a competitive procurement. See also *Datacom, Inc*., Comp. Gen. Dec. B-274175, 96-2 CPD ¶ 199

(agency purchased limited number of items to meet its needs until it could complete its competitive buy); *Polar Power, Inc.*, Comp. Gen. Dec. B-270536, 96-1 CPD ¶ 157 (purchased limited quantity on sole-source basis with balance of requirement to be purchased under competitive procedures); *Elbit Computers, Ltd.*, Comp. Gen. Dec. B-239038, 90-2 CPD ¶ 26 (agency planned to purchase initial quantity on sole-source basis and then purchase additional quantities on a competitive basis using reprocurement data); and *Abbott Prods., Inc.*, Comp. Gen. Dec. B-231131, 88-2 CPD ¶ 119 (no option or variation in quantity was included in sole-source award, and future requirements would be selected competitively). However, urgency will not be justified on this basis if the urgency was brought about by poor planning. See *New Breed Leasing Corp.*, Comp. Gen. Dec. B-274201, 96-2 CPD ¶ 202 (sole-source extension of incumbent's contract was created by agency's failure to engage in advance planning); *TLC Servs., Inc.*, Comp. Gen. Dec. B-252614, 93-1 CPD ¶ 481 (urgency on which noncompetitive contract award was based was the result of lack of advance planning). An agency justification under this exception does not support the procurement of more than a minimum quantity needed to satisfy the urgent requirement and should not continue for more than a minimum time. See the next section on limitations on the use of other than competitive procedures where the GAO sustained protests on the basis that the agency should have procured only a limited amount of its needs on an urgency or sole-source basis, pending the development of competition.

A finding of urgency may be justified while an award protest is being decided. See *J&J Columbia Servs. MV LTDA*, Comp. Gen. Dec. B-299595.2, 2007 CPD ¶ 126, and *Unified Indus., Inc.*, 70 Comp. Gen. 142 (B-241010), 91-1 CPD ¶ 11, where, in both cases, the GAO found reasonable an agency's sole-source award of interim contracts. See also *Computers Universal, Inc.*, Comp. Gen. Dec. B-296536, 2005 CPD ¶ 160 (extension of sole-source task order reasonable pending protest).

Although the statute does not indicate what type of serious injury must result to justify limiting competition, the GAO has included possible financial injury within the scope of the term, *Arthur Young & Co.*, Comp. Gen. Dec. B-221879, 86-1 CPD ¶ 536. In that case the Navy was permitted to make a sole-source award because it claimed that the incumbent was the only firm that could perform a management study in time and that the study was necessary to achieve an estimated $1.5 billion savings. Serious injury was also found in a potential failure of the agency's telephone system, *AT&T Info. Servs., Inc.*, 66 Comp. Gen. 58 (B-223914), 86-2 CPD ¶ 447, and potential poor operation of the agency's computer facility, *Data Transformation Corp.*, Comp. Gen. Dec. B-220581, 86-1 CPD ¶ 55.

(3) Industrial Mobilization, Essential Capability and Experts and Neutrals

The third exception in 41 U.S.C. § 253(c) and 10 U.S.C. § 2304(c) states:

> (3) it is necessary to award the contract to a particular source or sources in order (A) to maintain a facility, producer, manufacturer, or other supplier available for furnishing property or services in case of a national emergency or to achieve industrial mobilization, (B) to establish or maintain an essential engineering, research, or development capability to be provided by an educational or other nonprofit institution or a federally funded research and development center, or (C) to procure the services of an expert for use, in any litigation or dispute (including any reasonably foreseeable litigation or dispute) involving the Federal Government, in any trial, hearing, or proceeding before any court, administrative tribunal, or agency, or to procure the services of an expert or neutral for use in any part of an alternative dispute resolution process, whether or not the expert is expected to testify;

This exception deals with three dissimilar situations — maintaining a facility for industrial mobilization, establishing or maintaining critical engineering, research, or development capability provided by an educational or other nonprofit organization or federally funded research and development center, or procuring the services of an expert or neutral in a dispute.

With regard to the industrial mobilization element of this exception, an agency's decision will not be questioned as long as it can demonstrate that its determinations are related to its mobilization needs, *Outdoor Venture Corp*., Comp. Gen. Dec. B-279777, 98-2 CPD ¶ 27; *Minowitz Mfg. Co*., Comp. Gen. Dec. B-228502, 88-1 CPD ¶ 1. See *Honorable Dan Burton*, Comp. Gen. Dec. B-265884, Nov. 7, 1995, *Unpub*., for a full explanation of this policy. See also *Ridgeline Indus., Inc*., Comp. Gen. Dec. B-402105, 2010 CPD ¶ 22 (minimum sustaining rate sole source contract was necessary for the firm to continue operating its military specification tent production line); *Right Away Foods/Shelf Stable Foods*, Comp. Gen. Dec. B-259859.3, 95-2 CPD ¶ 34 (award to third mobilization base producer proper where agency reasonably determined that the failure of either of the current producers would be catastrophic in the event of a military emergency); *Kilgore Corp.*, Comp. Gen. Dec. B-253672, 93-2 CPD ¶ 220 (sole-source award to operate and maintain an ammunition plant based on mobilization need); *Lance Ordnance Co*., Comp. Gen. Dec. B-246849, 92-2 CPD ¶ 29 (sole-source award made to one of two mobilization base producers for smoke and illumination signals); *Greenbrier Indus., Inc*., Comp. Gen. Dec. B-248177, 92-2 CPD ¶ 74 (agency divided its requirements for chemical suits among four active mobilization base producers to provide a continuation of each firm's minimum sustaining rate of production); and *Propper Int'l , Inc*., Comp. Gen. Dec. B-229888, 88-1 CPD ¶ 296 (Navy hat considered an essential part of the enlisted person's uniform and designated industrial

mobilization item).

The second part of this exception is used primarily to award contracts to Federally Funded Research and Development Centers (FFRDCs), which were established under the authority of OFPP Policy Letter 84-1, 49 Fed. Reg. 14,462 (1984) (now rescinded), to "perform analyze, support and manage research and development activities of an agency." The provisions of Policy Letter 84-1 were implemented in FAR 35.017. See *SRI Int'l* , 69 Comp. Gen. 334 (B-237779), 90-1 CPD ¶ 318; 71 Comp. Gen. 155 (B-244564) (1992). These nonprofit organizations work in designated areas under "sponsoring agreements" in accordance with procedures set forth in FAR 35.017. Contracts must be awarded to FFRDCs within the scope of their designated areas on a sole-source basis because they are prohibited from competing with non-FFRDCs, FAR 35.017-1(c)(4). For cases holding that this non-competition requirement bars FFRDCs from acting as subcontractors, see *Logicon RDA*, Comp. Gen. Dec. B-276240, 97-1 CPD ¶ 219, and *Energy Compression Research Corp*., Comp. Gen. Dec. B-243650.2, 91-2 CPD ¶ 466.

The third part of this exception was added by the FASA in 1994, with no statutory definition of the term "expert." However, in *SEMCOR, Inc*., Comp. Gen. Dec. B-279794, 98-2 CPD ¶ 43, the GAO held that the term did not encompass the providing of litigation services which were performed, in major part, by paralegals, secretaries, editors and clerical personnel. This holding was based on the fact that, while these personnel had gained considerable experience from working on the major litigation for which the services were required, they did not have the "special skill or knowledge of a particular subject, combined with experience" which was required to establish that a person was an expert.

(4) Terms of International Agreement or Treaty

This exception in 41 U.S.C. § 253(c) and 10 U.S.C. § 2304(c) states:

> the terms of an international agreement or a treaty between the United States and a foreign government or international organization, or the written directions of a foreign government reimbursing the agency for the cost of the procurement of the property or services for such government, have the effect of requiring the use of procedures other than competitive procedures;

Terms of an international agreement or treaty may have the effect of requiring the use of other than competitive procedures. There is no requirement that the foreign government initiate a sole source designation. In the absence of bad faith or an intention to circumvent competition, it is immaterial whether a United States agency recommends

specific items or advises a foreign government as to what items might satisfy its needs. See *Goddard Indus., Inc*., Comp. Gen. Dec. B-275643, 97-1 CPD ¶ 104, finding proper a sole-source procurement that involved a foreign military sale and the foreign government on whose behalf the procurement was conducted requested purchase from a specified source. Similarly, in *Pilkington Aerospace, Inc*., Comp. Gen. Dec. B-259173, 95-1 CPD ¶ 180, the GAO found proper a sole-source award of advanced design windshields for the F-15 aircraft because the procurement involved a foreign military sale and the foreign government on whose behalf the procurement was conducted requested that the item be manufactured by a specified source. See also *Optic-Electronic Corp*., Comp. Gen. Dec. B-235885, 89-2 CPD ¶ 326 (sole-source award issued by the United States Army on behalf of the Egyptian government for laser range finders and ballistic computer systems proper); and *Kahn Indus., Inc*., Comp. Gen. Dec. B-225491, 87-1 CPD ¶ 343 (sole-source awards for dynameters on behalf of the Republic of the Philippines and the Arab Republic of Egypt proper).

(5) Authorized by Another Statute

This exception in 41 U.S.C. § 253(c) and 10 U.S.C. § 2304(c) states:

> (5) subject to subsection (j), a statute expressly authorizes or requires that the procurement be made through another executive agency or from a specified source, or the agency's need is for a brand-name commercial item for authorized resale;

The use of other than competitive procedures is permitted when a statute expressly authorizes or requires that a procurement be made through another agency or from a specified source. Sole source awards under the 8(a) set-aside procedure are usually justified under this exception. See *Bosco Contracting Inc*., Comp. Gen. Dec. B-236969, 89-2 CPD ¶ 346, holding that the CICA's mandate for full and open competition does not apply to a procurement being conducted as an 8(a) set-aside under 15 U.S.C. § 637(a).

This exception also authorizes the use of other than competitive procedures when "the agency's need is for a brand-name commercial item for authorized resale." See *Defense Commissary — Request for Advance Decision*, Comp. Gen. Dec. B-262047, 96-1 CPD ¶ 115, holding that the Defense Commissary Agency could noncompetitively procure items bearing the USO Always Home brand name for resale in military stores.

Economy Act orders do not fall under this exception. The Economy Act generally permits agencies to procure services under another agency's contract without full and

open competition only where that contract was awarded in compliance with CICA. See 10 U.S.C. § 2304(f)(5). In *Valenzuela Eng'g , Inc*., Comp. Gen. Dec. B-277979, 98-1 CPD ¶ 51, although the protest was dismissed as untimely, the GAO stated by letter to the Secretary of Air Force that its review indicated that the contract violated CICA. Here, the Air Force attempted to satisfy its requirements for operation and maintenance services pursuant to the Economy Act by placing an order under an existing indefinite-delivery, indefinite-quantity contract (IDIQ) that had been awarded by the Army. However, the GAO found that this contract did not comply with the CICA requirement for full and open competition because the work statement did not reasonably describe the scope of the services needed and therefore did not provide potential offerors notice of work that would be within the scope of the resulting contract. The GAO stated that because an agency may not procure property or services from another agency unless that other agency has complied fully with the requirements of CICA, the Air Force acted improperly in using the Army contract.

(6) National Security

This exception in 41 U.S.C. § 253(c) and 10 U.S.C. § 2304(c) states:

> (6) the disclosure of the agency's needs would compromise the national security unless the agency is permitted to limit the number of sources from which it solicits bids or proposals;

An agency may limit the number of sources from which it solicits offers if the disclosure of the agency's needs would compromise the national security. There are no protests on the use of this exception.

(7) Public Interest

This exception in 41 U.S.C. § 253(c) and 10 U.S.C. § 2304(c) states:

> (7) the head of the agency —
>
> > (A) determines that it is necessary in the public interest to use procedures other than competitive procedures in the particular procurement concerned, and
> >
> > (B) notifies the Congress in writing of such determination not less than 30 days before the award of the contract.

This exception enables the head of the agency to make a determination that it is necessary to the public interest to use other than competitive procedures in a particular procurement. See *Zublin Del., Inc*., Comp. Gen. Dec. B-227003.2, 87-2 CPD ¶ 149,

denying a protest that the Navy, after submission of initial offers, unreasonably restricted competition to United States firms for construction of Navy housing in the Philippines. The GAO held that the Secretary of the Navy, under 10 U.S.C. § 2304(c)(7), made the required determination that such a restriction was in the public interest because hiring foreign firms could jeopardize United States bases in the Philippines. See also *Spherix, Inc. v. United States*, 58 Fed. Cl. 514 (2004), holding the agency head properly exercised her statutory authority to award a sole source modification under 41 U.S.C. § 253(c)(7). The court found reasonable the D&F, which stated it is in the public interest to integrate agency recreation reservation requirements to provide a more comprehensive system with one-stop service. This decision followed an earlier case, *Spherix, Inc. v. United States*, 58 Fed. Cl. 351 (2003), addressing the court's jurisdiction under the public interest exception.

c. Limitations on Use of Other Than Competitive Procedures

Although a procurement may be conducted under other than competitive procedures, there are limitations on its use.

(1) Competition Required Where Practicable

Justification for the use of other than competitive procedures on the basis of any exception other than (c)(1) does not necessarily permit the use of sole source contracting. Competition is required from as many potential sources as is practicable. See 41 U.S.C. § 253(e) and 10 U.S.C. § 2304(e), which state this rule for two of the exceptions:

> An executive agency using procedures other than competitive procedures to procure property or services by reason of the application of subsection (c)(2) or (c) (6) shall request offers from as many potential sources as is practicable under the circumstances.

The FAR is broader by not limiting the requirement to solicit from as many sources as is practicable to only (c)(2) and (c)(6). FAR 6.301(d) is applicable to (c) (3), (c)(4), (c)(5), and (c)(7) as well. It provides:

> When not providing for full and open competition, the contracting officer shall solicit offers from as many potential sources as is practicable under the circumstances.

Thus, procurements under all subsections except (c)(1) should be conducted with

some degree of competition when circumstances permit.

Protests in this area have primarily been under subsection (c)(2). For instance, the GAO has held that even though urgency permitted a procurement without full and open competition, the agency violated the statute by awarding a sole-source contract, *TMS Bldg. Maint*., 65 Comp. Gen. 222 (B-220588), 86-1 CPD ¶ 68; *Data Based Decisions, Inc*., Comp. Gen. Dec. B-232663, 89-1 CPD ¶ 87. In *Major Contracting Servs., Inc*., Comp. Gen. Dec. B-401472, 2009 CPD ¶ 170, while the GAO agreed with the agency that the circumstances met the requirement for an exception to full and open competition based on urgency, it held that the agency should have conducted a limited competition rather than extending the contract on a sole-source basis. Here the results of the market survey identified potential qualified sources and the requirement for portable chemical restrooms had been procured by contract for at least ten years, providing the agency full familiarity with the potential sources. The GAO has also held that an agency violated the statute where it had conducted the procurement so inefficiently that a competitor did not have time to compete for the entire quantity, *Arrow Gear Co*., 68 Comp. Gen. 612 (B-235081), 89-2 CPD ¶ 135. See also *Bausch & Lomb, Inc*., Comp. Gen. Dec. B-298444, 2006 CPD ¶ 135 (protest sustained because agency never considered the capabilities of the equipment of other interested firms); *AT&T Info. Servs., Inc*., 66 Comp. Gen. 58 (B-223914), 86-2 CPD ¶ 447 (protest sustained when the agency could have conducted fast negotiations with another known source of the work); *Charles Snyder*, 68 Comp. Gen. 659 (B-235409), 89-2 CPD ¶ 208 (protest sustained where agency could have solicited nonlocal company that had previously expressed interest in procurement); *Ferranti Int'l Defense Sys., Inc*., Comp. Gen. Dec. B-237760, 90-1 CPD ¶ 317 (protest sustained where agency could have negotiated with a third source that had expressed interest and had prior experience, without significantly delaying the ongoing procurement). In *Earth Property Servs., Inc*., Comp. Gen. Dec. B-237742, 90-1 CPD ¶ 273, the agency was prohibited from soliciting only one source in an urgent procurement where a second offeror, that had previously done similar work for the agency, was available to perform on short notice. See also *Bay Cities Servs., Inc*., Comp. Gen. Dec. B-239880, 90-2 CPD ¶ 271, holding that the incumbent contractor's refusal to provide cost data did not justify failing to solicit a proposal for an urgent procurement of additional effort for four months (two other proposals had been solicited).

Although an agency is required to seek competition from as many potential sources as is practicable, competition may be limited to one firm when it is justified, *Braswell Servs. Group, Inc*., 92-1 CPD ¶ 72; *L-3 Communications Eotech, Inc. v. United States*, 85 Fed. Cl. 667 (2009) (government's decision to require type-classified close combat

optics, which only the incumbent awardee could provide, was not meritless, but needed to help assure the weaponry was acceptable, safe, suitable, and supportable, pursuant to Army Regulation 700-142). In *Reliance Mach. Works, Inc.*, Comp. Gen. Dec. B-220640, 85-2 CPD ¶ 685, the GAO stated that where an agency conducts a limited competition in an emergency, the fact that an offeror was not one of two firms solicited will not be grounds for a protest. An agency conducting a procurement under the urgency exception may limit competition to the only firm it reasonably believes can perform the work promptly and properly, *Total Industry & Packaging Corp.*, Comp. Gen. Dec. B-295434, 2005 CPD ¶ 38; *McGregor Mfg. Corp.*, Comp. Gen. Dec. B-285341, 2000 CPD ¶ 151; *IMR Sys. Corp.*, Comp. Gen. Dec. B-222465, 86-2 CPD ¶ 36; *Arthur Young & Co.*, Comp. Gen. Dec. B-221879, 86-1 CPD ¶ 537; *Gentex Corp.*, Comp. Gen. Dec. B-221340, 86-1 CPD ¶ 195. In *Research Analysis & Maint., Inc.*, Comp. Gen. Dec. B-296206, 2005 CPD ¶ 182, the GAO denied a protest by the incumbent contractor that the agency improperly failed to consider it as a potential source for a bridge contract, finding that the agency had reasonably determined that the incumbent's performance under the contract was unacceptable and that its plan to correct the unacceptable performance had been inadequate.

(2) Procurement Pending Development of Competition

If the agency finds in the acquisition planning process that it has missed the opportunity for full and open competition because of faulty actions, it may be permitted to limit competition for a period of time while it establishes the conditions for full and open competition in the future. In several instances the agency's justification of single source or urgency has been provisionally accepted, but the GAO has limited the scope of the procurement to that period of work necessary to establish the conditions for full and open competition. For example, agencies have been required to sever procurements in order to minimize the amount of work that is not subject to full and open competition, *ABA Indus., Inc.*, Comp. Gen. Dec. B-250186, 93-1 CPD ¶ 38 (procurement limited to quantity urgently required; contract modified to delete the non-urgent units, and this quantity was to be resolicited); *Tri-Ex Tower Corp.*, Comp. Gen. Dec. B-239628, 90-2 CPD ¶ 221 (urgent sole-source procurement limited to portion of work); *Ricoh Corp.*, 68 Comp. Gen. 531 (B-234655), 89-2 CPD ¶ 3 (agency should procure only immediate needs on sole-source basis when other companies are developing capability to meet agency needs); *Freedom Marine*, Comp. Gen. Dec. B-229809, 88-1 CPD ¶ 289 (agency should have obtained competition for at least half of its quantity where there was adequate time to do so if the procurement had commenced at the time the sole source J&A was prepared). In *Arrow Gear Co.*, 68 Comp. Gen. 612 (B-235081), 89-2 CPD ¶

135, the GAO recommended that the agency use the existing source for the minimum quantity needed to fulfill its needs while recompeting the requirement as to the quantity not urgently needed. The GAO held this was necessary because of the agency's dilatory conduct of the procurement. In *Signals & Sys., Inc*., Comp. Gen. Dec. B-288107, 2001 CPD ¶ 168, while the J&A supported a tangible urgency requirement, the GAO sustained the protest because that the Army had not made a reasonable effort to ascertain the minimum quantity necessary to satisfy its immediate urgent requirement. The GAO recommended that the agency promptly undertake a review to determine the number of units needed to satisfy its immediate urgent requirement, as documented in its justification, and not acquire more than that number. In *Filtration Dev. Co., LLC v. United States*, 60 Fed. Cl. 371 (2004), the court held that the Army was justified in using the unusual and compelling urgency exception, but only for the exact number of kits required for helicopters deploying to Iraq in the immediate future. The court was "unwilling to condone an indefinite extension of the unusual and compelling urgency exception." The Army used the same reasoning, after the first protest had been decided, to sole source an additional two hundred inlet kits. See *Filtration Dev. Co., LLC v. United States*, 63 Fed. Cl. 418 (2004). While the court had previously limited the scope of the previous J&A document to the specific number of kits needed, the court did not prevent the use of another J&A that detailed the urgent and compelling rationale for more kits based upon a separate and independent justification. The J&A addressed the increased need and the depletion of the kits previously bought under the last exception.

The length of time of contracts awarded under the unusual and compelling urgency exception to full and open competition is now limited pursuant to § 862 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417, and an Office of Federal Procurement Policy Administrator's Memorandum (May 31, 2007), which sought to enhance competition in federal acquisitions. The rule at FAR 6.302-2(d) applies to contracts that exceed the simplified acquisition threshold and provides that the total period of performance for such contracts awarded pursuant to the exception cannot exceed the time necessary —

> (A) To meet the unusual and compelling requirements of the work to be performed under the contract; and
>
> (B) For the agency to enter into another contract for the required goods and services through the use of competitive procedures.

The total period of performance cannot exceed one year unless the head of the agency determines that "exceptional circumstances" apply, FAR 6.3022(d)(2). The determination of "exceptional circumstances" is in addition to the "justification and approval" required to invoke the unusual and compelling urgency exception, FAR

6.302-2(d)(4).

(3) Ordering Work Under Existing Contracts

Agencies often attempt to order work under existing contracts. Some contract clauses (changes and options) and contract types (indefinite delivery contracts calling for task and delivery orders) specifically provide the mechanism for such actions. In some cases the agency is authorized but not required to order additional work without competing the work or justifying a noncompetitive award. In other cases the work is considered a new procurement and competition or justification must precede the ordering. For changes, the work must be within the general scope, and for task and delivery orders the work must not increase the scope, period or maximum dollar value.

(A) Change Orders

Change orders issued under the various Changes clauses may be made on a sole-source basis if they are within the general scope of the contract. Although the GAO does not review contract administration matters, it will review an allegation that the government action should have been the subject of a new procurement, *Engineering & Professional Servs., Inc.*, Comp. Gen. Dec. B-289331, 2002 CPD ¶ 24; *Atlantic Coast Contracting, Inc.*, Comp. Gen. Dec. B-288969.2, 2002 CPD ¶ 104.

The test in determining whether a modification triggers the competition requirements is whether there is a material difference between the modified contract and the contract that was originally awarded, indicating that the "field of competition" is different than contemplated by the original competitors. See *Engineering & Professional Servs., Inc.*, Comp. Gen. Dec. B-289331, 2002 CPD ¶ 24, stating:

> In determining whether a modification triggers the competition requirements in the Competition in Contracting Act of 1984, 10 U.S.C. § 2304(a)(1)(A) (Supp. IV 1998), we look to whether there is a material difference between the modified contract and the contract that was originally awarded. *Neil R. Gross & Co., Inc.*, [B-237434, Feb. 23, 1990, 90-1 CPD ¶ 212] at 2-3; see *AT&T Communications, Inc. v. Wiltel, Inc.*, 1 F.3d 1201, 1205 (Fed. Cir. 1993).
>
> Evidence of a material difference between the modification and the original contract is found by examining any changes in the type of work, performance period, and costs between the contract as awarded and as modified. *Access Research Corp.*, B-281807, Apr. 5, 1999, 99-1 CPD ¶ 64 at 3-4; *MCI Telecomms. Corp.*, B-276659.2, Sept. 29, 1997, 97-2 CPD ¶ 90 at 7-8. The question for our review is whether the original nature or purpose of the contract is so substantially changed by the modification that the original and modified contract would be essentially different, and the field of competition materially changed. *Everpure, Inc.*, B-226395.4, Oct. 10, 1990, 90-2 CPD ¶ 275 at 4.

The Court of Federal Claims uses essentially the same test. In *Chapman Law Firm Co. v. United States*, 81 Fed. Cl. 323 (2008), the court articulated the test as follows at 326-27:

> In determining whether a modification is outside the scope of the original government contract, the Court applies the "cardinal change doctrine." [*AT&T Communications, Inc. v.*] *Wiltel*, 1 F.3d [1201 (Fed. Cir. 1883)] at 1205 (noting that CICA sets forth no standard for determining when a modification is within the scope of the original contract). "[A] cardinal change … occurs when the government effects an alteration in the work so drastic that it effectively requires the contractor to perform duties materially different from those originally bargained for." Id. If the contract as modified materially departs from the scope of the original procurement, then CICA's competition requirements will apply. *See, e.g., CWT/Alexandar Travel, Ltd. v. United States*, 78 Fed. Cl. 486, 494 (2007); *HDM Corp. v. United States*, 69 Fed. Cl. 243, 254 (2005). In its analysis, the Court should look to whether the original offerors were adequately advised of the potential for the types of changes that in fact occurred, and "whether the modification is of a nature which potential offerors would reasonably have anticipated." *Wiltel*, 1 F.3d at 1207 (quoting *Neil R. Gross & Co.*, B-237434, 90-1 CPD ¶ 212 at 3 (February 23, 1990).

The court found that the only changes were the geographic expansion of service and the possibility of new pricing, and that these changes were clearly contemplated in the contracts.

The critical issue in these cases is the determination of whether the original competitors would have foreseen the changes that the agency has ordered. Apparently, the logic is that the original prices would have reflected such changes and therefore that new competition is not needed to ensure that the prices have been established through competition. See, for example, *CWT/Alexander Travel, Ltd. v. United States*, 78 Fed. Cl. 486 (2007), where a issue was whether a delay in the contract start date of more than two years (from an anticipated April 2005 until October 2007) made moot the price data on which the offerors relied. The court found no change outside of the scope because the solicitation did not specify a definite start date for commencement of performance - it only contemplated that the work would begin with a modification some time after award, which is precisely what happened - and the nature of the travel services required under the contract made price changes inevitable. Further, the proposed price modifications were not enough alone or in combination with the start date modifications to establish a change outside of the scope. Similarly in *CESC Plaza Limited Partnership v. United States*, 52 Fed. Cl. 91 (2002), where the protesters argued that the sum of the changes materially altered the contract (rather than the specific changes themselves), the court held that they were foreseeable to the offerors because they did not materially alter the contract's cash flow features or shift the risk of performance. See also *HDM Corp. v. United States*, 69 Fed. Cl. 243 (2005) (modification to a contract for management of medical insurance records not outside the scope because consolidating responsibility for the crossover function was consistent

with the broad objectives of the original contract); and *VMC Behavioral Healthcare Servs., Div. of Vasquez Group, Inc. v. United States*, 50 Fed. Cl. 328 (2001) (solicitation was for level of effort contract for employee assistance services, subject to modification as additional agencies were added to the contract's coverage). In contrast in *Cardinal Maint. Serv., Inc. v. United States*, 63 Fed. Cl. 98 (2004), the court found that the addition to, and deletion of, work from the contract materially changed the original competed contract. The changes were not of the type that were specifically authorized or even foreseen in the original contract. Rather, the modifications authorized substantial changes, which the contracting officer identified as "considerable" with costs that were potentially "extremely excessive." The contract had only contemplated "minimal additions and deletions of service" which would be accomplished through application of the Add/Delete of Service Cost Sheet, set forth in Section 1.6 of the solicitation. The modifications to the contract were not, however, made through this provision. Instead, the contracting officer eliminated the limitations by removing the Add/Delete of Service Cost Sheet. See also *CW Gov't Travel v. United States*, 61 Fed. Cl. 559 (2004), *reh'g denied*, 63 Fed. Cl. 459 (2005), *aff'd* , 163 Fed. Appx. 853 (Fed. Cir. 2005), where the court found that the addition, by contract modification, of traditional travel services to a contract to provide military travel services using a paperless automated travel management system was a material change. The original solicitation sought services for the construction of a web-based, wholly electronic travel services platform. When the platform ran into technical difficulties, the government modified the contract to provide traditional travel services. The court held that the new services were so far removed from the original requirements that they should have been independently solicited through full and open competition. See also *CCL, Inc. v. United States*, 39 Fed. Cl. 780 (1997) (modification increasing the number of locations where computer maintenance services were to be performed).

The Court of Federal Claims and GAO will look at the entire solicitation for the original contract to determine whether it adequately advised offerors of the potential for the type of changes found in the modification when making a scope determination. For instance, in *DOR Biodefense, Inc.*, Comp. Gen. Dec. B-296358.3, 2006 CPD ¶ 35, the protesters argued that the contract was improperly modified to require delivery of a bivalent serotype A/B vaccine, a product that was not listed among the optional RFP CLINs. The GAO determined that the type of work under the contract as modified remained substantially unchanged because the RFP advised offerors that the government reserved the right to change the list of vaccine sertoypes to add or delete products as need may arise. Similarly, in *Sallie Mae, Inc.*, Comp. Gen. Dec. B-400486, 2008 CPD ¶ 221, the protester argued that the modification of the contract to encompass the

servicing of the non-defaulted FFELP loans was beyond the original scope of the contract. In support of its argument the protester stated that the statement of objectives (SOO) did not describe the servicing of non-defaulted FFELP loans. Moreover, the protester argued that offerors could not possibly have contemplated that the contract would include the servicing of the non-defaulted FFELP loans given that the legislation authorizing the loan purchase program was not enacted until May 2008. The GAO disagreed, determining that the SOO clearly placed offerors on notice that the agency intended to award a contract for the management of all types of student loans. The SOO also specifically instructed that the solution was to be flexible enough to handle new requirements generated by Congress and to respond to legislative mandates and policy changes. See also *Overseas Lease Group, Inc.*, Comp. Gen. Dec. B-402111, 2010 CPD ¶ 34 (contract modification within scope where solicitation's differentiation between "nontactical" and "up-armored" vehicles was sufficient to put protester on notice that term "non-tactical" was intended to refer to unarmored vehicles); *Lasmer Indus., Inc.*, Comp. Gen. Dec. B-400866.2, 2009 CPD ¶ 77 (delivery order for parts was within scope where part was specifically included in the contract, and the contract allowed the agency to order the part under a negotiated delivery schedule); *Armed Forces Hospitality*, Comp. Gen. Dec. B-298978.2, 2009 CPD ¶ 192 (lack of definitiveness in the original SOW provided the Army with additional contractual flexibility and latitude to reduce the number of rooms to be renovated and extend performance); and *HG Properties A, LP*, Comp. Gen. Dec. B-290416, 2002 CPD ¶ 128 (lease modification changing location of site for construction of offered building space remains within the scope of the underlying lease where the property location requirements were only general in nature and scope with wide location boundaries). But see *W.H. Mullins*, Comp. Gen. Dec. B-207200, 83-1 CPD ¶ 158, where a modification of an existing requirements contract was found to be beyond the scope of competition for the original contract because the parties could not have reasonably anticipated such a major change. Similarly, in *Sprint Communications Co.*, Comp. Gen. Dec. B-278407.2, 98-1 CPD ¶ 60, a modification adding transmission services was found to be outside the scope because the initial procurement had stated that such services were not required.

A contract may not be modified by changing or relaxing requirements where the resulting work is fundamentally different from the work anticipated by the original solicitation, *Avtron Mfg., Inc.*, 67 Comp. Gen. 404 (B-229972), 88-1 CPD ¶ 458 (modification to the performance specifications in the purchase description for aircraft generator test stands); and *Lamson Div. of Diebold, Inc.*, Comp. Gen. Dec. B-196029.2, 80-1 CPD ¶ 447 (change order issued almost immediately after contract award substituting a mail delivery system of electric cars on fixed tracks in lieu of the

specialized system of stationary trays on moving belts). In *Poly-Pacific Techs., Inc*., Comp. Gen. Dec. B-296029, 2005 CPD ¶ 105, the original solicitation sought proposals that required offerors to both lease plastic media and recycle in compliance with regulations, and offerors were required to propose technical solutions and pricing for both the lease and recycling components of the work. The GAO stated that an agency may not modify a contract by changing or relaxing requirements where the resulting work is fundamentally different from the work anticipated by the original solicitation. Here, the RFP did not anticipate that the contractor could be relieved of the recycling requirement or that a disposal effort could be ordered in lieu of recycling.

(B) Extensions and Options

Contract extensions, exercise of contract options, and lease renewals can also constitute de facto sole-source procurements. Extensions adding only time to permit the contractor to complete performance of the original work are almost always within the scope of the procurement. However, if the original contract is seen as a procurement of services for a specified period of time, extensions calling for additional time will frequently be held to be de facto sole-source procurements. The GAO has stated that "competition should be sought whenever it appears likely that the Government's position can be improved whether in terms of cost or performance," 51 Comp. Gen. 57 (B-165218) (1971). In *Saltwater Inc. — Recons & Costs*, Comp. Gen. Dec. B-294121.3, 2005 CPD ¶ 33, the GAO sustained a protest regarding a Department of Commerce contract for fisheries observer services because the contract was awarded for a period longer than that upon which the competition was based. Specifically, the award was for a 6-month contract period from July 1, 2004 to December 31, 2004, with an option to extend the contract 1 year, i.e., to December 31, 2005, which Commerce exercised. The extension of the contract beyond June 30, 2005 constituted an improper sole-source action, since it was not supported by a J&A. In *Washington Nat'l Arena Ltd. Partnership*, 65 Comp. Gen. 25 (B-219136), 85-2 CPD ¶ 435, the government issued an amendment retroactively extending a contract that had expired four months earlier. The GAO held that this action constituted an improper de facto sole-source award. In *Memorex Corp*., 61 Comp. Gen. 42 (B-200722), 81-2 CPD ¶ 334, changing an "option to purchase" or a "lease-to-ownership" plan envisioning a five-year lease period was held to be outside the scope of the procurement. See also *Intermem Corp*., Comp. Gen. Dec. B-187607, 77-1 CPD ¶ 263, where a mandatory requirements contract was modified twice to extend its expiration date. The agency issued a D&F (a written approval by an authorized official clearly justifying the specific determination made), concluding that the extensions were in the best interests of the government because a

lapse would disrupt a government-wide mandatory source of equipment and services and user agencies would lose accumulated purchase credits. The GAO found that the extensions not justified became they necessary only because the agency failed to timely solicit a follow-on contract. In *Federal Data Corp*., Comp. Gen. Dec. B-196221, 80-1 CPD ¶ 167, a short renewal of an ADPE lease pending replacement with government-owned equipment constituted an unjustified sole-source procurement where responses to a CBD notice evinced competitive interests in a solicitation. See also *Techno-Sciences, Inc*., Comp. Gen. Dec. B-257686, 94-2 CPD ¶ 164, finding that the agency had improperly extended a contract on a sole-source basis, stating that other responsible sources could have competed for the requirement had the agency engaged in adequate advance procurement planning to allow a phase-in period for a new contractor.

Before an agency can exercise an option without competition or justification, "the option must have been evaluated as part of the initial competition," FAR 17.207(f). See also FAR 6.001, which contains the following statement of applicability of the competition requirements:

> This part applies to all acquisitions except —
>
> * * *
>
> (c) Contract modifications, including the exercise of priced options that were evaluated as part of the initial competition (see 17.207(f)), that are within the scope and under the terms of an existing contract.

Thus, the competition requirement does not apply to evaluated options because they are part of the original competition. However, FAR 17.207(d) requires some analysis of the reasonableness of the price before exercising options, *Banknote Corp. of Am*., Comp. Gen. Dec. B-250151, 92-2 CPD ¶ 413 (improper to rely on original bid prices, especially when quantities were increasing); *AAA Eng'g & Drafting, Inc*., Comp. Gen. Dec. B-236034.2, 92-1 CPD ¶ 307 (current market price must be checked to ensure that option price is reasonable). The GAO has been quite lenient in enforcing this requirement. See *Sippican, Inc*., Comp. Gen. Dec. B-257047.2, 95-2 CPD ¶ 220, where the protester, a firm that had lost the competition, had informed the agency that it could offer the option quantities at lower prices because it had reduced its costs. The GAO held that the contracting officer had properly exercised his discretion in failing to conduct a competition for the option quantity, stating:

> As a general rule, option provisions in a contract are exercisable at the discretion of the government. See Far 17.201. An informal analysis of prices or an examination of the market which indicates "that the option price is better than prices available in the market or that the option is the more advantageous offer" is one of three methods specifically set forth in FAR 17.207(d) as a basis for determining whether to exercise an

option. *Person-System Integration, Ltd*., B-246142; B-246142.2, Feb. 19, 1992, 92-1 CPD ¶ 204. The form of such examination is largely within the discretion of the contracting officer, so long as it is reasonable. See *Kollsman Instrument Co*., 68 Comp. Gen. 303 (1989), 89-1 CPD ¶ 243; *Action Mfg. Co*., 66 Comp. Gen. 463 (1987), 87-1 CPD ¶ 518. The FAR also permits a determination that the option price is the most advantageous based upon a finding that the time between contract award and option exercise is short enough and the market stable enough that the option price remains most advantageous. FAR 17.207(d).

Our Office will not question an agency's exercise of an option under an existing contract unless the protester shows that the agency failed to follow applicable regulations or that the determination to exercise the option, rather than conduct a new procurement, was unreasonable. *Tycho Technology, Inc*., B-222413.2, May 25, 1990, 90-1 CPD ¶ 500. The intent of the regulations is not to afford a firm that offered high prices under an original solicitation an opportunity to remedy this business judgment by undercutting the option price of the successful offeror. *Person-System Integration, Ltd., supra*. We find no basis to question the agency's determination to exercise the option.

Similarly in *Antmarin, Inc*., Comp. Gen. Dec. B-296317, 2005 CPD ¶ 149, the protester challenged the Navy's price analysis arguing that it was unreasonable to compare prices with those of the original competition because these prices were no longer valid due to the passage of time and changes in the market conditions. In finding that the Navy reasonably determined that exercising the option was reasonable the GAO stated:

The Navy did compare MLS's prices with those of the original competition and reasonably focused on the fact that MLS's price was approximately 43 percent lower than the other offerors' (a significant difference), and that MLS's escalation for its option year pricing was in line with the increases of the other offerors (demonstrating that MLS's did not offer overly inflated option year pricing in the original competition). Contrary to the protesters' suggestions, the Navy did not rely exclusively on a comparison of the prices from the original competition.

See also *Alice Roofing & Sheet Metal Works, Inc*., Comp. Gen. Dec. B-283153, 99-2 CPD ¶ 70, holding that the agency's use of consumer price index to analyze the rate of increase of option pricing for roofing services was not unreasonable. The GAO determined that there was no reason to suspect that roofing prices had either declined or increased at lower rate than prices generally, and the protester did not furnish any evidence demonstrating that roofing prices were substantially different from those of the option prices. The same result was reached in *Bulova Techs., Inc*., Comp. Gen. Dec. B-252660, 93-2 CPD ¶ 23, and *Valentec Wells, Inc*., Comp. Gen. Dec. B-239499, 90-2 CPD ¶ 177.

n contrast, if an option was not evaluated under the initial competition, FAR 17.207(f) prevents its exercise absent competition or an appropriate justification and authorization that full and open competition is not required, *Major Contracting Servs*., Comp. Gen. Dec. B-401472, 2009 CPD ¶ 170, *recons. denied*, 2009 CPD ¶ 250; *Stoehner Sec. Servs., Inc*., Comp. Gen. Dec. B-248077.3, 92-2 CPD ¶ 285; *Kollsman*

Instrument Co., Comp. Gen. Dec. B-233759, 89-1 CPD ¶ 243.

(C) Task and Delivery Orders

Task (services) and delivery (supplies) order contracts are contracts that do not specify a firm quantity, 10 U.S.C. § 2304d(1) and (2) and 41 U.S.C. § 253k(1) and (2). FAR Subpart 16.5 provides that task or delivery order contracts may take the form of requirements contracts or indefinite-quantity contracts and that there is a preference for multiple-award contracts.

Procurement notices and the other requirements of CICA are not required for the issuance of task or delivery orders under either single award or multiple-award contracts, 10 U.S.C. § 2304c(a) and 41 U.S.C. § 253j(a). However, 10 U.S.C. § 2304c(b) and 41 U.S.C. § 253j(b) require that each contractor receiving an award of an original task or delivery order contract be "provided a fair opportunity to be considered" for each order unless

> (1) the [executive] agency's need for the services or property ordered is of such unusual urgency that providing such opportunity to all such contractors would result in unacceptable delays in fulfilling that need;
>
> (2) only one such contractor is capable of providing the services or property required at the level of quality required because the services or property ordered are unique or highly specialized;
>
> (3) the task or delivery order should be issued on a sole-source basis in the interest of economy and efficiency because it is a logical follow-on to a task or delivery order already issued on a competitive basis; or
>
> (4) it is necessary to place the order with a particular contractor in order to satisfy a minimum guarantee.

The statutory exemption of task and delivery orders from competition is implemented in FAR 6.001(d) and (f).

A task or delivery order may not "increase the scope, period or maximum value" of the contract. Such increases may be accomplished only "by modification of the basic contract," 10 U.S.C. § 2304a(e) and 41 U.S.C. § 253h(e). Although not specifically stated in these sections, procurement notices and competition would be required for such actions unless a noncompetitive award could be justified because the exemption from competition is only applicable to task orders. By contrast, the FASA's coverage of task orders for advisory and assistance services specifically provides that contract modifications are subject to competition requirements, 10 U.S.C. § 2304b(f)(2) and 41 U.S.C. § 253i(f)(2). Under limited circumstances, a one-time extension not exceeding six months may be made on a sole-source basis, 10 U.S.C. § 2304b(g) and 41 U.S.C. §

253i(g).

The GAO has followed the same reasoning with task and delivery orders as with change orders. The test is whether the order is within the scope of the original competition. See *Lockheed Martin Fairchild Sys*., Comp. Gen. Dec. B-275034, 97-1 CPD ¶ 28, finding modernization of computer-based training within the scope of a contract for automatic data processing systems integration and support services, stating:

> In determining whether a delivery order issued under an existing contract is beyond the contract's scope of work, we look to whether there is a material difference between the contract, as modified by the delivery order, and the original contract. *Indian and Native Am. Employment and Training Coalition*, 64 Comp. Gen. 460 (1985), 85-1 CPD ¶ 432; *Dynamac Corp*., B-252800, July 19, 1993, 93-2 CPD ¶ 37. As to the materiality of a modification, we consider factors such as the extent of any changes in the type of work, performance period and costs between the contract as awarded and as modified by the delivery order, as well as whether the original contract solicitation adequately advised offerors of the potential for the type of delivery order issued. *Data Transformation Corp*., B-274629, Dec. 19, 1996, 97-1 CPD ¶ 10.

Task orders were also found to be within the scope of the contract in *Outdoor Venture Corp*., Comp. Gen. Dec. B-401628, 2009 CPD ¶ 260 (delivery order requirement for full concealment covers within scope since the SOW listed variations of Ultra Lightweight Camouflage Net Systems to be procured and noted that other versions not specifically identified could also be procured); *Morris Corp*., Comp. Gen. Dec. B-400336, 2008 CPD ¶ 204 (logical connection between the broad scope of food service operations delineated in the IDIQ contract—the feeding of individuals housed within a specified Iraqi training camp and/or coalition base—and the food service operations required to feed detainees located within the camp); *Colliers Int'l* , Comp. Gen. Dec. B-400173, 2008 CPD ¶ 147 (task order to conduct feasibility study was within scope of IDIQ which was broad and specifically provided for unidentified "special studies"); *Relm Wireless Corp*., Comp. Gen. Dec. B-298715, 2006 CPD ¶ 190 (tactical radio within scope of IDIQ because RFP's definition of Land Mobile Radio covered similar assets designated for contingency, tactical or war ready material purposes); *Specialty Marine, Inc*., Comp. Gen. Dec. B-293871, 2004 CPD ¶ 130 (statement of work language encompasses a broad category of ships without limitation to size); *Symetrics Indus., Inc*., Comp. Gen. Dec. B-289606, 2002 CPD ¶ 65 (retrofitting reasonably falls within definition of depot level maintenance); *Ervin & Assocs., Inc*., Comp. Gen. Dec. B-279083, 98-1 CPD ¶ 126 (relevant language in the solicitation's statement of work sets forth the anticipated services in broad, general, and flexible terms); *Techno-Sciences, Inc.*, Comp. Gen. Dec. B-277260.3, 98-1 CPD ¶ 138 (tasks within general scope where the contract specifically contemplated that operations, maintenance, and technical support would include whatever was necessary to support mission); *Exide Corp*., Comp. Gen. Dec. B-276988, 97-2 CPD ¶ 51

(delivery orders in excess of maximum order limitation and to be delivered after contract expiration within contract scope when its terms provided for such flexibility); *Master Security, Inc.*, Comp. Gen. Dec. B-274990.2, 97-1 CPD ¶ 21 (addition of number of hours and contract sites not considered material change); and *LDDS WorldCom*, Comp. Gen. Dec. B-266257, 96-1 CPD ¶ 50 (the added services could have been anticipated from the face of the contract and were not materially different than the services currently rendered under the contract); *Liebert Corp.*, Comp. Gen. Dec. B-232234.5, 91-1 CPD ¶ 413 (work within general scope but quantity beyond maximum stated in contract outside scope); and *Information Ventures, Inc.*, Comp. Gen. Dec. B-240458, 90-2 CPD ¶ 414 (tasks "logically related to the overall purpose" of the agreement).

When the original competitors would not have anticipated the order, it will be found to be outside the scope of the contract. For example, in *Anteon Corp.*, Comp. Gen. Dec. B-293523, 2004 CPD ¶ 51, the GAO stated that although an electronic passport cover is essentially an identification document that is not materially different in function from a smart identification card, the physical deliverables under the task order request were not reasonably within the scope of GSA's smart card contract. See also *Floro & Assocs.*, Comp. Gen. Dec. B-285451.3, 2000 CPD ¶ 172 (task order beyond the scope of a contract for noncomplex integration services of commercially available off-the-shelf hardware and software where it required the contractor to provide management services to assist in support of distance learning product lines); *Ervin v. Assocs., Inc.*, Comp. Gen. Dec. B-278850, 98-1 CPD ¶ 89 (task order beyond the scope when the work was not mentioned in the original solicitation); *Dynamac Corp.*, Comp. Gen. Dec. B-252800, 93-2 CPD ¶ 37 (order for support of a computerized information system outside the scope of a contract that was intended to provide engineering support for an agency's information resources management systems because the original solicitation for the contract did not adequately advise offerors of the potential for this type of order); *Data Transformation Corp.*, Comp. Gen. Dec. B-274629, 97-1 CPD ¶ 10 (operation of a nationwide debt collection system was held to be outside the scope of a litigation support contract - one factor supporting the decision was that the agency had historically procured the work under a separate contract); *Comdisco, Inc.*, Comp. Gen. Dec. B-277340, 97-2 CPD ¶ 105 (agency exceeded the scope of its task orders for computer equipment and related services by permitting computer hardware/software to constitute more than its allotted share of a contract); *Marvin J. Perry & Assocs.*, Comp. Gen. Dec. B-277684, 97-2 CPD ¶ 128 (modification of Federal Supply Schedule delivery orders to permit substitution of lower-grade, less expensive furniture materially altered the nature of the orders from those originally issued and thereby

prejudiced the protester).

d. Post-Protest Justifications

Even if it has been determined that government action in modifying a contract has gone beyond the scope of the procurement and therefore constitutes a de facto sole-source procurement, the GAO will deny the protest if a new sole-source procurement could have been justified. In *Tilden-Coil Constructors, Inc*., Comp. Gen. Dec. B-211189.3, 83-2 CPD ¶ 236, the Army modified an ongoing contract for the construction of eight buildings and a central energy plant to authorize the incumbent to construct two additional buildings. The GAO accepted the Army's explanation that additional costs and delayed completion dates would result from the overcrowding of the congested work site occasioned by the presence of another contractor. See also *Mediax Assocs*., Comp. Gen. Dec. B-211350, 84-1 CPD ¶ 71, declining to determine whether a modification exceeded the scope of a procurement after first concluding that a sole-source award was justified. Similarly in *Lyntronics Inc*., Comp. Gen. Dec. B-292204, 2003 CPD ¶ 140, neither the protester nor GAO raised the issue of whether the modification exceeded the scope of the procurement; rather the focus was on whether the sole-source modification was justified. According to the J&A, no other source could meet the agency's needs because any other source's product would have to undergo required safety and first article testing which would take a number of months and delay delivery. The protester stated it could have a first article testing completed in a matter of weeks, but did not describe how this would be achieved. The GAO found reasonable the agency's conclusion that there was only one responsible source. In *Hercules Aerospace Co.*, Comp. Gen. Dec. B-254677, 94-1 CPD ¶ 7, the protester asserted that a contract modification for additional rocket motors and engineering services amounted to a de facto sole-source procurement. Without deciding this issue, the GAO held that the agency's decision to modify the contract of the only qualified contractor due to unusual and compelling circumstances was reasonable. See also *Pegasus Global Strategic Solutions, LLC*, Comp. Gen. Dec. B-400422.3, 2009 CPD ¶ 73, where the GAO took as a "given" that the agency improperly modified the contract, but nonetheless found that the sole source modification was not unreasonable based on the agency's urgent requirement. Compare *Kent Watkins & Assocs*., Comp. Gen. Dec. B-191078, 78-1 CPD ¶ 377, where the government apparently added another year's work by modification and later wrote a sole-source justification for a new procurement after the protest had been lodged. The supporting reasons cited included that the incumbent contractor submitted the only response to the solicitation, the incumbent had gained special experience, and additional costs would be incurred in changing contractors. However, because the

agency was aware of other companies interested in the solicitation, the GAO found the sole-source award improper.

e. Justifications and Approvals

When the acquisition plan proposes a strategy that entails using a procurement that is other than competitive, 41 U.S.C. § 253(f) and 10 U.S.C. § 2304(f) require the contracting officer to provide written justification for the use of such procedures.

> These statutes require that the justification contain the following six elements:
>
> > (A) a description of the agency's needs;
> >
> > (B) an identification of the statutory exception from the requirement to use competitive procedures and a demonstration, based on the proposed contractor's qualifications or the nature of the procurement, of the reasons for using that exception;
> >
> > (C) a determination that the anticipated cost will be fair and reasonable;
> >
> > (D) a description of the market survey conducted or a statement of the reasons a market survey was not conducted;
> >
> > (E) a listing of the sources, if any, that expressed in writing an interest in the procurement; and
> >
> > (F) a statement of the actions, if any, the agency may take to remove or overcome any barrier to competition before a subsequent procurement for such needs.

See FAR 6.303-2 for additional guidance on the contents of this justification. These requirements generally apply without regard to which exemption from full and open competition resulted in the need to prepare a J&A.

This justification must be certified as accurate and complete by the contracting officer responsible for awarding the contract, 41 U.S.C. § 253(f)(1)(A), 10 U.S.C. § 2304(f) (1)(A). It must then be reviewed and approved pursuant to FAR 6.304, as follows:

Contract Amount		Approval Authority
Over	Not in excess of	
$500,000	$10,000,000	Competition advocate without delegation
$10,000,000	$50,000,000 ($75,000 for DOD, NASA & the Coast Guard)	Head of Procuring Activity or delegate (Flag Officer or GS-16 rank or above)
$50,000,000 ($75,000 for DOD, NASA & the Coast Guard)	———	Senior Procurement Executive of Agency without delegation

Justification and Approvals (J&As) should be prepared and approved during the acquisition planning process. However, they may be made subsequently and even after award if circumstances warrant, FAR 6.303-1(e). Although late preparation of a J&A may not represent good planning, the lateness will not affect the validity of an otherwise proper J&A, *AUTOFLEX, Inc*., Comp. Gen. Dec. B-240012, 90-2 CPD ¶ 294 (J&A executed after the closing date for receipt of proposals but prior to award); and *Magnavox Elec. Sys. Co*., Comp. Gen. Dec. B-258076.2, 94-2 CPD ¶ 266 (J&A not invalidated even though modified and signed by the approving authority after the lower-level officials had signed it and after a protest was filed). Similarly, if additional facts are learned after a J&A has been prepared, an amended J&A will satisfy the detailed requirements for information that must be included, *Minowitz Mfg. Co*., Comp. Gen. Dec. B-228502, 88-1 CPD ¶ 1. Clerical errors in a J&A will not invalidate a procurement, *Mnemonics, Inc*., Comp. Gen. Dec. B-261476.3, 96-1 CPD ¶ 7.

Procurements will be overturned if the J&A does not contain a reasonable explanation for the avoidance of full and open competition. See *Worldwide Languages Resources, Inc*., Comp. Gen. Dec. B-296984, 2005 CPD ¶ 206 (agency's J&A in support of the sole-source award flawed because it was premised on the unsupported conclusion that only one contractor was capable of meeting the requirement in a timely and cost-effective manner); *VSE Corp*., Comp. Gen. Dec. B-290452.3, 2005 CPD ¶ 103 (sole-source award improper because it is not supported by a written J&A); *Sabreliner Corp*., Comp. Gen. Dec. B-288030, 2001 CPD ¶ 170 (J&A replete with errors and inconsistencies that could not reasonably justify sole-source award); *Sturm, Ruger & Co*., Comp. Gen. Dec. B-235938, 89-2 CPD ¶ 375 (documentation not meeting the

specific requirements applicable to J&As insufficient to justify the avoidance of full and open competition); and *NI Indus., Inc*., Comp. Gen. Dec. B-223941, 86-2 CPD ¶ 674 (elimination of one of two mobilization base contractors not adequately justified where the J&A contained no statement of the particular facts and circumstances that would justify a sole-source award).

Class J&As are permitted if approved in writing in accordance with agency procedures, FAR 6.304(c). When class J&As are used, the approval level should probably be determined by the estimated total value of the class. Class J&As will not be sufficient if they do not relate to the particular facts and circumstances of the specific procurement being questioned, *NI Indus., Inc*., Comp. Gen. Dec. B-223941, 86-2 CPD ¶ 674.

The National Defense Authorization Act for FY 2008 amended 10 U.S.C. § 2304(f)(1)(C) and 41 U.S.C. § 253(f)(1)(C) by requiring that agencies post the justification and approval documents for all contracts awarded in reliance on a CICA exception on fedbizopps within 14 days of contract award.

f. Continuous Competition

Section 202 of the Weapon Systems Acquisition Reform Act of 2009, Pub. L. No. 111-23, requires DOD to adopt acquisition strategies for major weapon systems that provide for continuous competition throughout the life of the program. The Act contains a list of strategies which have been inserted in DFARS 207.106 verbatim with no additional guidance:

> (S-72) (1) In accordance with section 202 of the Weapon Systems Acquisition Reform Act of 2009 (Pub. L. 111-23), acquisition plans for major defense acquisition programs as defined in 10 U.S.C. 2430, shall include measures that —
>
> > (i) Ensure competition, or the option of competition, at both the prime contract level and subcontract level (at such tier or tiers as are appropriate) throughout the program life cycle as a means to improve contractor performance; and
> >
> > (ii) Document the rationale for the selection of the appropriate subcontract tier or tiers under paragraph (S-72)(1)(i) of this section, and the measures which will be employed to ensure competition, or the option of competition.
> >
> > (2) Measures to ensure competition, or the option of competition, may include, but are not limited to, cost-effective measures intended to achieve the following:
> >
> > > (i) Competitive prototyping.
> > >
> > > (ii) Dual-sourcing.

(iii) Unbundling of contracts.

(iv) Funding of next-generation prototype systems or subsystems.

(v) Use of modular, open architectures to enable competition for upgrades.

(vi) Use of build-to-print approaches to enable production through multiple sources.

(vii) Acquisition of complete technical data packages.

(viii) Periodic competitions for subsystem upgrades.

(ix) Licensing of additional suppliers.

(x) Periodic system or program reviews to address long-term competitive effects of program decisions.

(3) In order to ensure fair and objective "make-or-buy" decisions by prime contractors, acquisition strategies and resultant solicitations and contracts shall—

(i) Require prime contractors to give full and fair consideration to qualified sources other than the prime contractor for the development or construction of major subsystems and components of major weapon systems;

(ii) Provide for Government surveillance of the process by which prime contractors consider such sources and determine whether to conduct such development or construction in-house or through a subcontract; and

(iii) Provide for the assessment of the extent to which the prime contractor has given full and fair consideration to qualified sources in sourcing decisions as a part of past performance evaluations.

(4) Whenever a source-of-repair decision results in a plan to award a contract for the performance of maintenance and sustainment services on a major weapon system, to the maximum extent practicable and consistent with statutory requirements, the acquisition plan shall prescribe that award will be made on a competitive basis after giving full consideration to all sources (including sources that partner or subcontract with public or private sector repair activities).

There is very little guidance on the implementation of these strategies. However, some have been discussed in other parts of this chapter. The guidance in DOD PGI 217.7504, discussed below, is also useful since it was originally written to provide guidance to agencies that were establishing second sources for weapons systems. See Chapter 8 of Nash & Rawicz, *Intellectual Property in Government Contracts* (6th ed. 2008), for more in-depth discussion of the techniques that involve working around proprietary data.

g. Obtaining Competition for Spare Parts

The FAR requirement for considering competition in the planning process calls for

identification of the steps that will be taken to obtain competition for components and subsystems as well as spare parts. As discussed earlier, when life-cycle cost techniques are used, this can be accomplished by placing provisions in the original contract making the contractor responsible for the costs of subsystems, components and spare parts.

When the original contractor is not responsible for the life-cycle support of a product, the agency will have to plan the techniques that will be used in the future to obtain any necessary replacement subsystems, components, and parts. One way to accomplish this is to obtain a full data package with unlimited rights. However, there are limitations on this technique. See DFARS 227.7103-1 stating DOD's policy to permit the inclusion of proprietary items in designs and to avoid the acquisition of proprietary rights when procuring equipment:

> (c) Offerors shall not be required, either as a condition of being responsive to a solicitation or as a condition for award, to sell or otherwise relinquish to the Government any rights in technical data related to items, components or processes developed at private expense except for the data identified at 227.7103-5(a)(2) and (a)(4) through (9).
>
> (d) Offerors and contractors shall not be prohibited or discouraged from furnishing or offering to furnish items, components, or processes developed at private expense solely because the Government's rights to use, modify, release, reproduce, perform, display, or disclose technical data pertaining to those items may be restricted.

When these policies result in proprietary technical data packages, the agency must plan to obtain competition in the future acquisition of subsystems, components, and parts by working around the proprietary rights of the contractor that designed the equipment. The most useful guidance on the techniques that are available is set forth in DOD Procedures, Guidance and Information (PGI) 217.7504, stating the policy on the acquisition of parts when data is not available:

> When acquiring a part for which the Government does not have necessary data with rights to use in a specification or drawing for competitive acquisition, use one of the following procedures in order of preference—
>
> > (1) When items of identical design are not required, the acquisition may still be conducted through full and open competition by using a performance specification or other similar technical requirement or purchase description that does not contain data with restricted rights. Two methods are —
> >
> > > (i) Two-step sealed bidding; and
> >
> > > (ii) Brand name or equal purchase descriptions.
> >
> > (2) When other than full and open competition is authorized under FAR Part 6, acquire the part from the firm which developed or designed the item or process, or its licensees, provided productive capacity and quality are adequate and the price is fair and reasonable.
> >
> > (3) When additional sources are needed and the procedures in paragraph (1) of this section are not

practicable, consider the following alternatives —

(i) Encourage the developer to license others to manufacture the parts;

(ii) Acquire the necessary rights in data;

(iii) Use a leader company acquisition technique (FAR subpart 17.4) when complex technical equipment is involved and establishing satisfactory additional sources will require technical assistance as well as data; or

(iv) Incorporate a priced option in the contract which allows the Government to require the contractor to establish a second source.

(4) As a last alternative, the contracting activity may develop a design specification for competitive acquisition through reverse engineering. Contracting activities shall not do reverse engineering unless —

(i) Significant cost savings can be demonstrated; and

(ii) The action is authorized by the head of the contracting activity.

The most prevalent technique to obtain competition for spare parts is for the government to suggest that companies reverse engineer a product in order to compete for a quantity of items to be procured. The major way that an agency initiates this type of reverse engineering is by providing proprietary items to competitors. With regard to spare parts, this procedure is encouraged by 10 U.S.C. § 2320(d), which states:

> The Secretary of Defense shall by regulation establish programs which provide domestic business concerns an opportunity to purchase or borrow replenishment parts from the United States for the purpose of design replication or modification, to be used by such concerns in the submission of subsequent offers to sell the same or like parts to the United States.

This technique is sometimes called "competitive copying." The key issue when using this technique is the method by which the procuring agency determines that the product to be supplied will meet the government's requirements. There are three methods being used: analysis of the technical data prepared by the new source, preaward testing of the product to be supplied, and postaward testing of the product.

Agencies may insist on the submission of the technical data that will be used to perform a contract for a proprietary item before the award of such a contract, *EG&G Sealol*, Comp. Gen. Dec. B-232265, 88-2 CPD ¶ 558; *Electro-Magnetic Processes, Inc.*, Comp. Gen. Dec. B-227912, 87-2 CPD ¶ 269. The Defense Logistics Agency uses the following Conditions for Evaluation and Acceptance of Offers for Part Numbered Items clause in DLAD 52.217-9002 for this purpose:

> [T]he offeror must furnish with its offer legible copies of all drawings, specifications, or other data necessary to clearly describe the characteristics and features of the alternate product being offered. Data

> submitted must cover design, materials, performance, function, interchangeability, inspection and/or testing criteria, and other characteristics of the offered product. In addition, the offeror must furnish drawings and other data covering the design, materials, etc. of the exact product cited in the PID [procurement identification description] sufficient to enable the Government to determine that the offeror's product is equal to the product cited in the PID.

This clause is based on the premise that the government must review the technical data of an offeror that intends to provide the replenishment parts before it will award a contract for such parts. This is the most frequently used technique to ensure that these parts will meet the government's needs.

Alternatively, an agency may require preaward testing of an offered product to determine that it will perform as well as the sole source proprietary item, *Interstate Diesel Servs., Inc*., Comp. Gen. Dec. B-230107, 88-1 CPD ¶ 480; *B.H. Aircraft Co*., Comp. Gen. Dec. B-222565, 86-2 CPD ¶ 143. However, this may restrict competition because it requires the offeror to incur the costs of manufacturing the product and performing tests. Moreover, agencies must comply with the procedural requirements in 10 U.S.C. § 2319 or 41 U.S.C. § 253c when they use this technique. See FAR Subpart 9.2.

The least restrictive technique for determining product acceptability is to provide for post-award testing. Guidance on such first-article testing is contained in FAR Subpart 9.3. FAR 9.302 contains the following caution as to the possibility that this may impose the risk on the government if awarding to a contractor that cannot deliver a conforming product:

> First article testing and approval (hereafter referred to as testing and approval) ensures that the contractor can furnish a product that conforms to all contract requirements for acceptance. Before requiring testing and approval, the contracting officer shall consider the —
>
> (a) Impact on cost or time of delivery;
>
> (b) Risk to the Government of forgoing such test; and
>
> (c) Availability of other, less costly, methods of ensuring the desired quality.

Agencies sometimes create nonproprietary technical data packages by reverse engineering proprietary products. Reverse engineering is the process of developing design specifications by inspection and analysis of a product. Although DFARS PGI 217.7504 provides that reverse engineering by the government is the least desirable means of obtaining competition in the face of proprietary data, this practice has been found to be legal, *Westech Gear Corp. v. Dep't of the Navy*, 907 F.2d 1225 (D.C. Cir. 1990); *American Hoist & Derrick, Inc. v. United States*, 3 Cl. Ct. 198 (1983).

Sometimes nonproprietary technical data packages are created by awarding a contract to perform the reverse engineering, *EG&G Sealol*, Comp. Gen. Dec. B-232265, 88-2 CPD ¶ 558. When reverse engineering is too expensive to justify the effort to obtain competition, an agency can reasonably decide to continue the sole-source procurement, *Gel Sys., Inc*., Comp. Gen. Dec. B-231680, 88-2 CPD ¶ 316. See also *AAI ACL Techs*., *Inc*., Comp. Gen. Dec. 258679.4, 95-2 CPD ¶ 243, finding a sole-source award proper given the risk and cost associated with reverse engineering.

Agencies also attempt to obtain competition in the face of proprietary data by having the contractor with the proprietary data license other contractors. This is permitted by 10 U.S.C. § 2320(a)(2)(G)(iii). One form of licensing occurs in leader/follower procurement described in FAR Subpart 17.4. In that situation the developer of a product or system is required to create a follower company that is fully capable of producing the product or system. DOD PGI 217.7504 encourages the development of sources for spare parts by using the leader/follower technique or by encouraging the contractor to license other sources. In *Leigh Instruments, Ltd.*, Comp. Gen. Dec. B-233642, 89-1 CPD ¶ 149, the licensee complained that the contractor had failed to honor the license with the result that the licensee could not successfully compete on a procurement. The GAO did not entertain the protest, characterizing such situations as disputes between two private parties.

3. *Source Selection Procedures*

FAR 7.105(b)(3) states:

> *Source-selection procedures*. Discuss the source-selection procedures for the acquisition, including the timing for submission and evaluation of proposals, and the relationship of evaluation factors to the attainment of the acquisition objectives (see Subpart 15.3). When an EVMS is required (see FAR 34.202(a)) and a pre-award IBR is contemplated, the acquisition plan must discuss —
>
> (i) How the pre-award IBR will be considered in the source selection decision;
>
> (ii) How it will be conducted in the source selection process (see FAR 15.306); and
>
> (iii) Whether offerors will be directly compensated for the costs of participating in a pre-award IBR.

This element of the planning process requires the formulation of a source selection plan —a major task that is discussed in detail in Chapter 2. It also requires the agency to determine the timing of submission and evaluation of proposals. The need for acquisition streamlining to reduce the time taken in the preparation and evaluation of proposals was previously discussed. The sequence of the entire competitive negotiation

process will be discussed in the later treatment of the milestones for the acquisition cycle.

4. Acquisition Considerations

FAR 7.105(b)(4) states:

> *Acquisition considerations*. For each contract contemplated, discuss contract type selection (see Part 16); use of multi-year contracting, options, or other special contracting methods (see Part 17); any special clauses, special solicitation provisions, or FAR deviations required (see Subpart 1.4); whether sealed bidding or negotiation will be used and why; whether equipment will be acquired by lease or purchase (see Subpart 7.4) and why; and any other contracting considerations. Provide rationale if a performance-based acquisition will not be used or if a performance-based acquisition for services is contemplated on other than a firmfixed-price basis (see 37.102(a), 16.103(d), and 16.505(a)(3)).

This part of the plan covers the structure of the contract that will be used to carry out the acquisition strategy. Depending on the nature of the program, these decisions can be relatively simple or extremely complex. The major issues are type of contract, special procurement techniques, and the use of sealed bidding.

a. Type of Contract

Although agency policies have changed from time to time, the basic statutory and regulatory policy has remained constant — calling for a balanced approach to the selection of the proper contract type. The statutory guidance is simple and direct. 41 U.S.C. § 254(b) and 10 U.S.C. § 2301(a)(2) give broad discretion to use the appropriate type of contract on negotiated procurements but prohibit any use of a cost-plus-a-percentage-of cost system of contracts. FAR 16.103 carries out this policy by emphasizing two basic principles: the need to tailor the type of contract to the facts of each procurement, and the advantage of using fixed-price contracts when possible. This section of the FAR provides very balanced guidance in this area:

> (a) Selecting the contract type is generally a matter for negotiation and requires the exercise of sound judgment. Negotiating the contract type and negotiating prices are closely related and should be considered together. The objective is to negotiate a contract type and price (or estimated cost and fee) that will result in reasonable contractor risk and provide the contractor with the greatest incentive for efficient and economical performance.
>
> (b) A firm-fixed-price contract, which best utilizes the basic profit motive of business enterprise, shall be used when the risk involved is minimal or can be predicted with an acceptable degree of certainty. However, when a reasonable basis for firm pricing does not exist, other contract types should be considered, and negotiations should be directed toward selecting a contract type (or combination of types) that will appropriately tie profit to contractor performance.

(c) In the course of an acquisition program, a series of contracts, or a single long-term contract, changing circumstances may make a different contract type appropriate in later periods than that used at the outset. In particular, contracting officers should avoid protracted use of a cost-reimbursement or time-and-materials contract after experience provides a basis for firmer pricing.

(d) Each contract file shall include documentation to show why the particular contract type was selected. Exceptions to this requirement are —

(1) Fixed-price acquisitions made under simplified acquisition procedures;

(2) Contracts on a firm fixed-price basis other than those for major systems or research and development; and

(3) Awards on the set-aside portion of sealed bid partial set-asides for small business.

FAR 16.104 provides a list of factors to be considered in selecting the contract type with guidance as to the application of each factor. This section of the FAR requires the contracting officer to impose financial risks on the contractor that are commensurate with the ability of the parties to define and price the work with some degree of accuracy. This guidance describes the factors as follows:

(a) Price competition. Normally, effective price competition results in realistic pricing, and a fixed-price contract is ordinarily in the Government's interest.

(b) Price analysis. Price analysis, with or without competition, may provide a basis for selecting the contract type. The degree to which price analysis can provide a realistic pricing standard should be carefully considered. (See 15-404-1(b).)

(c) Cost analysis. In the absence of effective price competition and if price analysis is not sufficient, the cost estimates of the offeror and the Government provide the bases for negotiating contract pricing arrangements. It is essential that the uncertainties involved in performance and their possible impact upon costs be identified and evaluated, so that a contract type that places a reasonable degree of cost responsibility upon the contractor can be negotiated.

(d) Type and complexity of the requirement. Complex requirements, particularly those unique to the Government, usually result in greater risk assumption by the Government. This is especially true for complex research and development contracts, when performance uncertainties or the likelihood of changes makes it difficult to estimate performance costs in advance. As a requirement recurs or as quantity production begins, the cost risk should shift to the contractor, and a fixed-price contract should be considered.

(e) Urgency of the requirement. If urgency is a primary factor, the Government may choose to assume a greater proportion of risk or it may offer incentives to ensure timely contract performance.

(f) Period of performance or length of production run. In times of economic uncertainty, contracts extending over a relatively long period may require economic price adjustment terms.

(g) Contractor's technical capability and financial responsibility.

(h) Adequacy of the contractor's accounting system. Before agreeing on contract type other than firm-fixed-price, the contracting officer shall ensure that the contractor's accounting system will permit timely development of all necessary cost data in the form required by the proposed contract type. This factor may

be critical when the contract type requires price revision while performance is in progress, or when a cost-reimbursement contract is being considered and all current or past experience with the contractor has been on a fixed-price basis.

(i) Concurrent contracts. If performance under the proposed contract involves concurrent operations under other contracts, the impact of those contracts, including their pricing arrangements, should be considered.

(j) Extent and nature of proposed subcontracting. If the contractor proposes extensive subcontracting, a contract type reflecting the actual risks to the prime contractor should be selected.

(k) Acquisition history. Contractor risk usually decreases as the requirement is repetitively acquired. Also, product descriptions or descriptions of services to be performed can be defined more clearly.

This guidance sets forth the government's basic policy to use the type of contract that imposes sufficient risk on the contractor to motivate good performance yet relieves the contractor of risks over which it has no control and that are unpredictable. This goal requires the contracting parties to strike a delicate balance in the selection and negotiation of the contract type.

Because of the difficulties of selecting the proper type of contract for research and development contracts, FAR 35.006 contains the following special provisions dealing with the selection of the correct type of contract in this area:

(b) Selecting the appropriate contract type is the responsibility of the contracting officer. However, because of the importance of technical considerations in R&D, the choice of contract type should be made after obtaining the recommendations of technical personnel. Although the Government ordinarily prefers fixed-price arrangements in contracting, this preference applies in R&D contracting only to the extent that goals, objectives, specifications, and cost estimates are sufficient to permit such a preference. The precision with which the goals, performance objectives, and specifications for the work can be defined will largely determine the type of contract employed. The contract type must be selected to fit the work required.

(c) Because the absence of precise specifications and difficulties in estimating costs with accuracy (resulting in a lack of confidence in cost estimates) normally precludes using fixed-price contracting for R&D, the use of cost-reimbursement contracts is usually appropriate (see Subpart 16.3). The nature of development work often requires a cost-reimbursement completion arrangement (see 16.306(d)). When the use of cost and performance incentives is desirable and practicable, fixed-price incentive and cost-plus-incentive-fee contracts should be considered in that order of preference.

* * *

(e) Projects having production requirements as a follow-on to R&D efforts normally should progress from cost-reimbursement contracts to fixed-price contracts as designs become more firmly established, risks are reduced, and production tooling, equipment, and processes are developed and proven. When possible, a final commitment to undertake specific product development and testing should be avoided until —

(1) Preliminary exploration and studies have indicated a high degree of probability that development is feasible and

(2) The Government has determined both its minimum requirements and desired objectives for

product performance and schedule completion.

For a detailed discussion of the selection and application of the various types of contracts, see Chapter 8 of Cibinic & Nash, *Formation of Government Contracts* (3d ed. 1998).

Congress has enacted special provisions covering the selection of the proper type of contract for DOD weapon systems procurements. In the Defense Appropriations Act of 1987, 101 Stat. 1329, § 8118 prohibited the use of firm fixed-price contracts for the development of such systems without Secretarial approval. This prohibition stayed in place until the enactment of the National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, which contained § 818 reversing the rule and favoring the use of fixed-price type contracts for weapon systems development. This provision is implemented in DFARS 234.004 as follows:

> (2) In accordance with Section 818 of the National Defense Authorization Act for Fiscal Year 2007 (Pub. L. 109-364), for major defense acquisition programs as defined in 10 U.S.C. 2430—
>
> (i) The Milestone Decision Authority shall select, with the advice of the contracting officer, the contract type for a development program at the time of Milestone B approval or, in the case of a space program, Key Decision Point B approval;
>
> (ii) The basis for the contract type selection shall be documented in the acquisition strategy. The documentation—
>
> (A) Shall include an explanation of the level of program risk; and
>
> (B) If program risk is determined to be high, shall outline the steps taken to reduce program risk and the reasons for proceeding with Milestone B approval despite the high level of program risk; and
>
> (iii) If a cost-type contract is selected, the contract file shall include the Milestone Decision Authority's written determination that—
>
> (A) The program is so complex and technically challenging that it would not be practicable to reduce program risk to a level that would permit the use of a fixed-price type contract; and
>
> (B) The complexity and technical challenge of the program is not the result of a failure to meet the requirements of 10 U.S.C. 2366a.

b. Special Procurement Techniques

When the government has a firm determination of the quantity of articles or services needed and has available appropriations it will normally enter into a contract for the total quantity and obligate the funds. However, there are a number of situations where the quantity is uncertain or funds are not available for the full program. Thus, in

this part of the acquisition plan, the agency should consider whether it will benefit by contracting for more work than is immediately required in the current fiscal year or over additional years. The major benefit that can be derived from such contracts is lower prices resulting from reduced contractor costs because of capital investments and other efficiencies that would not be achieved if the contract were for only the work that is immediately required. Contracting agencies also achieve benefits from longer contracts by stabilizing their contract administration processes and not incurring the costs of repetitive procurements. While there is no single clearly enunciated government policy with regard to the use of these forms of contracting, it is apparent that a fundamental goal of the government should be to buy articles or services in sufficient quantities over a sufficient period of time to permit efficient performance of the contract. This policy with regard to supplies is contained in 10 U.S.C. § 2384(a) and 41 U.S.C. § 253f(a) and implemented in FAR Subpart 7.2. The latter statute states:

> Each executive agency shall procure supplies in such quantities as (A) will result in the total cost and unit cost most advantageous to the United States, where practicable, and (B) does not exceed the quantity reasonably expected to be required by the agency.

Contracts for more work than is immediately required must be written to comply with the Anti-Deficiency Act, 31 U.S.C. § 1341. This Act precludes the award of firm contracts for work until money has been appropriated to pay for it. The agency must use special contracting techniques to include such work in a contract. Four such techniques are widely used: multi-year contracts, options, task or delivery order contracts and requirements contracts.

(1) Multi-year Contracts

Multi-year contracting was devised by DOD in the 1960s to enable the military services to procure weapon systems over a five-year period. The contracting technique has been expanded over the years to cover the procurement of both supplies and services, and statutes have been enacted placing some limitations on its use. See 10 U.S.C. § 2306b (procurement of supplies by DOD, NASA, and the Coast Guard); 10 U.S.C. § 2306(g) (procurement of services by DOD, NASA, and the Coast Guard); 41 U.S.C. § 254c (procurement of supplies and services by other agencies).

Under a multi-year contract the procuring agency may stop ordering the supplies or services if the requirement no longer exists, but the contractor is protected by the payment of a cancellation charge (up to a cancellation ceiling) covering costs that have not been recovered in the prices paid to the date of cancellation. FAR 17.103 describes

this contracting technique:

> "Multi-year" contract means a contract for the purchase of supplies or services for more than 1, but not more than 5, program years. A multi-year contract may provide that performance under the contract during the second and subsequent years of the contract is contingent upon the appropriation of funds, and (if it does so provide) may provide for a cancellation payment to be made to the contractor if appropriations are not made. The key distinguishing difference between multiyear contracts and multiple year contracts is that multi-year contracts, defined in the statutes cited at 17.101, buy more than 1 year's requirement (of a product or service) without establishing and having to exercise an option for each program year after the first.

Multi-year contracts legally bind the government to order the stated requirements over the life of the contract as long as the requirement continues to exist and funding is available, *Applied Devices Corp. v. United States*, 219 Ct. Cl. 109, 591 F.2d 635 (1979). They are used to induce contractors to reduce their costs because they have some assurance of a long-term contract. FAR 17.105-2 lists the objectives of multi-year contracting:

> Use of multi-year contracting is encouraged to take advantage of one or more of the following:
>
> (a) Lower costs.
>
> (b) Enhancement of standardization.
>
> (c) Reduction of administrative burden in the placement and administration of contracts.
>
> (d) Substantial continuity of production or performance, thus avoiding annual startup costs, pre-production testing costs, make-ready expenses, and phaseout costs.
>
> (e) Stabilization of contractor work forces.
>
> (f) Avoidance of the need for establishing quality control techniques and procedures for a new contractor each year.
>
> (g) Broadening the competitive base with opportunity for participation by firms not otherwise willing or able to compete for lesser quantities, particularly in cases involving high startup costs.
>
> (h) Provide incentives to contractors to improve productivity through investment in capital facilities, equipment, and advanced technology.

FAR 17.105-1 recognizes the different statutory requirements for use of multi-year contracts:

> (a) Except for DoD, NASA, and the Coast Guard, the contracting officer may enter into a multi-year contract if the head of the contracting activity determines that —
>
> (1) The need for the supplies or services is reasonably firm and continuing over the period of the contract; and
>
> (2) A multi-year contract will serve the best interests of the United States by encouraging full and

open competition or promoting economy in administration, performance, and operation of the agency's programs.

(b) For DoD, NASA, and the Coast Guard, the head of the agency may enter into a multi-year contract for supplies if —

(1) The use of such a contract will result in substantial savings of the total estimated costs of carrying out the program through annual contracts;

(2) The minimum need to be purchased is expected to remain substantially unchanged during the contemplated contract period in terms of production rate, procurement rate, and total quantities;

(3) There is a stable design for the supplies to be acquired, and the technical risks associated with such supplies are not excessive;

(4) There is a reasonable expectation that, throughout the contemplated contract period, the head of the agency will request funding for the contract at a level to avoid contract cancellation; and

(5) The multi-year contracting method may be used for the acquisition of supplies or services.

Note that this guidance does not cover multi-year service contracts issued by DOD, NASA, or the Coast Guard pursuant to 10 U.S.C. § 2306(g). See DFARS 217.171 for guidance on this type of multi-year contracting.

(2) Options

An option is a unilateral right in a contract by which the government may, for a specified time, elect to purchase additional supplies or services called for by the contract, or elect to extend the term of the contract, FAR 2.101. Options have become the major means that agencies have avoided the need to obtain their requirements through annual purchases - hence avoiding the administrative cost and time of processing a procurement each year. Many agencies also use options for additional years' quantities of items as a means of inducing offerors to propose lower prices. This policy appears to be effective even though the options are not legally binding on the government. FAR 17.202(a) gives contracting officers broad authority to use options with the following limitations:

(b) Inclusion of an option is normally not in the Government's interest when, in the judgment of the contracting officer —

(1) The foreseeable requirements involve —

(i) Minimum economic quantities (i.e., quantities large enough to permit the recovery of startup costs and the production of the required supplies at a reasonable price); and

(ii) Delivery requirements far enough into the future to permit competitive acquisition, production, and delivery.

(2) An indefinite quantity or requirements contract would be more appropriate than a contract with options. However, this does not preclude the use of an indefinite quantity contract or requirements contract with options.

(c) The contracting officer shall not employ options if —

(1) The contractor will incur undue risks; e.g., the price or availability of necessary materials or labor is not reasonably foreseeable;

(2) Market prices for the supplies or services involved are likely to change substantially; or

(3) The option represents known firm requirements for which funds are available unless —

(i) The basic quantity is a learning or testing quantity; and

(ii) Competition for the option is impracticable once the initial contract is awarded.

Options have been widely used for additional years of work on services contracts. A major reason for this use of option is to maintain continuity of service when the agency is aware that it will have a continuing need for the services. See FAR 17.202 stating:

(d) In recognition of (1) the Government's need in certain service contracts for continuity of operations and (2) the potential cost of disrupted support, options may be included in service contracts if there is an anticipated need for a similar service beyond the first contract period.

In addition, FAR 17.204(e) requires that the total length of time of the basic contract and option periods shall not exceed five years for service contracts, and the total of the basic contract and option quantities shall not exceed the five-year requirements of the government for supply contracts. These limitations do not apply to information technology contracts.

When options are included in the contract, the agency must decide whether they will be evaluated in making the original source selection decision. If they are evaluated, they may be subsequently exercised without obtaining full and open competition pursuant to FAR 17.207. However, if they are not evaluated, the full and open competition requirement must be met, FAR 17.207(f). For this reason, most agencies evaluate options in the original procurement. FAR 17.206 provides the following guidance on evaluation of options:

(a) In awarding the basic contract, the contracting officer shall, except as provided in paragraph (b) of this section, evaluate offers for any option quantities or periods contained in a solicitation when it has been determined prior to soliciting offers that the Government is likely to exercise the options. (See 17.208.)

(b) The contracting officer need not evaluate offers for any option quantities when it is determined that evaluation would not be in the best interests of the Government and this determination is approved at a level above the contracting officer. An example of a circumstance that may support a determination not to evaluate offers for option quantities is when there is a reasonable certainty that funds will be unavailable to

permit exercise of the option.

Protests will be sustained if an agency exercises an unevaluated option without justifying a non-competitive procurement in accordance with the CICA procedures. See *Major Contracting Servs., Inc*., Comp. Gen. Dec. B-401472, 2009 CPD ¶ 170, *recons. denied*, 2009 CPD ¶ 250, explaining that this is the only rational interpretation of FAR 17.207(f). See also *Stoehner Security Servs., Inc*., Comp. Gen. Dec. B-248077.3, 92-2 CPD ¶ 285, applying this regulation to the exercise of an unpriced option. In *Freightliner Corp. v. Caldera*, 225 F.3d 1361 (Fed. Cir. 2000), the court held that FAR 17.207(f) gives the contractor no rights with regard to the improper exercise of an unevaluated option.

(3) Requirements Contracts

Another method of contracting for supplies or services that are not currently funded or may not be needed is the requirements contract. This type of indefinitedelivery contract may be used when the exact times or quantities of future delivers are not known at the time of contract award, FAR 16.501-2(a). The requirements contract "provides for the filling of all actual purchase requirements of designated Government activities for supplies or services during a specified contract period, with deliveries or performance to be scheduled by placing orders with the contractor," FAR 16.503(a). Thus, the government is legally required to order the supplies or services specified in the contract as long as it has a requirement for such supplies or services, *Torncello v. United States*, 231 Ct. Cl. 436, 681 F.2d 756 (1982); *Mason v. United States*, 222 Ct. Cl. 436, 615 F.2d 1343 (1980).

A requirements contract is appropriate when the government anticipates recurring requirements but cannot predetermine the precise quantities of supplies or services that the designated government activities will need during a definite period, FAR 16.503(b). The contract must contain a realistic estimated total quantity, FAR 16.503(a)(1). This estimate is not intended to be a representation to an offeror or contractor that the estimated quantity will be required or ordered or that conditions affecting requirements will be stable or normal. Rather, the estimate is solely for the benefit of the offerors, so that they have an idea of what will be expected of them under the contract. However, the agency must exercise care in computing the estimated requirement because the government will be liable if the estimate is inaccurate because of negligence, *Chemical Tech., Inc. v. United States*, 227 Ct. Cl. 120, 645 F.2d 934 (1981); *Hi-Shear Tech. v. United States*, 53 Fed. Cl. 420 (2002) (in estimating the number of components it

needed, the government failed to allow for units returned from the field that would be repaired and returned to stock and a new program implemented to increase the number of units returned).

Requirements contracts may be for a single year or for multiple years. In most cases requirements contracts for more than one year include options for a specified number of additional years where appropriations are not available at the time of contracting. See, for example, *Free State Reporting, Inc*., Comp. Gen. Dec. B-259650, 95-1 CPD ¶ 199 (requirements for support services for base year and two option years); *Tulane Univ*., Comp. Gen. Dec. B-259912, 95-1 CPD ¶ 210 (requirements for services for two base years and three option years). Multiple year requirements contracts could also be issued as a single document, including later years not covered by current appropriations, if there is no possibility that the contractor could obligate the government by performing work prior to the issuance of a requirement. See 42 Comp. Gen. 272 (B-144641) (1962), where the GAO ruled that a requirements contract was in violation of appropriations law because the government would be obligated to pay for work in a later year not covered under the contract. See also 67 Comp. Gen. 190 (B-224081) (1988), and 48 Comp. Gen. 494 (B-164908) (1969). In cases where a requirement contract is used in this way, an agency will normally include an "availability of funds" clause stating that the government will not be liable to pay the contractor until funds for future years have been made contractually available. See *Funding of Maintenance Contract Extending Beyond Fiscal Year*, Comp. Gen. Dec. B-259274, 96-1 CPD ¶ 247, where the GAO approved a requirements contract when the requirement covered two fiscal years with the second year restricted by an Availability of Funds clause. The GAO stated that "a naked contractual obligation that carries with it no financial exposure to the government does not violate the Anti-Deficiency Act."

Agencies have also used multi-year requirements contracts when multiyear or no-year funds are being used for the procurement. This practice was explicitly permitted by FAR 17.104-4 until 1996, when the provision was deleted from the regulation. It is still legally permissible even though the FAR is silent on the subject. For examples of multi-year requirements contracts, see *Liebert Corp*., 70 Comp. Gen. 448 (B-232234.5), 91-1 CPD ¶ 413 (agency issued firm-fixed-price requirements contract for services and materials over a five-year period); *CDI Marine Co*., Comp. Gen. Dec. B-219934.2, 86-1 CPD ¶ 242 (agency issued a CPFF requirements contract for services performed over a three-year period).

(4) Task and Delivery Order Contracts

Another form of contract providing for the ordering of supplies or services as the need is identified is the task or delivery order contract. These contracts are subject to the provisions of the Federal Acquisition Streamlining Act of 1994 (FASA), Pub. L. No. 103-355, dealing with "task order contracts" and "delivery order contracts," 10 U.S.C. § 2304a-2304d and 41 U.S.C. § 235h-235k. The following definitions are contained in 10 U.S.C. § 2304d and 41 U.S.C. § 253k:

> (1) The term "task order contract" means a contract for services that does not procure or specify a firm quantity of services (other than a minimum or maximum quantity) and that provides for the issuance of orders for the performance of tasks during the period of the contract.
>
> (2) The term "delivery order contract" means a contract for property that does not procure or specify a firm quantity of property (other than a minimum or maximum quantity) and that provides for the issuance of orders for the delivery of property during the period of the contract.

These statutory provisions are implemented in FAR Subpart 16.5, covering requirements contracts and indefinite-quantity contracts. Other types of contracts, such as level-of-effort contracts, may also provide for the ordering of work by tasks without calling for a "firm quantity" of work. If so, they would be subject to these statutes even though the FAR does not specify that they are covered.

One major purpose of these statutes is to ensure that these types of contracts will be sufficiently precise to enable offerors to ascertain the scope of the work to be ordered so that they can submit meaningful offers, as set forth at 10 U.S.C. § 2304a and 41 U.S.C. § 253h:

> (b) Solicitation. The solicitation for a task or delivery order contract shall include the following:
>
> > (1) The period of the contract, including the number of options to extend the contract and the period for which the contract may be extended under each option, if any.
> >
> > (2) The maximum quantity or dollar value of the services or property to be procured under the contract.
> >
> > (3) A statement of work, specifications, or other description that reasonably describes the general scope, nature, complexity, and purposes of the services or property to be procured under the contract.

In order to ensure that competition is maximized, these statutes favor the award of multiple contracts over single contracts for a designated series of task orders or delivery orders. See 10 U.S.C. § 2304a(d) and 41 U.S.C. § 253h(d), which grant authority to make single awards but state the following:

> (d) Single and Multiple Contract Awards. —
>
> > (1) The head of an agency may exercise the authority provided in this section —

(A) to award a single task or delivery order contract; or

(B) if the solicitation states that the head of the agency has the option to do so, to award separate task or delivery order contracts for the same or similar services or property to two or more sources.

(2) No determination under section 2304(b) of this title is required for award of multiple task or delivery order contracts under paragraph (1) (B).

(3)(A) No task or delivery order contract in an amount estimated to exceed $100,000,000 (including all options) may be awarded to a single source unless the head of the agency determines in writing that —

(i) the task or delivery orders expected under the contract are so integrally related that only a single source can reasonably perform the work;

(ii) the contract provides only for firm, fixed price task orders or delivery orders for —

(I) products for which unit prices are established in the contract; or

(II) services for which prices are established in the contract for the specific tasks to be performed;

(iii) only one source is qualified and capable of performing the work at a reasonable price to the government; or

(iv) because of exceptional circumstances, it is necessary in the public interest to award the contract to a single source.

(B) The head of the agency shall notify Congress within 30 days after any determination under subparagraph (A)(iv).

(4) The regulations implementing this subsection shall —

(A) establish a preference for awarding, to the maximum extent practicable, multiple task or delivery order contracts for the same or similar services or property under the authority of paragraph (1)(B); and

(B) establish criteria for determining when award of multiple task or delivery order contracts would not be in the best interest of the Federal Government.

10 U.S.C. § 2304b(e) and 41 U.S.C. § 253i(e) contain special limitations on task order contracts for "advisory and assistance services" if the contract period exceeds three years and the estimated contract amount is over $10 million. In such cases a single contract can be awarded only if the head of the executive agency determines that because the services required under the contract are unique or highly specialized, it is not practicable to award more than one contract. "Advisory and assistance services" are defined in 31 U.S.C. § 1105(g):

[T]he term "advisory and assistance services" means the following services when provided by nongovernmental sources:

(i) Management and professional support services.

(ii) Studies, analyses, and evaluations.

(iii) Engineering and technical services.

Most task and delivery order contracts are structured as indefinite-delivery, indefinite-quantity contracts. FAR 16.504 contains the following guidance on these contracts:

(a) Description. An indefinite-quantity contract provides for an indefinite quantity, within stated limits, of supplies or services during a fixed period. The Government places orders for individual requirements. Quantity limits may be stated as number of units or as dollar values.

(1) The contract must require the Government to order and the contractor to furnish at least a stated minimum quantity of supplies or services. In addition, if ordered, the contractor must furnish any additional quantities, not to exceed the stated maximum. The contracting officer should establish a reasonable maximum quantity based on market research, trends on recent contracts for similar supplies or services, survey of potential users, or any other rational basis.

(2) To ensure that the contract is binding, the minimum quantity must be more than a nominal quantity, but it should not exceed the amount that the Government is fairly certain to order.

(3) The contract may also specify maximum or minimum quantities that the Government may order under each task or delivery order and the maximum that it may order during a specific period of time.

(4) A solicitation and contract for an indefinite quantity must —

(i) Specify the period of the contract, including the number of options and the period for which the Government may extend the contract under each option;

(ii) Specify the total minimum and maximum quantity of supplies or services the Government will acquire under the contract;

(iii) Include a statement of work, specifications, or other description, that reasonably describes the general scope, nature, complexity, and purpose of the supplies or services the Government will acquire under the contract in a manner that will enable a prospective offeror to decide whether to submit an offer;

(iv) State the procedures that the Government will use in issuing orders, including the ordering media, and, if multiple awards may be made, state the procedures and selection criteria that the Government will use to provide awardees a fair opportunity to be considered for each order (see 16.505(b)(1));

(v) Include the name, address, telephone number, facsimile number, and e-mail address of the agency task and delivery order ombudsman (see 16.505(b)(6)) if multiple awards may be made;

(vi) Include a description of the activities authorized to issue orders; and

(vii) Include authorization for placing oral orders, if appropriate, provided that the Government has established procedures for obligating funds and that oral orders are confirmed in writing.

An IDIQ contract differs from a requirements contract in that the IDIQ contract does not obligate the government to purchase more than a stated minimum quantity, whereas a requirements contract obligates the government to purchase all of its requirements from the contractor during a fixed period of time, *Travel Centre v. Barram*, 236 F.3d 1316 (Fed. Cir. 2001). See also *Varilease Tech. Group, Inc. v. United States*, 289 F.3d 795 (Fed. Cir. 2002); *IMS Engineers-Architects, P.C. v. United States*, 86 Fed. Cl. 541 (2009); and *J. Cooper & Assocs. v. United States*, 53 Fed. Cl. 8 (2002).

c. Sealed Bidding

A final contracting consideration that must be addressed in the planning process is whether sealed bidding is the most appropriate technique. One of the major changes to procurement policy in the CICA was the elimination of the absolute preference for formal advertising (renamed "sealed bidding") over negotiation. Instead, the CICA substituted the following rule in 10 U.S.C. § 2304(a)(2) and 41 U.S.C. § 253(a)(2):

> In determining the competitive procedures appropriate under the circumstance, an executive agency —
>
> (A) shall solicit sealed bids if —
>
> (i) time permits the solicitation, submission, and evaluation of sealed bids;
>
> (ii) the award will be made on the basis of price and other price-related factors;
>
> (iii) it is not necessary to conduct discussions with the responding sources about their bids; and
>
> (iv) there is a reasonable expectation of receiving more than one sealed bid;

However, 10 U.S.C. § 2304(a)(1)(B) and 41 U.S.C. § 253(a)(1)(B) also provide that in conducting a procurement, an agency shall use the competitive procedure or combination of competitive procedures that is best suited under the circumstances of the procurement.

The statutes thus give agencies considerable discretion in deciding whether to use sealed bidding. These provisions are implemented by FAR 6.401, which states:

> Sealed bidding and competitive proposals, as described in Parts 14 and 15, are both acceptable procedures for use under Subparts 6.1, 6.2; and, when appropriate, under Subpart 6.3.
>
> (a) *Sealed bids*. (See Part 14 for procedures.) Contracting officers shall solicit sealed bids if —
>
> (1) Time permits the solicitation, submission, and evaluation of sealed bids;
>
> (2) The award will be made on the basis of price and other price-related factors;

(3) It is not necessary to conduct discussions with the responding offerors about their bids; and

(4) There is a reasonable expectation of receiving more than one sealed bid.

(b) *Competitive proposals*. (See Part 15 for procedures.)

(1) Contracting officers may request competitive proposals if sealed bids are not appropriate under paragraph (a) of this section.

(2) Because of differences in areas such as law, regulations, and business practices, it is generally necessary to conduct discussions with offerors relative to proposed contracts to be made and performed outside the United States and its outlying areas.

Competitive proposals will therefore be used for these contracts unless discussions are not required and the use of sealed bids is otherwise appropriate. Contracting officers must use sealed bidding if none of the four exceptions set forth in 10 U.S.C. § 2304(a)(2) and 41 U.S.C. § 253(a)(2) can be demonstrated. The GAO explained this rule in *Defense Logistics Agency*, 67 Comp. Gen. 16 (B-227055.2), 87-2 CPD ¶ 365 at 17:

> It is true … that CICA eliminates the specific preference for formally advertised procurements ("sealed bids") and directs an agency to use the competitive procedures, or combination of procedures, that is best suited under the circumstances of the procurement. However, CICA … does provide, in determining which competitive procedure is appropriate under the circumstances, that an agency "shall solicit sealed bids if": (1) time permits, (2) award will be based on price, (3) discussions are not necessary, and (4) more than one bid is expected to be submitted. As is evident, the plain language of the CICA provision is mandatory in nature. When the enumerated statutory conditions are present, the solicitation of sealed bids is, therefore, required, leaving no room for the exercise of discretion by the contracting officer in determining which competitive procedure to use.

In reaching this conclusion, the GAO relied on the legislative history of the CICA, stating:

> The legislative history of CICA also indicates the mandatory nature of the requirement to use sealed bidding when the statutory conditions are present. Senate Report No. 98-50, 98th Cong., 2nd Sess., reprinted in 1984 U.S. Code Cong. & Admin. News 2191, states, in pertinent part:

While competitive negotiation is recognized in S.338 as a bona fide competitive procedure, the Committee emphasizes that traditional formal advertising procedures are by no means cast aside. In fact, agencies are required … to solicit sealed bids [when the enumerated conditions are present.]

House Conference Report No. 98-861, 98th Cong., 2nd Sess., reprinted in 1984 U.S. Code Cong. & Admin. News 2110, states:

> In effect, the substitute, like the Senate amendment, removes the restriction from — and written justification required for — competitive proposal procedures and places them on a par with sealed bid procedures. The substitute maintains minimum criteria for sealed bid procedures to ensure their use when appropriate.

See also *Knoll N. Am., Inc*., Comp. Gen. Dec. B-250234, 93-1 CPD ¶ 26. In *Racal Corp*., 70 Comp. Gen. 127 (B-240579), 90-2 CPD ¶ 453, the GAO ruled that negotiation could not be used in a price-only procurement to ensure that offerors had a complete understanding of the specifications and to permit changes to the agency's requirements after submission of offerors. See also *Northeast Constr. Co*., 68 Comp. Gen. 406 (B-234323), 89-1 CPD ¶ 402, holding that negotiation was not appropriate because the procurement was based on price alone and the RFP did not call for technical proposals. But see *TLT Constr. Corp*., Comp. Gen. Dec. B-286226, 2000 CPD ¶ 179, denying a protest of the use of negotiation procedures, finding that the agency reasonably determined that discussions might be necessary to ensure that offerors fully understood the importance of timely, quality performance.

Agencies have great discretion to determine that a best value tradeoff analysis is necessary. See *Ceres Envt'l Servs., Inc*., Comp. Gen. Dec. B-310902, 2008 CPD ¶ 48, holding the use of negotiation procedures rather than sealed bidding to be appropriate because the accelerated schedule and complexity of the project necessitated consideration of non-price factors. In a unique case, *Weeks Marine, Inc. v. United States*, 79 Fed. Cl. 22 (2007), the court enjoined an agency from using negotiation procedures because it had not adequately justified their use. The Federal Circuit reversed this ruling in *Weeks Marine, Inc. v. United States*, 575 F.3d 1352 (Fed. Cir. 2009), stating at 1370-71:

> The Corps has put forth seven specific reasons for its procurement action, each of which represents a legitimate procurement objective. And as seen, in the case of each reason, the Acquisition Plan states the underlying rationale. Perhaps the Plan's fullest statement of an underlying rationale relates to emergency procurements.
>
> * * *
>
> [W]e hold that the Corps's decision to [use negotiation procedures] "evince[es] rational reasoning and consideration of relevant factors." Were we to conclude otherwise, we would be second-guessing the Corps's action. That is something we are not permitted to do. "If the court finds a reasonable basis for the agency's action, the court should stay its hand even though it might, as an original proposition, have reached a different conclusion as to the proper administration and application of the procurement regulations." *Honeywell, Inc. v. United States*, 870 F.2d 644, 648 (Fed. Cir. 1989) (quoting *M. Steinthal & Co. v. Seamans*, 455 F.2d 1289, 1301, 147 U.S. App. D.C. 221 (D.C. Cir. 1971)) (holding that the General Accounting Office's determination that a bid for a procurement contract was responsive and properly disclosed the bidder's identity had a rational basis).

Similarly, an agency's decision to use sealed bidding procedures instead of competitive negotiation will be upheld unless it is clearly unreasonable. In *Eagle Fire Inc.*, Comp. Gen. Dec. B-257951, 94-2 CPD ¶ 214, the protester argued that technical proposals were needed and discussions required; thus, the procurement should have

been conducted using competitive procedures rather than sealed bidding procedures. The GAO found no basis to object to the Navy's choice of using sealed bidding because there was no ambiguity in the specification requirements and the Navy could conduct a preaward survey to determine whether the low bidder was qualified and capable of performing the contract. See also *Tennessee Apparel Corp*., Comp. Gen. Dec. B-253178.3, 94-1 CPD ¶ 104, where the protester contended that negotiation procedures were required. The GAO found that the specifications identified in the IFB made price and price-related factors the only relevant evaluation criteria and made discussions unnecessary. Further, the GAO stated that the matters identified by the protester as necessary for discussions concerned a bidder's capacity to perform, which could be resolved through the conduct of a preaward survey. See also *Machinewerks, Inc*., Comp. Gen. Dec. B-258123, 94-2 CPD ¶ 238 (sealed bidding with bid samples an appropriate technique to ensure that the proposed product met the agency's needs); *Virginia Blood Servs*., Comp. Gen. Dec. B-259717, 95-1 CPD ¶ 185 (sealing bidding appropriate when agency reasonably concluded that there was no reason to conduct discussions or to consider factors other than price in selecting the contractor).

5. *Budgeting and Funding*

FAR 7.105(b)(5) states:

> Budgeting and funding. Include budget estimates, explain how they were derived, and discuss the schedule for obtaining adequate funds at the time they are required (see Subpart 32.7).

The government's full funding policy provides that budget authority sufficient to complete a useful segment of a capital project must be appropriated before any obligations for the useful segment may be incurred, otherwise a contract would violate the Anti-Deficiency Act. See OMB Circular A-11 (August 2009).

There are two situations, other than the special procurement techniques discussed above, where contracts can be awarded without full funding — incrementally funded contracts and contracts conditioned on the availability of funds.

a. Incrementally Funded Contracts

Incrementally funded contracts are contracts where the contract describes the work to be done in firm language but the scope of work is greater than the funds available to the agency at the time of contract award. The FAR contains no guidance on when an agency may use an incrementally funded contract. However, FAR 32.705-2(c) calls for

the use of the Limitation of Funds clause in FAR 52.232-22 when an incrementally funded cost-reimbursement contract is used.

NASA gives the following guidance for using incrementally funded contracts at NFS 18-32.702-70:

> (a) Cost-reimbursement contracts may be incrementally funded only if all the following conditions are met:
>
> > (1) The total value of the contract (including options as defined in FAR Subpart 17.2) is — (i) $500,000 or more for R&D contracts under which no supplies are deliverable; or (ii) $1,000,000 or more for all other contracts.
> >
> > (2) The period of performance exceeds one year.
> >
> > (3) The funds are not available to fund the total contract value fully at award.
> >
> > (4) Initial funding of the contract is $100,000 or more.
>
> (b) Fixed-price contracts, other than those for research and development, shall not be incrementally funded.
>
> (c)(1) Fixed-price contracts for research and development may be incrementally funded if the conditions of 1832.702-70(a)(1) through (4) are met and the initial funding of the contract is at least 50 percent of the total fixed price.
>
> > (2) Incrementally funded fixed-price contracts shall be fully funded as soon as adequate funding becomes available.
>
> (d) Except for a modification issued to fully fund a contract, incremental funding modifications shall not be issued for amounts totaling less than $25,000.
>
> (e) Except for a modification issued to close out a contract, modifications deobligating funds shall not be issued for amounts totaling less than $25,000.
>
> (f) The procurement officer, with the concurrence of the installation Chief Financial Officer, may waive any of the conditions set forth in paragraphs 1832.702-70(a) through (e). The procurement officer shall maintain a record of all such approvals during the fiscal year.
>
> (g) A class deviation from the conditions set forth in paragraphs 1832.70270(a) through (e) exists to permit incremental funding of contracts under Phase II of the Small Business Innovation Research (SBIR) and Small Business Technology Transfer (STTR) programs. This deviation exists with the understanding that the contracts will be fully funded when funds become available.

b. Contracts Conditioned on Availability of Funds

FAR 32.703-2 provides for the limited use of contracts issued subject to the availability of funds (with an appropriate contract clause):

> (a) Fiscal year contracts. The contracting officer may initiate a contract action properly chargeable to funds

of the new fiscal year before these funds are available, provided that the contract includes the clause at 52.232-18, Availability of Funds (see 32.705-1(a)). This authority may be used only for operation and maintenance and continuing services (e.g., rentals, utilities, and supply items not financed by stock funds) —

(1) Necessary for normal operations; and

(2) For which Congress previously had consistently appropriated funds, unless specific statutory authority exists permitting applicability to other requirements.

(b) Indefinite-quantity or requirements contracts. A one-year indefinite-quantity or requirements contract for services that is funded by annual appropriations may extend beyond the fiscal year in which it begins; provided, that —

(1) Any specified minimum quantities are certain to be ordered in the initial fiscal year (see 37.106) and

(2) The contract includes the clause at 52.232-19, Availability of Funds for the Next Fiscal Year (see 32.705-1(b)).

(c) Acceptance of supplies or services. The Government shall not accept supplies or services under a contract conditioned upon the availability of funds until the contracting officer has given the contractor notice, to be confirmed in writing, that funds are available.

6. Product Descriptions

FAR 7.105(b)(6) states:

Product or service descriptions. Explain the choice of product or service description types (including performance-based acquisition descriptions) to be used in the acquisition.

The product description is included in Section C of the contract in the form of a specification or work statement. The type of product description used is a key element of the acquisition planning process because it is inherently related to the extent of competition and the procurement technique.

With respect to specifications and work statements to be used in the procurement process, 41 U.S.C. § 253a(a) provides:

(1) In preparing for the procurement of property or services, an executive agency shall —

(A) specify its needs and solicit bids or proposals in a manner designated to achieve full and open competition for the procurement;

* * *

(C) develop specifications in such manner as is necessary to obtain full and open competition with due regard to the nature of the property or services to be acquired.

(2) Each solicitation under this title shall include specifications which

(A) consistent with the provisions of this title, permit full and open competition;

(B) include restrictive provisions or conditions only to the extent necessary to satisfy the needs of the executive agency or as authorized by law.

The same requirements are set forth in 10 U.S.C. § 2305(a)(1). These statutory provisions contain a number of policy objectives to be served in selecting the product description for a contract — promoting the acquisition of commercial items, favoring the use of functional or performance specifications, and avoiding the use of restrictive provisions. It is also vital that the product description be clearly stated to obtain the most effective competition and avoid later disputes.

a. Government vs. Commercial Specifications

For many years the government followed a policy favoring the use of government-drafted specifications — based, apparently, on the belief that such specifications were more precisely drafted and more likely to ensure that the procuring agencies obtained products and services that met their needs. However, there were increasing indications that these specifications (Federal specifications and military specifications) were not keeping up with market conditions and not allowing government agencies to obtain the best products and services available at the most economical prices. The policy changed in the 1990s. On June 29, 1994, the Secretary of Defense issued a memorandum calling for the use of performance specifications or non-government standards for all new military systems and permitting the use of military specifications only when a waiver has been obtained. This memorandum stated:

> Military Specifications and Standards: Performance specifications shall be used when purchasing new systems, major modifications, upgrades to current systems, and nondevelopmental and commercial items, for programs in any acquisition category. If it is not practicable to use a performance specification, a non-government standard shall be used. Since there will be cases when military specifications are needed to define an exact design solution because there is no acceptable non-government standard or because the use of a performance specification or nongovernment standard is not cost effective, the use of military specifications and standards is authorized as a last resort, with an appropriate waiver.

The intent of the policy was not to eliminate military specifications altogether, but to curtail the automatic development and imposition of unique military specifications as the cultural norm within the Department of Defense.

At the same time, the FASA included 10 U.S.C. § 2377 and 41 U.S.C. § 264b, stating a preference for the acquisition of commercial and nondevelopmental items and

requiring agencies to modify requirements in appropriate cases to ensure that the requirements can be met by commercial items or, to the extent that commercial items suitable to meet the agency's needs are not available, nondevelopmental items other than commercial items, state specifications in terms that enable and encourage bidders and offerors to supply commercial items or, to the extent that commercial items suitable to meet the agency's needs are not available, nondevelopmental items other than commercial items in response to the agency solicitations. This statutory coverage does not mandate the use of commercial standards but permits agencies to adopt any policy that will maximize the procurement of commercial items. FAR Part 11 preserves this agency discretion. FAR 11.002(a)(2)(ii) merely restates the first statutory requirement set forth above. FAR 11.101(a) revised the priority list for selection of specifications to remove military specifications and federal specifications from the list:

> Agencies may select from existing requirements documents, modify or combine existing requirements documents, or create new requirements documents to meet agency needs, consistent with the following order of precedence:
>
> (1) Documents mandated for use by law.
>
> (2) Performance-oriented documents (e.g., a PWS or SOO). (See 2.101.)
>
> (3) Detailed design-oriented documents.
>
> (4) Standards, specifications and related publications issued by the Government outside the Defense or Federal series for the non-repetitive acquisition of items.

This guidance is silent as to the policies of the Department of Defense but apparently permits the use of federal specifications if none of the documents on the list will suffice. See FAR 11.201, which states:

> (a) Solicitations citing requirements documents listed in the General Services Administration (GSA) Index of Federal Specifications, Standards and Commercial Item Descriptions, the DoD Acquisition Streamlining and Standardization Information System (ASSIST), or other agency index shall identify each document's approval date and the dates of any applicable amendments and revisions. Do not use general identification references, such as "the issue in effect on the date of the solicitation." Contracting offices will not normally furnish these cited documents with the solicitation, except when —
>
> (1) The requirements document must be furnished with the solicitation to enable prospective contractors to make a competent evaluation of the solicitation;
>
> (2) In the judgment of the contracting officer, it would be impracticable for prospective contractors to obtain the documents in reasonable time to respond to the solicitation; or
>
> (3) A prospective contractor requests a copy of a Government promulgated requirements document.
>
> (b) Contracting offices shall clearly identify in the solicitation any pertinent documents not listed in the GSA Index of Federal Specifications, Standards and Commercial Item Descriptions or ASSIST. Such documents shall be furnished with the solicitation or specific instructions shall be furnished for obtaining or examining

such documents.

(c) When documents refer to other documents, such references shall —

(1) Be restricted to documents, or appropriate portions of documents, that apply in the acquisition;

(2) Cite the extent of their applicability;

(3) Not conflict with other documents and provisions of the solicitation; and

(4) Identify all applicable first tier references.

b. Functional and Performance Specifications

Specifications are usually referred to as design, performance, or functional specifications. These different types of specifications have different legal ramifications. See *Blake Constr. Co. v. United States*, 987 F.2d 743 (Fed. Cir. 1993), where the court described design specifications at 744:

> Design specifications … describe in precise detail the materials to be employed and the manner in which the work is to be performed. The contractor has no discretion to deviate from the specifications, but is "required to follow them as one would a road map." "Detailed design specifications contain an implied warranty that if they are followed, an acceptable result will be produced." *Stuyvesant Dredging Co. v. United States*, 834 F.2d 1576, 1582 (Fed. Cir. 1987) (citing *United States v. Spearin*, 248 U.S. 132 (1918)).

In *Caddell Constr. Co. v. United States*, 78 Fed. Cl. 406 (2007), the contractor contended that the requirement to modernize a medical facility was a design specification while the government argued it was a performance specification. The court gave their contentions at 411-12:

> Plaintiff argues that because the contract in this case "prescribe[s] in minute detail 'the character, dimension, and location of the construction work'" it is a design specification. In particular, plaintiff points to the fact that the contract specified "the type steel, bolts, tubing, washers, studs, nuts, zinc coating and fasteners to be used." In addition, plaintiff avers that the contract dictated how fabrication and erection were to be performed, inspected, and tested. Finally, plaintiff claims that the structural and architectural drawings "specify the exact dimensions, locations, sizes and connections for each piece of steel required to be fabricated and assembled to form the structural frame for this Project" indicating that this contract was a design specification and not a performance specification.
>
> Defendant maintains that the contract in question was a performance specification because it "specified the end product (the building to be constructed) and left the discretion of how to construct the building almost entirely up to Caddell/SSC." Although defendant admits that the contract documents were detailed, defendant argues that because these details are not instructions on how to construct the building, the contract was not a design specification. Finally, defendant avers that because the contract did not provide the "means and methods" for the construction, the contract was a performance specification.

The court agreed with the contractor that, at the very least, the structural steel

portion of the contract was a design specification, stating at 412:

> Although the government did not dictate every aspect of the construction of the building and left certain key aspects of the construction, such as sequencing and scheduling, up to Caddell, the details and specifications for the structural steel were design specifications. Nine pages of the contract are devoted to specifications for the structural steel with specific instructions on what type of bolts, washers, nuts, welds, finishes, and connections, among other things could be used for the construction. This was clearly a "road map" for the structural steel fabricator to follow.
>
> * * *
>
> Although defendant urges this court to follow the court's decision in *PCL Construction Services, Inc. v. United States*, the two cases are factually dissimilar. In *PCL Construction*, plaintiff "promised that its construction efforts would include … its own 'engineering efforts' to address design problems as they occurred." *PCL Construction Services, Inc. v. United States*, 47 Fed. Cl. 745, 798 (2000). Plaintiff made no such assurances with regard to the steel structure in this case. In fact, plaintiff was obligated to fabricate the steel exactly according to the plans and to clear any questions of discrepancies or missing information with the government. Plaintiff could not "fill in the blanks," if necessary.

When the government uses a design specification, it impliedly warrants that the specifications are suitable for their intended purposes. See Chapter 3 of *Cibinic, Nagle & Nash, Administration of Government Contracts (4th ed. 2006)*.

In *Blake Constr. Co. v. United States*, 987 F.2d 743 (Fed. Cir. 1993), the court also discussed performance specifications at 744:

> Performance specifications "set forth an objective or standard to be achieved, and the successful bidder is expected to exercise his ingenuity in achieving that objective or standard of performance, selecting the means and assuming a corresponding responsibility for that selection." *J.L. Simmons Co. v. United States*, 188 Cl. Ct. 684, 412 F.2d 1360, 1362 (Ct. Cl. 1969).

In general, performance-type specifications describe the government's requirements in terms of the agency's needs rather than in terms of a precise description of the work to be done. In many cases they promote more competition by giving contractors more flexibility and place the risk of nonperformance on the contractor. See, for example, *Daewoo Eng'g & Constr. Co. v. United States*, 73 Fed. Cl. 547 (2006), *aff'd* , 557 F.3d 1332 (Fed. Cir. 2009), rejecting an allegation that a specification was defective. The court held that the disputed requirement was a performance specification that placed responsibility for compliance on the contractor, adding that with performance specifications "[t]he Government does not care how the job is completed, so long as it obtains what it paid for." The GAO denied a protest that the use of such specifications placed too much risk on the contractor by requiring substantial design effort, *McDermott Shipyards*, Comp. Gen. Dec. B-237049, 90-1 CPD ¶ 121, citing *Pitney Bowes*, 68 Comp. Gen. 249 (B-233100), 89-1 CPD ¶ 157, for the view that such

specifications are favored under the CICA.

A functional specification describes the work to be performed in terms of end purpose or the government's ultimate objective, rather than how the work is to be performed. Functional specifications may be regarded as a particular type of performance specification—one that describes the government's ultimate need or objective without specifying any particular approach or type of product that should be used to achieve the objectives.

This should be contrasted with a so-called "product-oriented" performance-type specification, which indicates the ultimate performance objectives of the government but also specifies a particular type of product or approach that must be used and the performance standards that must be met. Functional specifications have the advantage of permitting the widest possible competition. However, before functional specifications are introduced, the commercial market should be examined to guarantee that the needs of the government can and will be met through use of such specifications. Functional specifications must be carefully prepared to ensure that competitors are not misled by overly general statements of the agency's requirements. In *CompuServe*, Comp. Gen. Dec. B-188990, 77-2 CPD ¶ 182, the GAO discussed the benefits and disadvantages of functional specifications:

> To use the approach advocated by the protester — functional specifications — in a procurement such as the present one can increase competition, which is desirable. However, using functional specifications is not free from complex, and potentially costly, difficulties. Initially, the Government must expend considerable effort in drafting the specifications.
>
> Offerors must then translate the specifications into their own individual equipment and software approaches. This can involve a considerable amount of detail, may result in a variety of solutions to the Government's requirements and may be quite costly. A substantial effort on the part of the Government is then required to evaluate the proposals. Whether an agency conducting a procurement like the present one should be required to take a functional approach, as opposed to specifying a DBMS package, is a question which cannot be answered in the abstract.

See *Wincor Mgmt. Group, Inc*., Comp. Gen. Dec. B-278925, 98-1 CPD ¶ 106, holding that a specification describing the agency requirement for commercial washers and dryers in "broad functional terms" was sufficiently detailed to provide offerors with a "common understanding" of the agency's needs so they could "compete intelligently on a relatively equal basis."

Agencies can choose among a number of types of specifications or combine types of specifications to identify its needs. 41 U.S.C. § 253a(a)(3) and 10 U.S.C. § 2305(a)(1)(C), as modified by the FASA, provide:

> [T]he type of specification included in a solicitation shall depend on the nature of the needs of the executive agency and the market available to satisfy such needs. Subject to such needs, specifications may be stated in terms of —
>
> (A) function, so that a variety of products or services may qualify;
>
> (B) performance, including specifications of the range of acceptable
>
> characteristics or of the minimum acceptable standards; or
>
> (C) design requirements.

FAR 11.002(a)(2)(i) describes the types of specifications omitting the reference to design specifications:

> State requirements with respect to an acquisition of supplies or services in terms of —
>
> (A) Functions to be performed;
>
> (B) Performance required; or
>
> (C) Essential physical characteristics;

These provisions contain no explicit statement of which type of specification is preferred, but they list functional and performance specifications ahead of design specifications. Thus, they imply a preference for these broader product descriptions. FAR 11.101(a) is more explicit, stating a preference for performance-oriented specifications over design-oriented specifications. However, the ultimate objective is to obtain the most effective competition to meet the agency's needs.

Few specifications are composed solely of one type. The government must often combine specification types in order to describe its needs adequately and ensure full and open competition. See *Blake Constr. Co. v. United States*, 987 F.2d 743 (Fed. Cir. 1993), stating at 746:

> [T]he distinction between design and performance specifications is not absolute, and does not dictate the resolution of this case. Contracts may have both design and performance characteristics. *See, e.g., Utility Contractors, Inc. v. United States*, 8 Cl. Ct. 42, 50 n.7 (1985) ("Certainly one can find numerous government contracts exhibiting both performance and design specifications."), *aff'd mem.*, 790 F.2d 90 (Fed. Cir. 1986); *Aleutain Constructors v. United States*, 24 Cl. Ct. 372, 379 (1991) ("Government contracts not uncommonly contain both design and performance specifications." It is not only possible, but likely that a contractor will be granted at least limited discretion to find the best way to achieve goals within the design parameters set by a contract. *See, e.g., Penguin Indus., Inc. v. United States*, 209 Ct. Cl. 121, 530 F.2d 934, 937 (Ct. Cl. 1976). "On occasion the labels 'design specification' and 'performance specification' have been used to connote the degree to which the government has prescribed certain details of performance on which the contractor could rely. However, those labels do not independently create, limit, or remove a contractor's obligations." *Zinger Constr. Co. v. United States*, 807 F.2d 979, 981 (Fed. Cir. 1986) (citations omitted). These labels merely help the court discuss the discretionary elements of a

contract. It is the obligations imposed by the specification which determine the extent to which it is "performance" or "design," not the other way around.

FAR Subpart 37.6 provides for the use of performance specifications in contracting for services. This gives the contractor the maximum opportunity to find the most efficient way to perform. FAR 37.602 states:

(a) A Performance work statement (PWS) may be prepared by the Government or result from a Statement of objectives (SOO) prepared by the Government where the offeror proposes the PWS.

(b) Agencies shall, to the maximum extent practicable —

(1) Describe the work in terms of the required results rather than either "how" the work is to be accomplished or the number of hours to be provided (see 11.002(a)(2) and 11.101);

(2) Enable assessment of work performance against measurable performance standards;

(3) Rely on the use of measurable performance standards and financial incentives in a competitive environment to encourage competitors to develop and institute innovative and cost-effective methods of performing the work.

(c) Offerors use the SOO to develop the PWS; however, the SOO does not become part of the contract. The SOO shall, at a minimum, include —

(1) Purpose;

(2) Scope or mission;

(3) Period and place of performance;

(4) Background;

(5) Performance objectives, i.e., required results; and

(6) Any operating constraints.

c. Specifications for Development Contracts

Specifications for development contracts have always been performance specifications. Traditionally, development specifications called for a considerable amount of innovative effort in order to meet the government's needs. DOD has now prohibited this flexibility by requiring a new phase in the development cycle. As discussed earlier, this constitutes an adoption of the policy of knowledge-based acquisition, which is a management approach requiring adequate knowledge at critical junctures (i.e., knowledge points) throughout the acquisition process to make informed decisions. The policy provides a framework for developers to ask themselves at key decision points whether they have the knowledge they need to move to the next phase of

acquisition. DOD Directive 5000.1 calls for sufficient knowledge to reduce the risk associated with program initiation, system demonstration, and full-rate production, stating:

> E1.1.14. Knowledge-Based Acquisition. PMs shall provide knowledge about key aspects of a system at key points in the acquisition process. PMs shall reduce technology risk, demonstrate technologies in a relevant environment, and identify technology alternatives, prior to program initiation. They shall reduce integration risk and demonstrate product design prior to the design readiness review. They shall reduce manufacturing risk and demonstrate producibility prior to full-rate production.

Other methods of ensuring that development specifications do not require the use of innovative technologies in the development process have been called "evolutionary development" and "spiral development." DOD Instruction 5000.02 reemphasizes that "evolutionary acquisition is the preferred DOD strategy for rapid acquisition of mature technology for the user." "Spiral development" is no longer used as an evolutionary acquisition strategy term but it can still be used as an engineering term to describe a software development method. With regard to evolutionary development, the instruction states:

> An evolutionary approach delivers capability in increments, recognizing, up front, the need for future capability improvements. The objective is to balance needs and available capability with resources, and to put capability into the hands of the user quickly.

These techniques are endorsed by the Weapon Systems Acquisition Reform Act of 2009, Pub. L. No. 111-23. It requires that Department of Defense officials responsible for cost estimates, budgeting, and acquisition all weigh in on system capability documents before they are validated by the Joint Requirements Oversight Council. Thus, the DOD director of cost assessment and program evaluation; the Under Secretary of Defense (Comptroller); and the Under Secretary of Defense for Acquisition, Technology and Logistics are to comment on tradeoffs between cost, schedule, and performance objectives as part of the requirements development process. This is the first major paradigm shift in how requirements for major defense acquisition programs are validated.

d. Unduly Restrictive Specifications

The use of unduly restrictive specifications is prohibited by 41 U.S.C. § 253a(a)(2) and 10 U.S.C. § 2305(a)(1)(B). An unduly restrictive specification is one that limits competition by including a requirement that exceeds the needs of the government, *Kohler Co*., Comp. Gen. Dec. B-257162, 94-2 CPD ¶ 88. The procuring agency has considerable discretion in determining its needs, and the GAO will not disturb the

agency's determination unless a protester shows that the restrictive provision is unreasonable. See *AT&T Corp*., Comp. Gen. Dec. B-270841, 96-1 CPD ¶ 237, stating:

> The governing statutes and regulations allow contracting agencies broad discretion in determining their minimum needs and the appropriate method for accommodating them. See 10 U.S.C. § 2305(a)(1)(A) (1994); Federal Acquisition Regulation § 6.101(b) and 7.103(c). Government procurement officials who are familiar with the conditions under which supplies, equipment, or services have been used in the past, and how they are to be used in the future, are generally in the best position to know the government's actual needs, and therefore, are best able to draft appropriate specifications. *Gel Sys., Inc*., B-234283, May 8, 1989, 89-1 CPD ¶ 433. Although an agency is required to specify its needs in a manner designed to achieve full and open competition, and is required to include restrictive provisions or conditions only to the extent necessary to satisfy its needs, without a showing that competition is restricted, agencies are permitted to determine how best to accommodate their needs, *Mine Safety Appliances Co*., B-242379.2; B-242379.3, Nov. 27, 1991, 91-2 CPD ¶ 506, and we will not substitute our judgment for that of the agency. *Simula, Inc*., B-251749, Feb. 1, 1993, 93-1 CPD ¶ 86; *Purification Envtl*., B-259280, Mar. 14, 1995, 95-1 CPD ¶ 142.

The GAO has also stated that an agency's basis for using a restrictive specification will be held to be reasonable if it can "withstand logical scrutiny," *Glock, Inc*., Comp. Gen. Dec. B-236614, 89-2 CPD ¶ 593; *Chadwick-Helmuth Co., Inc*., Comp. Gen. Dec. B-279621.2, 98-2 CPD ¶ 44. However, a stricter rule is applicable when the provision limits the competition to a single source, *Daniel H. Wagner, Assocs*., 65 Comp. Gen. 305 (B-220633), 86-1 CPD ¶ 166.

The GAO will not rule on protests that the specification was less restrictive than proper to meet the needs of an agency, *Purification Envtl*., Comp. Gen. Dec. B-259280, 95-1 CPD ¶ 142; *Technology Scientific Servs., Inc*., Comp. Gen. Dec. B-245039, 91-2 CPD ¶ 233; *Terex Corp*., 64 Comp. Gen. 691 (B-217053), 85-2 CPD ¶ 76. Of the various kinds of specifications, design specifications are the most likely to be unduly restrictive. They are likely to contain specific requirements that are not necessary to meet the agency's needs but that preclude some contractors from competing. See, for example, *Mossberg Corp*., Comp. Gen. Dec. B-274059, 96-2 CPD ¶ 189 (requirement that shotguns be constructed with nonreflective steel receiver rather than aluminum and requirement for crossbolt-type safety versus top-of-the-receiver); *Kohler Co*., Comp. Gen. Dec. B-257162, 94-2 CPD ¶ 88 (requirement that diesel engines in power generators be four-cycle); *Bardex Corp*., Comp. Gen. Dec. B-252208, 93-1 CPD ¶ 461 (requirement for electromechanical shiplift rather than hydraulic lifting devices); *Data-Team, Inc*., 68 Comp. Gen. 368 (B-233676), 89-1 CPD ¶ 355 (requirement that copying machines use dry toner); *North Am. Reporting, Inc*., 60 Comp. Gen. 64 (B-198448), 80-2 CPD ¶ 364 (exclusion of electronic stenographic equipment); *Lanier Bus. Prods., Inc*., Comp. Gen. Dec. B-193693, 79-1 CPD ¶ 232 (overly intricate features on text editing equipment); and *Constantine N. Polites & Co*., Comp. Gen. Dec. B-189214, 78-

2 CPD ¶ 437 (exclusion of metric threaded parts).

Specifications written around a certain product are particularly susceptible to being found unduly restrictive. See, for example, *Racal Corp*., Comp. Gen. Dec. B-233240, 89-1 CPD ¶ 169 (make and model specification); *Southern Techs., Inc*., 66 Comp. Gen. 208 (B-224328), 87-1 CPD ¶ 42 (specific product required); *Jarrell-Ash Div. of the Fisher Scientific Co*., Comp. Gen. Dec. B-185582, 77-1 CPD ¶ 19 (specified feature found in only one product); and 48 Comp. Gen. 345 (B-164993) (1968) (commercial specification describing, in great part, the desk of one manufacturer). See, however, *Stavely Instruments, Inc*., Comp. Gen. Dec. B-259548.3, 95-1 CPD ¶ 256, holding that the specifications for X-ray units were not unduly restrictive even though only one company manufactured the product and the specifications were written around that product; Stavely did not challenge the technical specifications or otherwise assert that the specifications overstated or otherwise exceeded the Air Force's actual needs. See also *Kenwood USA Corp*., Comp. Gen. Dec. B-294638, 2004 CPD ¶ 239, where the protester alleged that the specifications were unduly restrictive because they mimic specifications listed in Motorola technical manuals, and that Motorola was the only entity that would be able to compete successful. The GAO found that there was no evidence that Kenwood was competitively harmed by the allegedly restrictive specifications, stating that Kenwood did not furnished it with an explanation as to how any of the challenged specifications prevent firms other than Motorola from competing effectively.

A specification will not be held to be unduly restrictive if the agency can show that it has a legitimate need for the specified restrictive feature. See, for example, *Messier-Bugatti, Safran Group*, Comp. Gen. Dec. B-401064, 2009 CPD ¶ 109 (designs indicates that lock-ring wheels have lower life-cycle costs, are logistically simpler to support, and offer improved maintainability over tie-bolt designs); *Shirlington Limousine & Transport, Inc*., Comp. Gen. Dec. B-299241, 2007 CPD ¶ 68 (requirement that the secured storage facility be accessed by an electronic access control system results in higher levels of safety and efficiency); *General Electrodynamics Corp*., Comp. Gen. Dec. B-298698, 2006 CPD ¶ 180 (electronic load cells outweighs the inherent reliability and maintainability risks of hydraulic load cells); *USA Fabrics, Inc*., Comp. Gen. Dec. B-295737, 2005 CPD ¶ 82 (consignment inventory requirement intended to reduce the amount of time that it takes FPI to supply DSCP with T-shirts for the military); *Vertol Sys. Co*., Comp. Gen. Dec. B-295936, 2005 CPD ¶ 80 (requirement of an appropriate certification by competent aviation authorities not unreasonable to ensure the safety of government personnel); *Ocean Servs., LLC*, Comp. Gen. Dec. B-292511.2, 2003 CPD ¶ 206 (RFP's provision that all vessels meet

the SOLAS requirements set forth in Subchapter U in order to meet certain enhanced safety-related requirements); *NVT Techs., Inc*., Comp. Gen. Dec. B-292302.3, 2003 CPD ¶ 174 (bond requirement in nonconstruction contract necessary to protect the government's interests); *Caswell Int'l Corp*., Comp. Gen. Dec. B-278103, 98-1 CPD ¶ 6 (interoperability requirement based on agency's need to ensure operational safety and military readiness); *CairnsAir, Inc.,* Comp. Gen. Dec. B-278141, 98-1 CPD ¶ 1 (specification for brand-name self-contained breathing apparatus which had to be compatible with components and with existing inventory); *Innovative Refrigeration Concepts*, Comp. Gen. Dec. B-272370, 96-2 CPD ¶ 127 (requiring particular type of heat exchanger and digital controller requiring less maintenance and was more efficient); *Laidlaw Envtl. Servs*., Comp. Gen. Dec. B-272139, 96-2 CPD ¶ 109 (specification prohibiting use of open-burn/open-detonation technologies reflecting legitimate environmental concerns); *Purification Envtl*., Comp. Gen. Dec. B-270762, 96-1 CPD ¶ 203 (requirement to use one particular design approach (oxidation process rather than new accelerated chemical treatment process) which was the only way to remove the contaminant without creating a hazardous waste); *Building Sys. Contractors, Inc*., Comp. Gen. Dec. B-266180, 96-1 CPD ¶ 18 (specifications for a brand-name computerized energy management control system when the system had to be compatible with the other 23 facilities at the base); *T&S Prods., Inc*., Comp. Gen. Dec. B-261852, 95-2 CPD ¶ 161 (requirement for pressure-sensitive adhesive shipping tape with a specified length where that tape quality was necessary to secure fiberboard shipping boxes); *Fisons Instruments, Inc*., Comp. Gen. Dec. B-261371, 95-2 CPD ¶ 31 (specifications for a mass spectrometry system); *Electronic Office Env'ts* , Comp. Gen. Dec. B-254571, 93-2 CPD ¶ 342 (detailed design specifications for file cabinets when necessary to maintain aesthetic appearance); *Lenderking Metal Prods*., Comp. Gen. Dec. B-252035, 93-1 CPD ¶ 393 (suspension system incorporating features of brand-name product when agency experience indicated that features necessary to meet agency's needs); *Absecon Mills, Inc*., Comp. Gen. Dec. B-251685, 93-1 CPD ¶ 332 (upholstery fabrics to be used by Federal Prison Industries when necessary for aesthetics); *Trilectron Indus., Inc*., Comp. Gen. Dec. B-248475, 92-2 CPD ¶ 130 (requiring air conditioners to use new coolant that reduces ozone release even though EPA regulations do not require its use); *Electro-Methods, Inc*., 70 Comp. Gen. 53 (B-239141.2), 90-2 CPD ¶ 363 (buying entire modification kits rather than individual parts); *Pulse Elecs., Inc*., Comp. Gen. Dec. B-240105, 90-2 CPD ¶ 309 (MIL-Q-9858A quality assurance requirement for complex item); *Allen Organ Co*., Comp. Gen. Dec. B-231473.2, 88-2 CPD ¶ 196 (requirement for wind-blown pipe organ to harmonize with historic building even though it excluded electronic organs); *Milcare, Inc*., Comp. Gen. Dec. B-230876, 88-2 CPD ¶ 29 (inward-opening doors on storage cabinetswhen agency

had space shortage); and *Honeywell Inc.*, Comp. Gen. Dec. B-230224, 88-1 CPD ¶ 568 (detailed salient characteristics describing features of brand-name product when agency demonstrated its need for specified features).

Performance specifications are much less likely than design specifications to be found to be unduly restrictive unless they contain a restrictive design feature. See, for example, *Harris Enters., Inc.*, Comp. Gen. Dec. B-311143, 2008 CPD ¶ 60 (requirement that awardee be ISO compliant); *MCI WorldCom Deutschland GmbH*, Comp. Gen. Dec. B-291418, 2003 CPD ¶ 1 (requirement that telecommunication circuits be accredited); Mark Dunning Indus., Inc., Comp. Gen. Dec. B-289378, 2002 CPD ¶ 46 (in a solicitation for trash collection services, requirements that offerors employ an individual household weighing system in order to provide the agency with data on the trash and recycling habits of family housing residents not unduly restrictive); *CHE Consulting, Inc.*, Comp. Gen. Dec. B-284110, 2000 CPD ¶ 51 (requirement to obtain support agreements from 65% of the original equipment manufacturers); and *Sun Refining & Mktg. Co.*, Comp. Gen. Dec. B-239973, 90-2 CPD ¶ 305 (requirement for delivery of oil products by pipeline rather than by truck).

Performance requirements, however, can be unduly restrictive in some instances, *MadahCom, Inc.*, Comp. Gen. Dec. B-298277, 2006 CPD ¶ 119 (requirements requiring compliance with specific radio frequency standard and minimum transmission range for equipment); *Instrument Control Serv., Inc.*, Comp. Gen. Dec. B-289660, 2002 CPD ¶ 66 (unnecessary requirement that items be calibrated within 5 workdays); *Chadwick-Helmuth Co.*, Comp. Gen. Dec. B-279621.2, 98-2 CPD ¶ 44 (unnecessary requirement that commercial computer power supply operate all existing software when software is readily modified); *Prime-Mover Co.*, Comp. Gen. Dec. B-201970, 81-2 CPD ¶ 325 (unnecessary speed and mechanical requirements for forklift vehicles); *Globe Air, Inc.*, Comp. Gen. Dec. B-180969.2, 75-1 CPD ¶ 57 (requirement that rotor blades on helicopter be no more than 37 feet in diameter). Compare *Glock, Inc.*, Comp. Gen. Dec. B-236614, 89-2 CPD ¶ 593 (requirement that handguns be double-action first shot, single-action subsequent shots reasonable for safety purposes); *Fluid Eng'g Assocs.*, 68 Comp. Gen. 447 (B-234540), 89-1 CPD ¶ 520 (requirement for independent roughing/backing pump system reasonable based on analysis of agency needs); and *Hallmark Packaging Prods., Inc.*, Comp. Gen. Dec. B-232218, 88-2 CPD ¶ 390 (requirement that trash bags pass tear-resistance test reasonable because it is a standard commercial test).

e. Unclear or Ambiguous Specifications

If specifications are vague or ambiguous, they will not communicate the exact needs of the agency to the offerors. This will generally result in proposals that do not fully meet the agency's needs or do not give rise to the most satisfactory product or service that the offeror can provide. It may even result in some potential offerors deciding not to submit proposals because they assume the agency is not seeking their product or service. The outcome of such specifications is, thus, either reduced competition or the need for considerably greater clarification or discussion after the proposals have been submitted. Most protests of ambiguous or vague specifications have occurred in sealed bid procurements, where specification problems cannot be cleared up easily after bid opening. Although there is more flexibility in negotiated procurements, agencies are still required to provide clear and unambiguous specifications. The GAO stated the following rule in *Alpha Q, Inc*., Comp. Gen. Dec. B-248706, 92-2 CPD ¶ 189:

> The government has a general obligation when seeking bids or proposals to draft solicitations in a way that identifies the agency's needs with sufficient detail and clarity so that all vendors have a common understanding of what is required under the contract in order that they can compete on an equal basis. *Dynalectron Corp*., B-198679, Aug. 11, 1981, 81-2 CPD ¶ 115; *Worldwide Marine, Inc*., B-212640, Feb. 7, 1984, 84-1 CPD ¶ 152. This means that a contracting agency normally must provide or at least reference the applicable specifications and drawings which are to govern the contractor's performance. Federal Acquisition Regulation (FAR) 10.008(d). Solicitations are not required to be so detailed as to eliminate all uncertainties, *AAA Eng'g & Drafting, Inc*., B-236034, Oct. 31, 1989, 89-2 CPD ¶ 404, and in some cases the government cannot provide drawings or other data because they are either not available or not releasable. *See Oktel*, B-244956, B-244956.2, Dec. 4, 1991, 91-2 CPD ¶ 512; *American Diesel Engineering Co., Inc.*, B-245534, Jan. 16, 1992, 92-1 CPD ¶ 79. However, where relevant information is available for inclusion in a solicitation and would give offerors seeking to meet government requirements a clearer understanding of those requirements than they would otherwise have, the information should be provided.

The following discussion includes decisions on both sealed bid and competitively negotiated procurements where guidance is provided to ensure fair competition and obtain the best product or service to meet the agency's needs.

(1) Requirement for Clarity

Specifications and solicitations that are susceptible to more than one reasonable interpretation of what kind of performance is contemplated are ambiguous. Such requirements are objectionable because they impede full and open competition by failing to ensure that offerors are competing on a common or equal basis. This rule is strictly enforced in sealed bid procurements and would appear to be equally applicable to competitively negotiated procurements using design specifications. See *North Am. Reporting, Inc*., 60 Comp. Gen. 64 (B-198448), 80-2 CPD ¶ 364, stating at 69:

> We agree with the protester that the term "other service" as used in the amended IFB is ambiguous…. [T]he term "other service" may be any other delivery service each bidder cares to offer as long as the FERC is so advised. Thus, the bidders are, in effect, defining the term and, as they do so differently, their bids are not comparable because they are not bidding on the same delivery bases. *See* 39 Comp. Gen. 570, 572 (1960). Therefore, we believe that this portion of the IFB accelerated delivery specification is not sufficiently definite to permit the preparation and evaluation of bids on a common basis.

In *M.J. Rudolph Corp*., Comp. Gen. Dec. B-196159, 80-1 CPD ¶ 84, the GAO recommended resolicitation of a contract to lease cranes for loading ships where the specifications were susceptible to more than one reasonable interpretation as to the necessary performance characteristics of the cranes. See also *Allied Signal, Inc*., Comp. Gen. Dec. B-275032, 97-1 CPD ¶ 136 (RFP ambiguous where protester and awardee both have reasonable interpretations of a requirement that the proposed modules must be backward compatible with two existing intelligence terminals); *MLC Fed., Inc*., Comp. Gen. Dec. B-254696, 94-1 CPD ¶ 8 (RFP's system architecture requirement that equipment proposed be of the latest line could have referred only to the conceptual structure and functional behavior of the machine as distinct from the physical design); *Consolidated Devices, Inc. — Recons*., Comp. Gen. Dec. B-225602.2, 87-1 CPD ¶ 437 (RFP did not adequately define the torque/force tension ranges within which the calibrators were to operate); *University Research Corp*., 64 Comp. Gen. 273 (B-216461), 85-1 CPD ¶ 210 (RFP contained vague description of training courses with result that incumbent contractor had unfair advantage); *Maron Constr. Co*., Comp. Gen. Dec. B-193106, 79-1 CPD ¶ 169 (specifications were ambiguous as to the quantity of doors and frames required); *Kemp Indus., Inc*., Comp. Gen. Dec. B-192301, 78-2 CPD ¶ 248 (specifications were ambiguous regarding a requirement that a specific motor assembly be used in the power pack supplying howitzers); *Orthopedic Equip. Co*., Comp. Gen. Dec. B-189971, 78-1 CPD ¶ 391 (specifications were unclear as to whether or not leaded steel could be used in the production of mountain pilon snap links); *Flo Tek*, Inc., 56 Comp. Gen. 378 (B-187571), 77-1 CPD ¶ 129 (specifications were ambiguous as to the type of stainless steel required under the contract); *Learning Resources Mfg. Co*., Comp. Gen. Dec. B-180642, 74-1 CPD ¶ 308 (specifications did not indicate whether modular counter units were to be constructed of particle board or plywood and particle board); 51 Comp. Gen. 635 (B-174813) (1972) (specifications did not indicate whether photo composition, Linotron 1010 system, or master typography program was to be furnished); 51 Comp. Gen. 518 (B-173244) (1972); Comp. Gen. Dec. B-173452, Sept. 27, 1971, *Unpub*. (inconsistent provisions in solicitation); 49 Comp. Gen. 713 (B-169368) (1970) (solicitation failed to specify delivery time); 52 Comp. Gen. 87 (B-175254) (1972) (unclear whether solicitation referred to gear box components formerly or currently used by manufacturer); 52 Comp. Gen. 842 (B-177879) (1973) (solicitation incorporated two inconsistent bid acceptance

provisions causing 10 of 13 bidders to submit nonresponsive bids); *Air Plastics, Inc*., 53 Comp. Gen. 622 (B-179836), 74-1 CPD ¶ 100 (specifications did not detail descriptive data required); *Jacobs Transfer, Inc*., 53 Comp. Gen. 797 (B-180195), 74-1 CPD ¶ 213 (specifications failed to estimate the number of work units required); *Allied Contractors, Inc*., Comp. Gen. Dec. B-186114, 76-2 CPD ¶ 55 (specification ambiguous as to whether prefabricated metal building was needed in sewage treatment plant).

Specifications are not ambiguous when they contain clear performance requirements. An agency can properly elect to state its needs in terms of performance or functional requirements in order to encourage greater competition. See *Memorex Corp*., Comp. Gen. Dec. B-212660, 84-1 CPD ¶ 153, finding that it was proper to define the requirement in terms of the "required capability and characteristics of the requested equipment" in order to invite innovative and independent approaches to meeting the agency's needs. The GAO relied to some extent on the fact that five proposals had been submitted in response to the RFP. See also *Jackson Jordan, Inc*., Comp. Gen. Dec. B-198072, 80-2 CPD ¶ 104, where, on a sealed bid procurement, the GAO held that a specification requiring "tamping 100% of the switch" was not ambiguous, although performance was impossible, because it provided the best method presently available to describe the performance characteristic. It is also proper to define the work in terms of sample tasks, *International Sec. Tech., Inc.,* Comp. Gen. Dec. B-215029, 85-1 CPD ¶ 6.

An agency can also impose risks on competitors when it does not have necessary information. See *ANV Enters., Inc*., Comp. Gen. Dec. B-270013, 96-1 CPD ¶ 40 (specification to test soil for the proper fertilizer requirements and to furnish and apply fertilizer did not impose undue risk where agency provided information on the types and quantities of fertilizer used historically); *Cobra Techs., Inc*., Comp. Gen. Dec. B-254890, 94-1 CPD ¶ 35 (failure to include an estimate of the hours required to assist tenant moves not undue risk because there was no historical data to use and the IFB described what was to be required); *Newport News Shipbuilding & Dry Dock Co*., Comp. Gen. Dec. B-221888, 86-2 CPD ¶ 23 (statement that offerors should assume the work was similar to prior overhauls and that if not, price would be adjusted provided sufficient clarity); *Korean Maint. Co*., 66 Comp. Gen. 12 (B-223780), 86-2 CPD ¶ 379 (requirement that offeror bear risk of utility costs for three-year performance period not undue risk where past usage data were included in RFP); *Dynalectron Corp*., 65 Comp. Gen. 290 (B-220518), 86-1 CPD ¶ 151 (requirement that offeror bear risk of amount of materials needed to perform work not undue risk where neither agency nor offerors could make a good estimate because the past usage data were not segregated); *Analytics*

Inc., Comp. Gen. Dec. B-215092, 85-1 CPD ¶ 3 (requirement that equipment function with other unspecified equipment to be procured in the future not overly vague); and *Klein-Sieb Advertising & Pub. Relations, Inc.*, Comp. Gen. Dec. B-200399, 81-2 CPD ¶ 251, *recons. denied*, 82-1 CPD ¶ 101 (statement that agency could not compute amount of services required not overly vague where seven proposals received).

The apparent confusion of bidders evidenced by their varied responses to the solicitation can be indicative of ambiguity in the specification. One solicitation was canceled because six of nine bidders took exception to the specifications, Comp. Gen. Dec. B-177660, Apr. 24, 1973, *Unpub*. See also *Ferguson-Williams, Inc.*, Comp. Gen. Dec. B-258460, 95-1 CPD ¶ 39 (agency canceled solicitation where refuse collection and disposal requirements did not identify the agency's actual requirements and the three low bidders were misled). However, in *Bentley, Inc.*, Comp. Gen. Dec. B-200561, 81-1 CPD ¶ 156, the GAO overturned the agency's decision to cancel a solicitation for alleged ambiguity, relying in part upon the fact that none of the several bidders had complained that the solicitation was ambiguous.

The mere fact that there is a great variation in bid prices is not sufficient evidence of inadequate specifications to require cancellation, *Broken Lance Enters., Inc.*, Comp. Gen. Dec. B-193066, 78-2 CPD ¶ 328 (submission of low bids does not indicate ambiguity and is not a basis to challenge an award); *Arvol D. Hays Constr. Co.*, Comp. Gen. Dec. B-187526, 76-2 CPD ¶ 378 (wide disparity in bid prices does not automatically indicate defective IFB); *J.C.L. Servs., Inc.*, Comp. Gen. Dec. B-181009, 74-1 CPD ¶ 198 (that a wide range of bids was received does not necessarily indicate defect in the specifications).

(2) Errors or Omissions in Specifications

Specifications may be improper due to errors or omissions even though they are definite and unambiguous, *Day & Zimmerman, Inc.*, Comp. Gen. Dec. B-212017, 84-1 CPD ¶ 377 (current operating data needed for competition for services); 50 Comp. Gen. 50 (B-169977) (1970) (erroneous provision expressed fixed level of labor hours required as opposed to estimated level); 51 Comp. Gen. 426 (B-174010) (1972) (solicitation omitted data requirements); Comp. Gen. Dec. B-173740.1, Nov. 17, 1971, *Unpub*. (specifications omitted test capability and one specific item); Comp. Gen. Dec. B-178482, July 10, 1973, Unpub. (explosive was erroneously classified in specifications as class "C" rather than class "B"); *Kleen-Rite Janitorial Servs., Inc.*, Comp. Gen. Dec. B-180345, 74-1 CPD ¶ 210 (bid sheet omitted blank space for an

itemized price). See also *Hoechst Marion Roussel, Inc*., Comp. Gen. Dec. B-279073, 98-1 CPD ¶ 127, granting a protest because the solicitation for drugs did not obtain competition on some of the dosages actually used by the agency when these dosages were available commercially at lower prices than the smaller dosages in the solicitation.

Government construction contracts often attempt to overcome this problem by including an Omissions and Misdescriptions clause that requires a contractor to perform omitted or misdescribed details of the work that are necessary to carry out the intent of the drawings or specifications. However, this clause applies only to details, not to new sections of unspecified work. For example, in *Strauss Constr. Co*., ASBCA 22791, 79-1 BCA ¶ 13,578, a contractor was not required to provide a particular fire extinguishing system whose description was omitted from the specifications because the particular system was not a "detail" under the clause. Furthermore, the government may include contract clauses that require the contractor to assume the risk of specification or drawing errors or omissions. In 48 Comp. Gen. 750 (B-165953) (1968), the GAO approved the use of such a clause, stating at 754:

> [W]e are not aware of any situations where [the] doctrine of implied warranty or representation as to the adequacy of Government specifications has been extended to cases where the Government discloses the inadequacies of such specifications and permits or requires the contractor to make necessary corrections.

See also *Varo, Inc*., Comp. Gen. Dec. B-193789, 80-2 CPD ¶ 44.

(3) Open or Indefinite Specifications

Provisions permitting offerors to select the applicable specification, like ambiguous specifications, may preclude competition on a common basis. In *Alpha Q, Inc*., Comp. Gen. Dec. B-248706, 92-2 CPD ¶ 189, the GAO ruled that a specification was improper because it required offerors to deliver parts for General Electric engines meeting "the latest revision of the General Electric drawing." The GAO reasoned that FAR 10.008(b) required that the government furnish such information. That provision, now in FAR 11.201, states:

> Do not use general identification references, such as "the issue in effect on the date of the solicitation."

See also *Pulse Elecs., Inc*., Comp. Gen. Dec. B-244764, 91-2 CPD ¶ 468, finding a specification improper because it required offerors to comply with military specifications and standards "in effect as of the date set for receipt of proposals."

7. *Priorities, Allocations and Allotments*

FAR 7.105(b)(7) states:

> *Priorities, allocations, and allotments*. When urgency of the requirement dictates a particularly short delivery or performance schedule, certain priorities may apply. If so, specify the method for obtaining and using priorities, allocations, and allotments, and the reasons for them (see Subpart 11.6).

FAR Subpart 11.6 describes the application of the Defense Priorities and Allocation System under the Defense Production Act of 1950, 50 U.S.C. App. § 2061 et seq. This Act permits an agency awarding contracts in support of the national defense to designate such contracts with a DO or DX rating, which gives them priority over other orders received by suppliers of certain materials. FAR 11.603(f) provides that guidance on the use of these priorities is contained in agency instructions. See, for example, DOD Manual 4400.1-M (May 1995), which prescribes uniform procedures to assure priority treatment on contracts and orders for materials, components, and equipment on authorized programs to meet required delivery dates.

8. *Contractor versus Government Performance*

FAR 7.105(b)(8) states:

> *Contractor versus Government performance*. Address the considerations given to OMB Circular A-76 (see Subpart 7.3).

OMB Circular A-76, Policies for Acquiring Commercial or Industrial Services Needed by the Government, states a preference for contracting with private sources when an agency is obtaining commercial products or services. In most acquisition planning efforts this policy will not be an issue because the agency does not have the capability of performing the work with its own employees. This policy is operative primarily when the agency had decided to contract out work that has previously been performed by agency employees. In such cases the agency must conduct the procurement in accordance with the OMB Circular and the guidance in FAR Subpart 7.3. This entails the conducting of a competition between the agency activity and potential contractors. There may also be some situations when an agency activity will be permitted to compete for work that is designated for procurement from private sources. Contracting officers should review their agency regulations for guidance on contracting procedures to be used in this situation. See Chapter 3 of *Cibinic & Nash, Formation of Government Contracts (3d ed. 1998)* for a detailed discussion of the A-76 policy.

9. Inherently Governmental Functions

FAR 7.105(b)(9) states:

Inherently governmental functions. Address the consideration given to Subpart 7.5.

Certain governmental functions may not be contracted out to private firms. OFPP issued a proposed policy letter on March 31, 2010, adopting the FAIR Act definition as the single, government-wide definition. This definition reflects longstanding OFPP guidance that had been set out in OFPP Policy Letter 92-1, Sept. 30, 1992. The definition, which the draft guidance stated should be inserted in all existing regulations and policies, provides that an activity is "inherently governmental when it is so intimately related to the public interest as to mandate performance by federal employees." The draft also lists 20 examples of inherently governmental functions.

The proposed policy letter provides guidance to help agencies determine whether a given function meets the definition of an "inherently governmental function." The proposed policy letter retains a list of examples of inherently governmental functions, currently found in FAR Subpart 7.5. OFPP would also create tests for agencies to use in determining whether functions not appearing on the list otherwise fall within the definition of inherently governmental. The "nature of the function" test would ask agencies to consider whether the direct exercise of sovereign power is involved. Such functions are uniquely governmental and, therefore, inherently governmental. The "discretion" test would ask agencies to evaluate whether the discretion associated with the function, when exercised by a contractor, would have the effect of committing the government to a course of action. This test was included in OFPP Policy Letter 92-1, Inherently Governmental Functions, and currently may be found in OMB Circular A-76 (Attachment A, para. B(1)(b)), which rescinded Policy Letter 92-1.

The guidance seeks to clarify and reinforce that agencies have both pre-award and post-award responsibilities for evaluating whether a function is inherently governmental and taking steps to avoid transferring inherently governmental authority to a contractor, such as through inadequate attention to contract administration. For proposed work, a determination that the work is not inherently governmental should be made prior to issuance of the solicitation, preferably during acquisition planning. For ongoing contracts, agencies should review how work is performed; focusing, in particular, on functions that are closely associated with inherently governmental activities and professional and technical services, to ensure the scope of the work or the circumstances have not changed to the point that inherently governmental authority has

been transferred to the contractor.

10. Management Information Requirements

FAR 7.105(b)(10) states:

> *Management information requirements*. Discuss, as appropriate, what management system will be used by the Government to monitor the contractor's effort. If an Earned Value Management System is to be used, discuss the methodology the Government will employ to analyze and use the earned value data to assess and monitor contract performance. In addition, discuss how the offeror's /contractor's EVMS will be verified for compliance with the American National Standards Institute/Electronics Industries Alliance (ANSI/EIA) Standard-748, Earned Value Management Systems, and the timing and conduct of integrated baseline reviews (whether prior to or post award) (See 34.202).

Some agencies impose management information systems on major contractors to ensure that they receive timely information on the progress of the work during performance. See, for example, Chapter 7 of DOD Regulation 5000.2-R, *Mandatory Procedures for Major Defense Acquisition Programs (MDAPs) and Major Automated Information System (MAIS) Acquisition Programs* (Apr. 5, 2002), which required reports from contractors on cost and schedule performance in order to assess whether programs are meeting their objectives. Generally, such reporting is not required on contracts for commercial items or for non-commercial items that were competitively procured on firm-fixed-price contracts. DFARS 234.201 requires that cost or incentive contracts and subcontracts valued at $20 million or more [in then year dollars] comply with the American National Standards Institute/Electronic Industries Alliance (ANSI/EIA) Standard 748—Earned Value Management Systems (ANSI/EIA-748). Cost or incentive contracts and subcontracts valued at $50 million or more are required to have an ANSI/EIA-748 compliant EVMS that has been determined acceptable by the Cognizant Federal Agency. The Defense Contract Management Agency is the executive agency for determining EVMS compliance when DoD is the Cognizant Federal Agency.

NASA Policy Directive 9501.1H, Oct. 7, 2005, establishes guidelines for a NASA contractor Financial Management Reporting System. Reporting is done by the contractor through the use of the NASA Form 533 series of Contractor Financial Management Reports. These reports supply the following: "(1) … correlated information needed by NASA project management for the evaluation of contractor cost as it relates to schedule and technical performance; (2) … actual and projected data necessary for assuring that contractor performance is realistically planned and supported by dollar and labor resources; and (3) … contractor cost information to the NASA accounting system as set forth in the Financial Management Manual 9060, 9100, and 9240." This system of

reporting is applicable to all NASA cost-type contracts, price-redetermination contracts, and fixed-price incentive contracts. NASA Procedures and Guidelines (NPG 9501.2D), May 23, 2001, implements this directive. The report formats include NASA Form 553M, which provides monthly data on actual and planned costs and labor hours, short-term cost projections, estimates to complete, and contract values, and NASA Form 553Q, which provides quarterly time-phased cost and labor-hour estimates. The NASA Form 533M report is required when the contract value is $500,000 or greater and the period of performance is one year or more, or the contract value is $1 million or greater, regardless of the period of performance. The NASA Form 533Q is required only when the contract value is $1 million or greater and the period of performance is for one year or more.

The contractor's internal management system should be relied upon to the maximum extent possible, without requiring costly modifications, to furnish the data necessary for any management reporting system required by a government agency.

11. Make-or-Buy Programs

FAR 7.105(b)(11) states:

> *Make or buy*. Discuss any consideration given to make-or-buy programs (see Subpart 15.407-2).

FAR 2.101 defines "make-or-buy program" as that part of a contractor's written plan for a contract identifying those major items to be produced or work efforts to be performed in the prime contractor's facilities and those to be subcontracted.

Make-or-buy programs are imposed on offerors or contractors to permit the contracting officer to make a detailed analysis of whether the contractor will perform the work in the most efficient manner. FAR 15.407-2(c) contains the following guidance on the use of such programs:

> (1) Contracting officers may require prospective contractors to submit make-or-buy program plans for negotiated acquisitions requiring cost or pricing data whose estimated value is $11.5 million or more, except when the proposed contract is for research or development and, if prototypes or hardware are involved, no significant follow-on production is anticipated.
>
> (2) Contracting officers may require prospective contractors to submit make-orbuy programs for negotiated acquisitions whose estimated value is under $11.5 million only if the contracting officer —
>
> (i) Determines that the information is necessary; and
>
> (ii) Documents the reasons in the contract file.

12. Test and Evaluation

FAR 7.105(b)(12) states:

> *Test and evaluation*. To the extent applicable, describe the test program of the contractor and the Government. Describe the test program for each major phase of a major system acquisition. If concurrency is planned, discuss the extent of testing to be accomplished before production release.

FAR Part 46 contains detailed guidance on quality assurance and provides standard inspection clauses for use in different types of contracts. These standard clauses generally provide that the contractor is responsible for performing sufficient inspection and testing to ensure that supplies or services meet the contract requirements. However, FAR 46.201 gives agencies great latitude in imposing any inspection or testing requirement necessary to meet their needs. FAR 46.201(c) contains the following guidance:

> Although contracts generally make contractors responsible for performing inspection before tendering supplies to the Government, there are situations in which contracts will provide for specialized inspections to be performed solely by the Government. Among situations of this kind are —
>
> > (1) Tests that require use of specialized test equipment or facilities not ordinarily available in suppliers' plants or commercial laboratories (e.g., ballistic testing of ammunition, unusual environmental tests, and simulated service tests); and
> >
> > (2) Contracts that require Government testing for first article approval (see Subpart 9.3).

In the procurement of major systems, the Department of Defense is prohibited from proceeding "beyond low-rate initial production" until the completion of an initial operational test and evaluation (OT&E) program, 10 U.S.C. § 2399. DOD Regulation 5000.02, *Operation of the Defense Acquisition System*, Enclosure 6, Dec. 8, 2008, requires that each system acquisition have an integrated test program, including OT&E that ensures that each phase has been successfully competed:

> 1.b. The PM, in concert with the user and the T&E community, shall coordinate DT&E, OT&E, LFT&E, family-of-systems interoperability testing, information assurance testing, and modeling and simulation (M&S) activities, into an efficient continuum, closely integrated with requirements definition and systems design and development. The T&E strategy shall provide information about risk and risk mitigation, provide empirical data to validate models and simulations, evaluate technical performance and system maturity, and determine whether systems are operationally effective, suitable, and survivable against the threat detailed in the STAR or STA. The T&E strategy shall also address development and assessment of the weapons support equipment during the EMD Phase, and into production, to ensure satisfactory test system measurement performance, calibration traceability and support, required diagnostics, and safety. Adequate time and resources shall be planned to support pre-test predictions and post-test reconciliation of models and test results, for all major test events. The PM, in concert with the user and the T&E community, shall provide safety releases (to include formal Environment, Safety, and Occupational Health (ESOH) risk acceptance in accordance with Section 6 of Enclosure 12) to the developmental and operational testers prior to any test

using personnel.

The regulation contains no guidance as to how much of this test activity is to be included in the acquisition plan, but it is clear that any work that must be performed or supported by contractors must be taken into account during the planning process.

13. Logistics Considerations

FAR 7.105(b)(13) states:

Logistics considerations. Describe —

> (i) The assumptions determining contractor or agency support, both initially and over the life of the acquisition, including consideration of contractor or agency maintenance and servicing (see Subpart 7.3) support for contracts to be performed in a designated operational area or supporting a diplomatic or consular mission (see 25.301-3); and distribution of commercial items;
>
> (ii) The reliability, maintainability, and quality assurance requirements, including any planned use of warranties (see Part 46);
>
> (iii) The requirements for contractor data (including repurchase data) and data rights, their estimated cost, and the use to be made of the data (see Part 27); and
>
> (iv) Standardization concepts, including the necessity to designate, in accordance with agency procedures, technical equipment as "standard" so that future purchases of the equipment can be made from the same manufacturing source.

This part of the plan is very important when the agency is purchasing equipment that it will use over a period of years. In such cases the maintenance of that equipment may cost considerably more than the cost of the original equipment. The agency must plan the procurement to ensure that these maintenance costs are minimized. This generally entails planning to contract for maintenance work or replacement parts or components at reasonable prices and/or including warranty clauses in the original contract..

a. Warranties

FAR Subpart 46.7 contains guidance on the use of warranties and provides, in general, that they should not be used unless they are cost-effective. Nonetheless, FAR 46.710 specifies a number of standard warranty clauses for use when the contracting officer has decided that they are beneficial. FAR 46.703 contains the following guidance on the decision to use warranties:

> The use of warranties is not mandatory. In determining whether a warranty is appropriate for a specific acquisition, the contracting officer shall consider the following factors:

(a) *Nature and use of the supplies or services*. This includes such factors as —

(1) Complexity and function;

(2) Degree of development;

(3) State of the art;

(4) End use;

(5) Difficulty in detecting defects before acceptance; and

(6) Potential harm to the Government if the item is defective.

(b) *Cost*. Warranty costs arise from —

(1) The contractor's charge for accepting the deferred liability created by the warranty; and

(2) Government administration and enforcement of the warranty (see paragraph (c) of this section).

(c) *Administration and enforcement*. The Government's ability to enforce the warranty is essential to the effectiveness of any warranty. There must be some assurance that an adequate administrative system for reporting defects exists or can be established. The adequacy of a reporting system may depend upon such factors as the —

(1) Nature and complexity of the item;

(2) Location and proposed use of the item;

(3) Storage time for the item;

(4) Distance of the using activity from the source of the item;

(5) Difficulty in establishing existence of defects; and

(6) Difficulty in tracing responsibility for defects.

(d) *Trade practice*. In many instances an item is customarily warranted in the trade, and, as a result of that practice, the cost of an item to the Government will be the same whether or not a warranty is included. In those instances, it would be in the Government's interest to include such a warranty.

(e) *Reduced requirements*. The contractor's charge for assumption of added liability may be partially or completely offset by reducing the Government's contract quality assurance requirements where the warranty provides adequate assurance of a satisfactory product.

Prior to 1997, 10 U.S.C. § 2403 required DOD to obtain "guarantees" on major weapon systems contracts. This statute was repealed by § 847 of the FY 1998 Defense Authorization Act, Pub. L. No. 105-85.

b. Contracting for Parts or Components

The FAR contains no guidance on the steps necessary to ensure that replacement parts and components can be procured at reasonable prices. However, DOD PGI 217.75 provides that an agency may either acquire replenishment parts concurrently with production of the end item or acquire them competitively in a subsequent procurement when the agency has the right to use the technical data describing the parts. If neither of these can be accomplished, DOD PGI 217.7504 provides guidance on techniques that can be used to acquire the parts effectively. These techniques were discussed earlier in the material on obtaining competition. DOD PGI 217.7506 providing guidance on the need to "break out" spare parts from the contractor that designed a system so that they can be procured separately from the manufacturer of the parts or on a competitive basis. See ¶ 1-102 stating:

> (b) The objective of the DoD Spare Parts Breakout Program is to reduce costs through the use of competitive procurement methods, or the purchase of parts directly from the actual manufacturer rather than the prime contractor, while maintaining the integrity of the systems and equipment in which the parts are to be used. The program is based on the application of sound management and engineering judgment in —
>
> (1) Determining the feasibility of acquiring parts by competitive procedures or direct purchase from actual manufacturers; and
>
> (2) Overcoming or removing constraints to breakout identified through the screening process (technical review) described in 3-302.

14. Government-Furnished Property

FAR 7.105(b)(14) states:

> *Government-furnished property*. Indicate any Government property to be furnished to contractors, and discuss any associated considerations, such as its availability or the schedule for its acquisition (see Part 45.102).

FAR Part 45.102, Government Property, stipulates the following policy:

> (a) Contractors are ordinarily required to furnish all property necessary to perform Government contracts.
>
> (b) Contracting officers shall provide property to contractors only when it is clearly demonstrated —
>
> (1) To be in the Government's best interest;
>
> (2) That the overall benefit to the procurement significantly outweighs the increased cost of administration, including ultimate property disposal;
>
> (3) That providing the property does not substantially increase the Government's assumption of risk; and
>
> (4) That Government requirements cannot otherwise be met.

(c) The contractor's inability or unwillingness to supply its own resources is not sufficient reason for the furnishing or acquisition of property.

15. Government-Furnished Information

FAR 7.105(b)(15) states:

Government-furnished information. Discuss any Government information, such as manuals, drawings, and test data, to be provided to prospective offerors and contractors. Indicate which information that requires additional controls to monitor access and distribution (e.g., technical specifications, maps, building designs, schedules, etc.), as determined by the agency, is to be posted via the Federal Technical Data Solution (FedTeDS) (see 5.102(a)).

This is an important element of the acquisition planning process because the government is generally liable if it provides defective drawings or specifications to a contractor. See Chapter 3 of Cibinic, Nagle & Nash, *Administration of Government Contracts* (4th ed. 2006). The agency must determine whether any such information is accurate and must plan steps to avoid furnishing it, if possible, if its accuracy is questionable.

16. Environmental and Energy Conservation

FAR 7.105(b)(16) states:

Environmental and energy conservation objectives. Discuss all applicable environmental and energy conservation objectives associated with the acquisition (see Part 23), the applicability of an environmental assessment or environmental impact statement (see 40 CFR part 1502), the proposed resolution of environmental issues, and any environmentally-related requirements to be included in solicitations and contracts.

Some agencies have assigned one individual as an environmental advocate who is tasked with ensuring that environmental considerations are included in all procurement decisions.

FAR Part 23 is designed to improve the government's energy efficiency through proactive procurement decisions. These regulations were promulgated in 2001 in response to Executive Order No. 13123, "Greening the Government Through Efficient Energy Management," and substantially revised in 2007 in response to § 104 of the Energy Policy Act of 2005, Pub. L. No. 109-58 (codified at 22 U.S.C. §§ 16511-16514), and Executive Order No. 13423, "Strengthening Federal Environmental Energy, and Transportation Management," January 26, 2007.

FAR Subpart 23.2 addresses the acquisition of energy-efficient products and the use of energy-savings performance contracts. Agencies are required to purchase Energy Star and Federal Energy Management Program (FEMP)-designated energy efficient products unless the head of the agency determines that the products are not life cycle cost effective or are not reasonably available, FAR 23.203.

FAR 23.705 is specific to the government's acquisition of energy-efficient electronic products. Agencies are required to meet at least 95% of their annual acquisition requirements for electronic products with Electronic Product Environmental Assessment Tool (EPEAT)-registered products, unless an EPEAT standard for such products is unavailable.

The procurement preference for biobased products was added to the FAR in 2007 in Subpart 23.4, to implement the requirement in the Farm Security and Rural Investment Act of 2002, 7 U.S.C. § 8102, for federal agencies to give a preference to biobased products, as designated by the USDA, when procuring certain types of items. FAR Subpart 23.4 requires agencies to establish an affirmative procurement program for USDA-and EPA-designated items if the agency's purchase of a designated item exceeds $10,000 or the aggregate amount paid for designated items in the preceding fiscal year was $10,000 or more, FAR 23.400.

The second preference program in FAR Subpart 23.4 is for use of products containing recovered materials. "Recovered material" is defined as "waste materials and by-products recovered or diverted from solid waste, but the term does not include those materials and by-products generated from, and commonly reused within, an original manufacturing process," FAR 2.101. The EPA is required by the Resource Conservation and Recovery Act, Pub. L. No. 94-580 (codified at 42 U.S.C. § 6901 et. seq.), to designate products that are or can be made with recovered materials. FAR 23.404(b) provides that agency affirmative procurement programs must require that 100% of purchases of EPA designated products contain recovered material, unless the item cannot be acquired competitively within a reasonable time, meeting appropriate performance standards, or at a reasonable price.

FAR 23.202 implements the government's policy to acquire supplies and services that promote energy and water efficiency, advance the use of renewable energy products, and help foster markets for emerging technologies, FAR 23.202. This policy extends to all acquisitions, including those below the simplified acquisition threshold.

17. Security Considerations

FAR 7.105(b)(17) states:

Security considerations. For acquisitions dealing with classified matters, discuss how adequate security will be established, maintained, and monitored (see Subpart 4.4). For information technology acquisitions, discuss how agency information security requirements will be met. For acquisitions requiring routine contractor physical access to a Federally-controlled facility and/or routine access to a Federally-controlled information system, discuss how agency requirements for personal identity verification of contractors will be met (see Subpart 4.13).

FAR 4.403 requires contracting officers to ensure that any contractor has the appropriate security clearances when classified information is required for contract performance. This provision provides:

(a) *Presolicitation phase*. Contracting officers shall review all proposed solicitations to determine whether access to classified information may be required by offerors, or by a contractor during contract performance.

(1) If access to classified information of another agency may be required, the contracting officer shall —

(i) Determine if the agency is covered by the NISP; and

(ii) Follow that agency's procedures for determining the security clearances of firms to be solicited.

(2) If the classified information required is from the contracting officer's agency, the contracting officer shall follow agency procedures.

(b) *Solicitation phase*. Contracting officers shall —

(1) Ensure that the classified acquisition is conducted as required by the NISP or agency procedures, as appropriate; and

(2) Include —

(i) An appropriate Security Requirements clause in the solicitation (see 4.404); and

(ii) As appropriate, in solicitations and contracts when the contract may require access to classified information, a requirement for security safeguards in addition to those provided in the clause (52.204-2, Security Requirements).

(c) *Award phase*. Contracting officers shall inform contractors and subcontractors of the security classifications and requirements assigned to the various documents, materials, tasks, subcontracts, and components of the classified contract as follows:

(1) Agencies covered by the NISP shall use the Contract Security Classification Specification, DD Form 254. The contracting officer, or authorized representative, is the approving official for the form and shall ensure that it is prepared and distributed in accordance with the Industrial Security Regulation.

(2) Contracting officers in agencies not covered by the NISP shall follow agency procedures.

Contracting officers must insert FAR 52.204-2, Security Requirements, in solicitations and contracts when the contract may require access to classified information.

If any prospective contractors have not obtained clearances under the Defense Industrial Security Program, they will be unable to participate in any competition. This issue must be addressed in the acquisition planning process in order to provide time for such contractors to become part of the program and obtain security clearances for all their employees who would have to handle classified material during contract performance.

18. Contract Administration

FAR 7.105(b)(18) states:

> *Contract administration*. Describe how the contract will be administered. In contracts for services, include how inspection and acceptance corresponding to the work statement's performance criteria will be enforced.

FAR Part 42 provides guidance on the performance of contract administration and related audit services. The agency should decide, in the planning process, whether the contract will be administered by the procuring agency or by a field organization. FAR 42.201(b) notes that the Defense Contract Management Command is a major organization charged with the responsibility for contract administration. Other agencies have similar, but smaller, organizations. These organizations are listed in the Federal Directory of Contract Administration Services Components, FAR 42.203.

In order to ensure that contract administration is performed efficiently and effectively and that contractors are treated consistently on different contracts, FAR 42.002 requires that agencies use field offices that provide contract administration and audit services, as follows:

> (a) Agencies shall avoid duplicate audits, reviews, inspections, and examinations of contractors or subcontractors, by more than one agency, through the use of interagency agreements.
>
> (b) Subject to the fiscal regulations of the agencies and applicable interagency agreements, the requesting agency shall reimburse the servicing agency for rendered services in accordance with the Economy Act (31 U.S.C. 1535).
>
> (c) When an interagency agreement is established, the agencies are encouraged to consider establishing procedures for the resolution of issues that may arise under the agreement.

FAR 42.202 provides guidance on the delegation of contract administration function to contract administration offices. The contract administration functions are listed in FAR 42.302, but the agency has the choice of which functions to delegate and which to retain.

If audit services will be required during the performance of a contract, the audit agency to provide such services should be determined in the planning process. The major agency providing such services is the Defense Contract Audit Agency, FAR 42.101(b). However, other agencies also provide such services with selected contractors — primarily educational institutions. DCAA maintains a Directory of Federal Contract Audit Offices, FAR 42.103. The procedure for requesting audit services is set forth in FAR 42.102.

19. Other Considerations

FAR 7.105(b)(19) states:

> *Other considerations*. Discuss, as applicable:
>
> (i) Standardization concepts;
>
> (ii) The industrial readiness program;
>
> (iii) The Defense Production Act;
>
> (iv) The Occupational Safety and Health Act;
>
> (v) Support Anti-terrorism by Fostering Effective Technologies Act of 2002 (SAFETY Act) (see Subpart 50.2);
>
> (vi) Foreign sales implications;
>
> (vii) Special requirements for contracts to be performed in a designated operational area or supporting a diplomatic or consular mission; and
>
> (viii) Any other matters germane to the plan not covered elsewhere.

This part of the plan can cover any matter not covered in other parts. The list in the FAR is clearly a partial list, and the agency should consider carefully any other issues that are relevant to a successful procurement.

One matter that should be considered in this part when supplies are being procured is whether the quantity needed is an "economic purchase quantity." FAR 7.202(a) and (b) provide the following guidance:

> (a) Agencies are required by 10 U.S.C. 2384(a) and 41 U.S.C. 253(f) to procure supplies in such quantity

as (1) will result in the total cost and unit cost most advantageous to the Government, where practicable, and (2) does not exceed the quantity reasonably expected to be required by the agency.

(b) Each solicitation for a contract for supplies is required, if practicable, to include a provision inviting each offeror responding to the solicitation (1) to state an opinion on whether the quantity of the supplies proposed to be acquired is economically advantageous to the Government, and (2) if applicable, to recommend a quantity or quantities which would be more economically advantageous to the Government. Each such recommendation is required to include a quotation of the total price and the unit price for supplies procured in each recommended quantity.

20. Milestones for the Acquisition

FAR 7.105(b)(20) states:

Milestones for the acquisition cycle. Address the following steps and any others appropriate:

Acquisition plan approval.

Statement of work.

Specifications.

Data requirements.

Completion of acquisition-package preparation.

Purchase request.

Justification and approval for other than full and open competition where applicable and/or any required D&F approval.

Issuance of synopsis.

Issuance of solicitation.

Evaluation of proposals, audits, and field reports.

Beginning and completion of negotiations.

Contract preparation, review, and clearance.

Contract award.

The milestone chart should contain a specific date for the completion of each step in the acquisition process and should identify the person or organization responsible for the action. When the procurement is being conducted by an acquisition team in accordance with FAR 1.102(d), the member of the team that will play the lead role in completing each action should be identified in the milestone chart. Any additional steps that are required to implement the acquisition plan should also be included in the milestone

chart.

21. Participants

FAR 7.105(b)(21) states:

> *Identification of participants in acquisition plan preparation*. List the individuals who participated in preparing the acquisition plan, giving contact information for each.

This list of participants in the acquisition planning process provides contacts if there are later questions about any element of the plan.

CHAPTER 2

DEVELOPMENT OF THE SOURCE SELECTION PLAN

As noted in Chapter 1, a key element of the acquisition plan is the source selection procedures that will be followed in the procurement. Most agencies prepare a source selection plan detailing these procedures based on the procurement strategy that will be used. The plan should include the evaluation factors and their relative importance as well as the internal procedures that will be used to make the ultimate source selection decision. While a complete source selection plan is not a legal requirement, its preparation has been adopted by agencies as good business practice.

The GAO has continuously held that failure to adhere to the source selection plan is not protestable because it is an internal agency document vesting no rights in offerors, *Sayres & Assocs. Corp.*, Comp. Gen. Dec. B-295946, 2005 CPD ¶ 90; *Islandwide Landscaping, Inc.*, Comp. Gen. Dec. B-293018, 2004 CPD ¶ 9; *Johnson Controls World Servs., Inc.*, Comp. Gen. Dec. B-289942, 2002 CPD ¶ 88; *Mid Pacific Envtl.*, Comp. Gen. Dec. B-283309.2, 2000 CPD ¶ 40. Some decisions of the Court of Federal Claims have agreed with this reasoning, *Manson Constr. Co. v. United States*, 79 Fed. Cl. 16 (2007); *ManTech Telecommunications & Information Sys. Corp. v. United States*, 49 Fed. Cl. 57 (2001); *C&L Constr. Co. v. United States*, 6 Cl. Ct. 792 (1984). In contrast, other decisions of the Court of Federal Claims have held that failure to adhere to the plan is grounds for granting a protest, *Fort Carson Support Servs. v. United States*, 71 Fed. Cl. 571 (2006) (agencies may change plans at will but "subordinate officials" may not deviate from approved plan); *Beta Analytics Int'l , Inc. v. United States*, 67 Fed. Cl. 384 (2005) (departure from plan indicated unequal treatment of offerors).

The statutes and FAR give agencies broad discretion in devising source selection procedures. For example, there is no requirement in the FAR for a written source selection plan, but many agencies require the preparation of such plans as the initial step in the competitive negotiation process. See DFARS 215.303(b)(2) requiring a source selection plan for "high-dollar value and other acquisitions." See also *Contracting for Best Value: A Best Practice Guide to Source Selection*, AMC-P 715-3 (Jan. 1, 1998); *NAVSEA Source Selection Guide*, Section 4 (Jan. 24, 2001; *Transportation Acquisition*

Manual (TAM) 1215.303(b); and AFFARS *Informational Guidance* 5315.303 (Dec. 2008).

The goal of a source selection plan is to structure and implement each procurement to assure that the contract is awarded to the competitor with the most favorable offer. The source selection plan should enable the government: (1) to conduct a fair and unbiased competition and (2) to arrive at a contract that ensures that the contractor will fully meet the government's needs. The source selection plan should include source selection procedures that ensure these objectives are met. Moreover, in order to accomplish these two goals the agency must first organize a source selection team.

I. SOURCE SELECTION TEAM

In order to achieve the benefit of the various disciplines involved in selecting the procurement strategy and evaluation factors, it is essential that the source selection team be established at the outset. This requires a determination as to the number of people that will be involved in the process and the selection of people who are competent to evaluate proposals and make the source selection decision and are free from bias or conflict of interest.

A. Composition and Functions of Team

FAR 1.102(c) states the following expansive composition of the "Acquisition Team:"

> The Acquisition Team consists of all participants in Government acquisition including not only representatives of the technical, supply, and procurement communities but also the customers they serve, and the contractors who provide the products and services.

The statement of guiding principles in FAR 1.102 emphasizes that the "Acquisition Team" is responsible for successful procurement. FAR 1.102-3 states:

> The purpose of defining the Federal Acquisition Team (Team) in the Guiding Principles is to ensure that participants in the System are identified — beginning with the customer and ending with the contractor of the product or service. By identifying the team members in this manner, teamwork, unity of purpose, and open communication among the members of the Team in sharing the vision and achieving the goal of the System are encouraged. Individual team members will participate in the acquisition process at the appropriate time.
>
> The functions of the "Acquisition Team" are set forth in FAR 1.102-4
>
> (a) Government members of the Team must be empowered to make acquisition decisions within their areas of responsibility, including selection, negotiation, and administration of contracts consistent with the Guiding

Principles. In particular, the contracting officer must have the authority to the maximum extent practicable and consistent with law, to determine the application of rules, regulations, and policies, on the specific contract.

(b) The authority to make decisions and the accountability for the decision made will be delegated to the lowest level within the System, consistent with law.

(c) The Team must be prepared to perform the functions and duties assigned. The Government is committed to provide training, professional development, and other resources necessary for maintaining and improving the knowledge, skills, and abilities for all Government participants on the Team, both with regard to their particular area of responsibility within the System, and their respective role as a team member. The contractor community is encouraged to do likewise.

(d) The System will foster cooperative relationships between the Government and its contractors consistent with its overriding responsibility to the taxpayers.

Many agencies adopted this team concept in the 1990s, referred to as Integrated Product Teams (IPTs), as the best way to perform the competitive negotiation process. An IPT was defined in *DOD Guide to Integrated Product and Process Development* (version 1.0) Feb. 5, 1996, as follows:

Integrated Product Teams are cross-functional teams that are formed for the specific purpose of delivering a product for an external or internal customer. IPT members should have complimentary skills and be committed to a common purpose, performance objectives, and approach for which they hold themselves mutually accountable. IPTs are the means through which IPPD is implemented. Members of an integrated product team represent technical, manufacturing, business, and support functions and organizations which are critical to developing, procuring and supporting the product. Having these functions represented concurrently permits teams to consider more and broader alternatives quickly, and in a broader context, enables faster and better decisions. Once on a team, the role of an IPT member changes from that of a member of a particular functional organization, who focuses on a given discipline, to that of a team member, who focuses on a product and its associated processes. Each individual should offer his/her expertise to the team as well as understand and respect the expertise available from other members of the team. Team members work together to achieve the team's objectives.

The Federal Aviation Administration, which operates outside the FAR and the standard procurement statutes, also structured its entire competitive negotiation process based on the use of IPTs. Paragraph 1.11 of the FAA Acquisition Management System stated:

Integrated Product Teams will be used for all acquisitions, whether at headquarters or for field activities, including those pre-existing to April 1, 1996. The size and composition of individual Integrated Product Teams will vary widely. A complex development of a NAS system may require an IPT of many people with varied capabilities. On the other hand, the procurement of low-cost products or services may involve an IPT of as few as two people, representing the provider and the user or customer.

For guidance on organizing and leading effective IPTs, see *Rules of the Road: A Guide for Leading Successful Integrated Product Teams* (Office of the Under Secretary of Defense, Nov. 1995). Additional guidance was contained in Part 5.4 of

DOD Regulation 5000.2-R, *Mandatory Procedures for Major Defense Acquisition Programs (MDAPs) and Major Automated Information System (MAIS) Acquisition Programs*, Mar. 15, 1996.

Although this was good guidance, it has been deleted from the current regulations. Thus, the FAA AMS no longer contains this requirement and DOD Regulation 5000.2-R has been superseded by DOD Instruction 5000.02, Dec. 8, 2008 (not discussing IPTs). Nonetheless, many agencies continue to use IPTs in their major procurements.

In spite of the fact that agency regulations do not call for a formal team structure, the source selection process in intrinsically a team endeavor. Thus, source selection teams should be established and "tailored" for each particular acquisition. In some cases this will mean that the team will consist of the contracting officer and a technical evaluator, while in other, larger or more complex procurements, the team will consist of many members from various disciplines. The Army Materiel Command guidance in *Contracting for Best Value: A Best Practice Guide to Source Selection*, AMC-P 715-3, Jan. 1, 1998, discussed the concept of "tailoring" the evaluation team:

> Source selection should be a multidisciplined team effort from the earliest planning stages. The size and composition of the team should be tailored specifically to the acquisition. In complex source selections you may have a larger team (e.g., 8 to 10 people) from various functional disciplines. In streamlined source selections, however, the team may consist of one or more technical evaluators and the contracting officer, who is also the source selection authority. Whether the team is large or small, it should be established to ensure continuity and active ongoing involvement of appropriate contracting, technical, logistics, legal, user, contract administrators, and other experts to ensure a comprehensive evaluation of each proposal.

Within the Acquisition Team, FAR 15.303(a) specifies the source selection and contracting process responsibilities. The contracting officer is the source selection authority (SSA) unless the agency head appoints another individual. FAR 15.303(b) and (c) provides guidance on the roles of the SSA and the contracting officer as follows:

> (b) The source selection authority shall —
>
> (1) Establish an evaluation team, tailored for the particular acquisition, that includes appropriate contracting, legal, logistics, technical, and other expertise to assure a comprehensive evaluation of offers;
>
> (2) Approve the source selection strategy or acquisition plan, if applicable, before solicitation release;
>
> (3) Ensure consistency among the solicitation requirements, notices to offerors, proposal preparation instructions, evaluation factors and subfactors, solicitation provisions or contract clauses, and data requirements;
>
> (4) Ensure that proposals are evaluated based solely on the factors and subfactors contained in the solicitation (10 U.S.C. 2305(b)(1) and 41 U.S.C. 253b(d)(3));

(5) Consider the recommendations of advisory boards or panels (if any); and

(6) Select the source or sources whose proposal is the best value to the Government (10 U.S.C. 2305(b)(4)(B) and 41 U.S.C. 253b(d)(3)).

(c) The contracting officer shall —

(1) After release of a solicitation, serve as the focal point for inquires from actual or prospective offerors;

(2) After receipt of proposals, control exchanges with offerors in accordance with 15.306; and

(3) Award the contract(s).

1. Major Acquisitions

In procurements of special significance to an agency, because of dollar size or importance, more formal source selection procedures are followed. The distinguishing feature in these procedures is that the source selection authority (SSA) usually is not a member of the immediate source selection team but is a higher-ranking official of the agency. In such cases the source selection team usually contains one or more levels of personnel to advise and brief the SSA during the decisional process. Such personnel are necessary because the SSA is not expected to be a full participant in all the steps of the source selection process but is expected to make the competitive range and source selection decisions. DOD has imposed additional review processes and has mandated that officials not perform multiple functions in the source selection process. See DFARS 203.170 stating:

To ensure the separation of functions for oversight, source selection, contract negotiation, and contract award, departments and agencies shall adhere to the following best practice policies:

(a) Senior leaders shall not perform multiple roles in source selection for a major weapon system or major service acquisition. Departments and agencies shall certify every 2 years that no senior leader has performed multiple roles in the acquisition of a major weapon system or major service. Completed certifications shall be forwarded to the Director, Defense Procurement, in accordance with the procedures at PGI 203.170.

* * *

(c) Acquisition process reviews of the military departments shall be conducted to assess and improve acquisition and management processes, roles, and structures. The scope of the reviews should include -

(1) Distribution of acquisition roles and responsibilities among personnel;

(2) Processes for reporting concerns about unusual or inappropriate actions;

* * *

(d) Source selection processes shall be -

(1) Reviewed and approved by cognizant organizations responsible for oversight;

(2) Documented by the head of the contracting activity or at the agency level; and

(3) Periodically reviewed by outside officials independent of that office or agency.

(e) Legal review of documentation of major acquisition system source selection shall be conducted prior to contract award, including the supporting documentation of the source selection evaluation board, source selection advisory council, and source selection authority.

Agencies often require the use of formal procedures for negotiated acquisitions over a specified dollar threshold, but the thresholds vary among the agencies. For example, the Air Force designates program personnel as the SSA for most acquisitions over $10 million with higher ranking officials as the SSA for many acquisitions over $100 million, AFFARS 5315.303(c). Other agencies have different thresholds. See NASA (NFS 1815.300-70(a) - acquisitions over $50 million) and DOT (TAM 1215.303 - "major systems" defined as systems with life-cycle costs of over $150 million or meeting other characteristics).

When formal procedures are used, it has been common for the source selection organization to include a source selection evaluation board (SSEB or SEB) and/or a source selection advisory council (SSAC), but these names vary from agency to agency. The contracting officer usually serves only as an advisor to the SSA but continues to play a major role. Under FAR 15.303(c) the contracting officer must, at a minimum, serve as a focal point for inquiries from prospective offerors after release of the solicitation, control exchanges with offerors after receipt of proposals, and sign the contract.

The precise role of the SSEB and the SSAC is a matter of agency discretion. See AFFARS Mandatory Procedure 5315.3 containing the following descriptions of the functions of the source selection evaluation team (formerly the SSEB) and the SSAC:

Source Selection Evaluation Team (SSET) is a group of government and, if needed, nongovernment personnel representing the various functional disciplines relevant to the acquisition. The Source Selection Evaluation Team evaluates proposals and reports its findings to the SSAC (if used) and the SSA.

Source Selection Advisory Council (SSAC) is a group of senior government personnel who provide counsel during the source selection process and may prepare the comparative analysis of the Source Selection Evaluation Team's evaluation results, when directed by the SSA.

SSEBs are generally responsible for creating the evaluation plan and evaluating

the proposals. They are composed of agency officials with expertise in the area of the procurement and frequently contain voting and nonvoting members. In most cases they establish evaluation panels containing additional people with expertise in specialized areas. See the NASA Source Selection Guide (http://ec.msfc.nasa.gov/hq/library/sourceselection/guide.pdf), which contains a description of all participants in the agency's SEB procedure as follows:

> 2.5.4 … The SEB Chairperson is the principal operating executive of the SEB. … The Chairperson is expected to manage the team efficiently without compromising the validity of the findings provided to the SSA as the basis for a sound selection decision….
>
> 2.5.5 … The SEB Recorder functions as the principal administrative assistant to the SEB Chairperson….
>
> 2.5.6 … If a committee is utilized, it functions as a fact-finding arm of the SEB, usually in a broad grouping of related disciplines (e.g., technical or management). … The committee examines in detail each proposal, or portion thereof, assigned by the SEB. It evaluates such proposals or excerpts in accordance with the approved evaluation factors and sub-factors before submitting a written report to the SEB summarizing its evaluation….

Although these boards are generally composed of government employees, the FAR does not require this, and the GAO has approved the use of outside review committees in conjunction with in-house personnel, *Raytheon Co.*, Comp. Gen. Dec. B-261959.3, 96-1 CPD ¶ 37; *Tulane Univ.*, Comp. Gen. Dec. B-193012, 80-1 CPD ¶ 309. See NFS 1815.370(c)(2):

> While SEB participants are normally drawn from the cognizant installation, personnel from other NASA installations or other Government agencies may participate. When it is necessary to disclose the proposal (in whole or in part) outside the Government, approval shall be obtained in accordance with 18-15.207-70.

For guidance of other agencies on the use of outside evaluators, see DEAR 915.305(d), AFFARS 5315.305(c), and GSAM 515.305-70.

SSACs are composed of high-level agency employees who oversee the SSEB. They provide additional assistance and advice to the SSA. SSACs are not used in all cases. For example, they are not included in the standard organizations described in the NASA and GSA regulations.

Agencies have almost complete discretion as to the method used to convey evaluation results to the SSA and the role of the SSA in the source selection decision. However, the SSA must devote sufficient time to making the decision to be able to demonstrate that it was his or her independent judgment. See *Environmental Chem. Corp.*, Comp. Gen. Dec. B-275819, 97-1 CPD ¶ 154, stating:

> [S]election officials are not bound by recommendations made or price/cost evaluation methodologies used

by an agency evaluation panel or other subordinate officials. *See Bell Aerospace Co.*, 55 Comp. Gen. 244 (1975), 75-2 CPD ¶ 168. Rather, source selection officials in negotiated procurements have broad discretion in determining the manner and extent to which they will make use of the technical and cost evaluation results. *Grey Advertising, Inc.*, 55 Comp. Gen. 1111 (1976), 76-1 CPD ¶ 325. In exercising that discretion, they are subject only to the tests of rationality and consistency with the established evaluation factors. *Id*.

This permits the SSA to accept the judgments of the lower-level officials or to make a totally independent assessment. For cases permitting adoption of the lower-level assessments, see *Planet/Space, Inc.*, Comp. Gen. Dec. B-401016, 2009 CPD ¶ 103 (protest that SSA had not considered a factor denied because he had been briefed on the issue and adopted risk assessment of SEB); *U.S. Facilities, Inc*., Comp. Gen. Dec. B-293029, 2004 CPD ¶ 17 (protest of lack of independent decision denied because SSA participated in all major steps of procurement); *PRC, Inc.,* Comp. Gen. Dec. B-274698.2, 97-1 CPD ¶ 115 (protest that the SSA's analysis was superficial denied because the decision was reasonable based on the record). For a case where the SSA did a thorough assessment in making the decision, see *Micro-dyne Outsourcing, Inc. v. United States*, 72 Fed. Cl. 694 (2006).

A protest will be sustained if it is found that the SSA has not exercised independent judgment in arriving at the source selection decision. See *Information Sciences Corp. v. United States*, 73 Fed. Cl. 70 (2006), finding no independent decision where the SSA adopted, almost verbatim, a report of minority members of the technical evaluation team without any explanation of why that view was superior to the majority members' view. See also *AT&T Corp.*, Comp. Gen. Dec. B-299542.3, 2008 CPD ¶ 65 (SSA was apparently unaware of evaluation findings); and *IDEA Int'l , Inc. v. United States*, 74 Fed. Cl. 129 (2006) (SSA did not explain why he did not follow the recommendation of the technical evaluators). Protests have also been granted when it is clear that the SSA did not devote sufficient effort to understand the decision, *ProTech Corp.*, Comp. Gen. Dec. B-294818, 2005 CPD ¶ 73 (SSA did not follow evaluation factors); *Keeton Corrections, Inc.*, Comp. Gen. Dec. B-293348, 2005 CPD ¶ 44 (SSA did not notice mistake in evaluations); *Ashland Sales & Serv. Co.*, Comp. Gen. Dec. B-291206, 2003 CPD ¶ 33 (SSA relied on contracting officer document containing factual errors); *Shumaker Trucking & Excavating Contractors, Inc.*, Comp. Gen. Dec. B-290732, 2002 CPD ¶ 169 (SSA endorsed contracting officer document that contained no rationale for the decision).

There are numerous cases sustaining the SSA's independent assessment of the proposals. See *University Research Co.*, Comp. Gen. Dec. B-294358.6, 2005 CPD ¶ 83 (SSA thoroughly explained why he did not follows the views of the technical evaluators); *MW-All Star Joint Venture*, Comp. Gen. Dec. B-291170.4, 2004 CPD ¶ 98

(SSA reasonably assigned different ratings than evaluators); *Resource Mgmt. Int'l , Inc.*, Comp. Gen. Dec. B-278108, 98-1 CPD ¶ 29 (SSA's evaluation that protester's slightly higher technical rating did not merit the expenditure of additional funds reasonable notwithstanding the technical evaluation committee's recommendation to award to protester); *LTR Training Sys., Inc.*, Comp. Gen. Dec. B-274996, 97-1 CPD ¶ 71 (SSA reasonably evaluated technical proposals as equal in spite of SSET's evaluation that protester's proposal was superior); *EBA Eng'g , Inc.*, Comp. Gen. Dec. B-275818, 97-1 CPD ¶ 127 (SSA's decision to raise technical standing of awardee reasonable); *Juarez & Assocs., Inc.*, Comp. Gen. Dec. B-265950.2, 96-1 CPD ¶ 152 (SSA reasonably evaluated technical proposals as equal in spite of source evaluation group's evaluation that protester's proposal was superior). If the SSA adopts flawed assessments of the lower-level officials, the source selection decision will be overturned. See, for example, *New Breed Leasing Corp.*, Comp. Gen. Dec. B-259328, 96-2 CPD ¶ 84 (protest granted because decision was based on technical evaluation board report that misstated findings of evaluators).

2. Smaller Acquisitions

When acquisitions are not considered "major," far less formal procedures are generally followed. In such cases, the contracting officer is almost always the SSA and the source selection team is reduced to a few individuals. For example, in the Air Force, AFFARS 5315.303 states that for acquisitions of no more than $10 million:

> (a)(1) The contracting officer is the Source Selection authority (SSA) for acquisitions of $10M or less. Except as provided in paragraph (4) below, contracting officer is the SSA for acquisitions of any dollar value using Performance Price Tradeoff (PPT) or Lowest Price Technically Acceptable (LPTA) procedures, unless the acquisition plan approving authority designates otherwise.

The Army has more complete guidance in *Contracting for Best Value: A Best Practice Guide to Source Selection*, AMC-P 715-3 (Jan. 1, 1998), stating that in streamlined source selections "the team may consist of one or more technical evaluators and the contracting officer, who is the source selection authority." NASA is less explicit on the size and composition of the team in smaller procurements, merely providing discretion on the structure of the team when procurements are under $50 million, NFS 1815.300-70(a)(1)(ii).

It can be seen that in these smaller procurements, agencies generally have a great deal of discretion in structuring the source selection team. At a minimum, the contracting officer is expected to use agency employees with expertise in the technical aspects of the procurement to evaluate those elements of the proposals. In addition, many

contracting officers use agency employees with technical expertise to assist them in making the best value decision in order to select the source. This permits the agency to arrive at a knowledgeable judgment as to the dollar value of the various aspects of the technical proposals submitted.

These less formal procedures have been recognized by the GAO. There is no legal requirement for source selection evaluation boards, and the evaluation can be conducted by one person if properly qualified, *Carol L. Bender, M.D.*, Comp. Gen. Dec. B-196912, 80-1 CPD ¶ 243. The GAO has offered little guidance with respect to the composition of evaluation teams because this is primarily a matter of agency discretion, *Washington School of Psychiatry*, Comp. Gen. Dec. B-189702, 78-1 CPD ¶ 176.

B. Qualifications of Team Members

Whatever organization is used in the source selection process, the members of the team must possess two traits. First, they must have the skill and ability to carry out their tasks in a professional manner. Second, they must be free from bias or conflict of interest.

1. Competence

Procuring agencies are highly dependent on the quality of the personnel performing the basic evaluation of the proposals. They must have the technical or business skills to evaluate all or part of the proposals. They should also be able to exercise good business judgment in determining which proposal is most advantageous to the government. See NFS 1815.370(c):

> *Designation*. (1) The SEB shall be comprised of competent individuals fully qualified to identify the strengths, weaknesses, and risks associated with proposals submitted in response to the solicitation. The SEB shall be appointed as early as possible in the acquisition process, but not later than acquisition plan or acquisition strategy meeting approval.

Neither the Court of Federal Claims nor the GAO has been willing to review the technical qualifications of members of the source selection team, *Software Eng'g Servs. Corp. v. United States*, 85 Fed. Cl. 247 (2009); *IMLCORP, LLC*, Comp. Gen. Dec. B-310582, 2008 CPD ¶ 15; *Eggs & Bacon, Inc*., Comp. Gen. Dec. B-310066, 2007 CPD ¶ 209; *Glatz Aeronautical Corp*., Comp. Gen. Dec. B-293968.2, 2004 CPD ¶ 160; *EBA Eng'g , Inc.*, Comp. Gen. Dec. B-275818, 97-1 CPD ¶ 127. See *Stat-a-Matrix, Inc*., Comp. Gen. Dec. B-234141, 89-1 CPD ¶ 472, stating:

> The composition of technical evaluation panels is within the discretion of the contracting agency and, as such, will not be reviewed by our Office absent a showing of possible bad faith, fraud, conflict of interest, or actual bias on the part of evaluators. *New Mexico State University*, B-230669.2, June 2, 1988, 88-1 CPD ¶ 523. None of these factors is shown or even alleged here. Moreover, it is our view that the important and responsible positions held by the agency evaluators here constituted prima facie evidence that they were qualified to evaluate proposals. *Communications and Data Systems Assocs.*, B-223988, Oct. 29, 1986, 86-2 CPD ¶ 491.

Nonetheless, the Court of Federal Claims has ordered an agency to appoint a new SSA and a reconstructed SEB when it has found that the procurement was conducted improperly, *Wackenhut Servs., Inc. v. United States*, 85 Fed. Cl. 273 (2008). See also *Information Sciences Corp. v. United States*, 73 Fed. Cl. 70 (2006), ordering the agency to appoint a new SSA when the prior SSA did not exercise independent judgment in making the best value decision. The GAO has also recommended that new officials be appointed when improper conduct has occurred in the protest process. See *University Research Co., LLC*, Comp. Gen. Dec. B-294358, 2004 CPD ¶ 217 (appointment of new SSA recommended because prior SSA misstated technical finding in GAO protest); and *Beneco Enters., Inc.*, Comp. Gen. Dec. B-283512.3, 2000 CPD ¶ 176 (appointment of new SSA and SSEB recommended because prior officials had misrepresented facts).

2. Freedom from Bias or Conflict of Interest

Evaluators must be not only technically qualified, but also free from bias or conflict of interest. The Guiding Principles in FAR 1.102 emphasize this requirement. See FAR 1.102-2(c), which sets forth a "performance standard:"

> Conduct business with integrity, fairness, and openness. (1) An essential consideration in every aspect of the System is maintaining the public's trust. Not only must the System have integrity, but the actions of each member of the Team must reflect integrity, fairness, and openness. The foundation of integrity within the System is a competent, experienced, and well-trained, professional workforce. Accordingly each member of the Team is responsible and accountable for the wise use of public resources as well as acting in a manner which maintains the public's trust. Fairness and openness require open communication among team members, internal and external customers, and the public.

Evaluators are also subject to agency standards of conduct and the federal Standards of Ethical Conduct in 5 C.F.R. § 2635. See FAR 3.101-1, which states:

> Government business shall be conducted in a manner above reproach and, except as authorized by statute or regulation, with complete impartiality and with preferential treatment for none. Transactions relating to the expenditure of public funds require the highest degree of public trust and an impeccable standard of conduct. The general rule is to avoid strictly any conflict of interest or even the appearance of a conflict of interest in Government-contractor relationships. While many Federal laws and regulations place restrictions on the actions of Government personnel, their official conduct must, in addition, be such that they would

have no reluctance to make a full public disclosure of their actions.

The major conflicts of interest that must be avoided are financial interests in offerors and employment discussions with offerors. Government employees are prohibited from participating in a procurement with a company in which they hold a financial interest, 18 U.S.C. § 208. The definition of "financial interest" is included in 5 C.F.R. § 2635.403(c):

> (1) Except as provided in paragraph (c)(2) of this section, the termfinancial interest is limited to financial interests that are owned by the employee or by the employee's spouse or minor children. However, the term is not limited to only those financial interests that would be disqualifying under 18 U.S.C. § 208(a) and § 2635.402. The term includes any current or contingent ownership, equity, or security interest in real or personal property or a business and may include an indebtedness or compensated employment relationship. It thus includes, for example, interests in the nature of stocks, bonds, partnership interests, fee and leasehold interests, mineral and other property rights, deeds of trust, and liens, and extends to any right to purchase or acquire any such interest, such as a stock option or commodity future. It does not include a future interest created by someone other than the employee, his spouse, or dependent child or any right as a beneficiary of an estate that has not been settled.
>
> (2) The term financial interest includes service, with or without compensation, as an officer, director, trustee, general partner or employee of any person, including a nonprofit entity, whose financial interests are imputed to the employee under § 2635.402(b)(2)(iii) or (iv).

Employment negotiations are also a conflict of interest under 18 U.S.C. § 208. Guidance on this prohibition is contained in 5 C.F.R. § 2635.603. Employment negotiations are also covered in the Procurement Integrity Act, 41 U.S.C. § 423. See FAR 3.104-3, which contains the following guidance on the requirements of this Act:

> (c) *Actions required when an agency official contacts or is contacted by an offeror regarding non-Federal employment (subsection 27(c) of the Act).* (1) If an agency official, participating personally and substantially in a Federal agency procurement for a contract in excess of the simplified acquisition threshold, contacts or is contacted by a person who is an offeror in that Federal agency procurement regarding possible non-Federal employment for that official, the official must —
>
> > (i) Promptly report the contact in writing to the official's supervisor and to the agency ethics official; and
> >
> > (ii) Either reject the possibility of non-Federal employment or disqualify himself or herself from further personal and substantial participation in that Federal agency procurement (see 3.104-5) until such time as the agency authorizes the official to resume participation in that procurement, in accordance with the requirements of 18 U.S.C. 208 and applicable agency regulations, because —
> >
> > > (A) The person is no longer an offeror in that Federal agency procurement; or
> > >
> > > (B) All discussions with the offeror regarding possible non-Federal employment have terminated without an agreement or arrangement for employment.

For a full discussion of the standards of conduct see Chapter 1 of Cibinic & Nash,

Formation of Government Contracts (3d ed. 1998).

The FAR 3.101-1 requirement "to avoid strictly any conflict of interest or even the appearance of a conflict of interest" is designed to ensure that offerors are cofin-dent of integrity in the procurement process. However, where the appearance of a conflict is not brought to light until after completion of evaluation there has been a reluctance on the part of the courts and the GAO to overturn a procurement unless there are hard facts showing bias or an actual conflict of interest. While such decisions may be justified on practical grounds, they should not be considered as endorsing the knowing use of personnel with the appearance of a conflict of interest.

If the contracting officer finds, during the conduct of the procurement, that any member of the team has an actual or apparent conflict of interest or bias, that person should be removed from the source selection team. A number of cases have upheld such removal. See, for example, *EBA Eng'g , Inc.*, Comp. Gen. Dec. B-275818, 97-1 CPD ¶ 127 (some members of evaluation panel replaced after they received letters from employees of incumbent contractor arguing that it should not be replaced); *Pemco Aeroplex, Inc.*, Comp. Gen. Dec. B-239672.5, 91-1 CPD ¶ 367 (some members of evaluation team replaced after flawed evaluation); *Louisiana Physicians for Quality Med. Care, Inc.*, 69 Comp. Gen. 6 (B-235894), 89-2 CPD ¶ 316 (new evaluation panel established after agency learned that chairman of original panel had close relationship with officer of competitor); *Applied Science Assocs., Inc.*, Comp. Gen. Dec. B-234467, 89-1 CPD ¶ 577 (evaluation panel member removed because his academic advisor was executive of offeror); *National Council of Teachers of English*, Comp. Gen. Dec. B-230669, 88-2 CPD ¶ 6 (outside evaluator dropped when competitor's proposal included evaluator's enthusiastic letter of endorsement); *Brown & Root Servs.*, Corp., Comp. Gen. Dec. B-227079.3, 88-1 CPD ¶ 324 (evaluator removed because he held stock in parent corporation of offeror); and *Pharmaceutical Sys., Inc.*, Comp. Gen. Dec. B-221847, 86-1 CPD ¶ 469 (initial evaluation panel disbanded when contracting officer was led to believe that it could not render an impartial recommendation).

In spite of the firm requirements that agency employees must be free from conflict of interest, it has been very difficult to successfully protest either bias or conflict of interest. The GAO has stated that any successful protest must be based on hard facts, not mere suspicion or innuendo, *Environmental Affairs Mgmt., Inc.*, Comp. Gen. Dec. B-277270, 97-2 CPD ¶ 93; *Dayton T. Brown, Inc.*, 68 Comp. Gen. 6 (B-231579), 88-2 CPD ¶ 314. The major situation where hard facts have been demonstrated is where an agency employee acknowledged bias in connection with a guilty plea on a charge that she engaged in employment discussions while serving as a major participant in source

selections. See *Lockheed Martin Aeronautics Co.*, Comp. Gen. Dec. B-295401, 2005 CPD ¶ 41; and *Lockheed Martin Corp.*, Comp. Gen. Dec. B-295402, 2005 CPD ¶ 24.

The GAO has also held that it will not rule on a contention of bias if there is an ongoing investigation of the facts that are claimed to demonstrate bias, *Pemco Aeroplex, Inc.*, Comp. Gen. Dec. B-310372, 2008 CPD ¶ 2. Where an appearance of impropriety is alleged, the GAO frequently states that it will not overturn the agency's decision unless the protester can present evidence that the evaluator actually influenced the award of the contract, *ITECH, Inc.*, Comp. Gen. Dec. B-231693, 88-2 CPD ¶ 268; *Mariah Assocs., Inc.*, Comp. Gen. Dec. B-231710, 88-2 CPD ¶ 357. This same test was used by the court in *Dynalectron Corp. v. United States*, 4 Cl. Ct. 424 (1984), *aff'd* , 758 F.2d 665 (Fed. Cir. 1985) (statements of manager of evaluation team showing bias against protester but no proof of biased scoring of proposals). Compare *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520 (1961), where the Court held that a contract was unenforceable due to the appearance of a conflict of interest on the part of an employee who played a minor role in the contract award process.

There are numerous cases upholding an agency determination that employees participating in the procurement had no actual bias or conflict of interest. For instance, in *CACI, Inc.-Fed. v. United States*, 719 F.2d 1567 (Fed. Cir. 1983), the court upheld an award where most of the technical evaluators had discussed employment with one of the offerors a year before the procurement and the offeror had been the government official in charge of the preceding contract. The court reasoned that there was no technical violation of 18 U.S.C. § 207 or § 208 and no hard facts proving an appearance of a conflict of interest. See also *Raydar & Assocs., Inc.*, Comp. Gen. Dec. B-401447, 2009 CPD ¶ 180 (allowing offeror access to government offices and property not proof of bias when offeror was incumbent contractor); *Integrated Mgmt. Resources Group, Inc.*, Comp. Gen. Dec. B-400550, 2008 CPD ¶ 227 (email requiring all planned awards to protester to be brought to attention of top agency officials does not prove bias); *Palmetto GBA, LLC*, Comp. Gen. Dec. B-298962, 2007 CPD ¶ 25 (evaluator's statement alluding to pressure to change a score not sufficient evidence of bias); *Hard Bodies, Inc.*, Comp. Gen. Dec. B-279543, 98-1 CPD ¶ 172 (contracting officer's ire at offeror's frequent phone calls insufficient to prove bias); *Cygnus Corp.*, Comp. Gen. Dec. B-275957, 97-1 CPD ¶ 202 (presence of vested marital property rights in assets or income of an offeror controlled by employee's spouse did not give government employee sufficient ownership or control over offeror so as to constitute a conflict of interest); *SF & Wellness*, Comp. Gen. Dec. B-272313, 96-2 CPD ¶ 122 (although awardee's spouse was a full-time government employee, he had no connection with Navy's physical fitness program or the awardee's operations); *DRI/McGraw-Hill*,

Comp. Gen. Dec. B-261181, 95-2 CPD ¶ 76 (mere fact that member of technical evaluation panel had co-authored various publications with awardee insufficient to prove conflict of interest where there was no current economic relationship between technical evaluation panel member and awardee and no evidence that member had exerted improper influence on behalf of awardee); *Trataros/Basil, Inc.*, Comp. Gen. Dec. B-260321, 95-1 CPD ¶ 265 (allegation that evaluator was biased against offeror was not supported by any evidence — evaluator's scores were in line with other evaluators); *Docusort, Inc.*, Comp. Gen. Dec. B-254852.2, 95-1 CPD ¶ 107, *recons. denied*, 95-2 CPD ¶ 25 (mere fact that contracting officer proposed adding fee to awardee's contract price for phase-in costs insufficient to show bias where such fees were not added nor were phase-in costs evaluated); *Sprint Communications Co.*, Comp. Gen. Dec. B-256586, 94-1 CPD ¶ 300 (no conflict where member of evaluation committee, as president of a university, was entitled to a seat on the board of directors of an offeror's principal subcontractor; president himself was not a member of the subcontractor's board of directors and, in any event, did not participate in the award selection); *Jaycor*, Comp. Gen. Dec. B-240029.2, 90-2 CPD ¶ 354 (no clear proof that evaluator was biased against offeror or had employment discussions with winner); *Quality Sys., Inc.*, Comp. Gen. Dec. B-235344, 89-2 CPD ¶ 197 (no action taken when evaluator was personal friend of employee of offeror — no proof of bias or receipt of gratuities); *Laser Power Tech, Inc.*, Comp. Gen. Dec. B-233369, 89-1 CPD ¶ 267 (no action taken when chairman of technical evaluation panel discussed procurement with subcontractor shortly before issuance of RFP — no evidence of bias or disclosure of sensitive information); *Presearch, Inc.*, Comp. Gen. Dec. B-227097, 87-2 CPD ¶ 28 (heavy burden to show bias not met by protester); *Aqua-Chem, Inc.*, Comp. Gen. Dec. B-221319, 86-1 CPD ¶ 319 (no action taken where chairman of evaluation panel had tried to issue sole source contract to competitor, due to the lack of hard evidence); and *Ensign-Bickford Co.*, Comp. Gen. Dec. B-211790, 84-1 CPD ¶ 439 (protester failed to demonstrate any bias against its technical design on the part of the evaluator).

II. PROCUREMENT STRATEGIES

Once established, the source selection team must decide on the methodology that will be used to ultimately select the source. The procurement statutes give the agencies a great degree of discretion in devising competitive negotiation strategies designed to fulfill the government's needs. Three issues must be addressed in devising the best strategy: the selection of the appropriate competitive negotiation technique, the designation of mandatory requirements, and the possible use of a multistep process.

A. Selecting the Competitive Negotiation Technique

Prior to the FAR Part 15 rewrite, contained in FAC 97-02, Sept. 30, 1997, FAR 15.602 described two types of competitive negotiation: (1) "cost or price competition between proposals that meet the Government's requirements," and (2) "competition involving an evaluation and comparison of cost or price and other factors." The latter technique became know as the "best value" technique. In addition, FAR 15.613 permitted agencies to use "alternative source selection procedures."

The FAR rewrite uses the term "best value" more broadly. It encompasses all the strategies, whether or not based on tradeoffs between cost or price and other factors. FAR 15.402 states: "The objective of source selection is to select the proposal that represents the best value." The term is now defined in FAR 2.101:

> Best value means the outcome of an acquisition that, in the Government's estimation, provides the greatest overall benefit in response to the requirement.

FAR 15.100 makes it clear that the regulatory guidance under the rewritten FAR is only partial by stating:

> This subpart describes some of the acquisition processes and techniques that may be used to design competitive acquisition strategies suitable for the specific circumstances of the acquisition.

Thus, agencies are permitted to devise the appropriate strategy for each procurement. FAR 15.101, entitled "Best value continuum," elaborates on this concept:

> An agency can obtain best value in negotiated acquisitions by using any one or a combination of source selection approaches. In different types of acquisitions, the relative importance of cost or price may vary. For example, in acquisitions where the requirement is clearly definable and the risk of unsuccessful contract performance is minimal, cost or price may play a dominant role in source selection. The less definitive the requirement, the more development work required, or the greater the performance risk, the more technical or past performance considerations may play a dominant role in source selection.

The FAR then describes two specific techniques — the "tradeoff process" and the "lowest-price, technically acceptable source selection process." The following material discusses both processes. It also considers other strategies that have been used in the past.

1. Tradeoff Process

This strategy was previously known as the best value technique. The hallmark of the system is that it permits the determination of best value to be made *after the receipt*

and evaluation of proposals. It is described in FAR 15.101-1:

> (a) A tradeoff process is appropriate when it may be in the best interest of the Government to consider award to other than the lowest priced offeror or other than the highest technically rated offeror.
>
> (b) When using the tradeoff process, the following apply:
>
> > (1) All evaluation factors and significant subfactors that will aff ect contract award and their relative importance shall be clearly stated in the solicitation; and
> >
> > (2) The solicitation shall state whether all evaluation factors other than cost or price when combined are significantly more important than, approximately equal to, or significantly less important than cost or price.
>
> (c) This process permits tradeoffs among cost or price and non-cost factors and allows the Government to accept other than the lowest priced proposal. The perceived benefits of the higher-priced proposal shall merit the additional cost, and the rationale for tradeoffs must be documented in the file in accordance with 15.406.

This process is the most widely used because it permits the source selection decision to be made after the proposals have been fully analyzed. However, it gives the source selection official very broad discretion because the ultimate decision is made on a *subjective* basis. The essence of the process is that, when the offeror with the lowest price is not evaluated best on the non-price factors, the selection decision is based on a business judgment as to whether the added value of non-price factors is worth a higher price. See *TRW, Inc. v. Widnall*, 98 F.3d 1325 (Fed. Cir. 1996); *Environmental Chemical Corp.*, Comp. Gen. Dec. B-275819, 97-1 CPD ¶ 154. It is clear that this judgment as to the value of the non-cost factors need not be quantified, FAR 15.308. See *Widnall v. B3H Corp*., 75 F.3d 1577 (Fed. Cir. 1996), stating that these tradeoff decisions must be based on a "reasoned explanation" of the decision but need not be based on quantification of the non-cost factors. The same result was reached by the GAO in *Systems Mgmt., Inc*., Comp. Gen. Dec. B-287032.5, 2002 CPD ¶ 29; *Suddath Van Lines, Inc.*, Comp. Gen. Dec. B-274285.2, 97-1 CPD ¶ 204; *Kay & Assoc., Inc.*, Comp. Gen. Dec. B-258243.7, 96-1 CPD ¶ 266; and *EG&G Team*, Comp. Gen. Dec. B-259917.3, 95-2 CPD ¶ 175. If the agency does quantify some of the non-cost evaluation factors, the GAO will not scrutinize the quantification for accuracy but will focus on the overall rationality of the best value decision, *DDD Co*., Comp. Gen. Dec. B-276708, 97-2 CPD ¶ 44.

In the past, some agencies have attempted to devise numerical formulas to make this tradeoff appear to be *objective*. Some of these formulas have used a total point system by assigning points to the price, others have assigned dollar values to the non-price factors or have divided the price by the points assigned to non-price factors to

come up with a dollars per point figure. Such techniques have been accepted as tools to be used in evaluating the relative merits of proposals. However, the GAO has indicated that these are only evaluation techniques and that the source selection official should still exercise judgment in determining whether the merits of the highest scored proposal are worth paying a higher price. See *C&B Constr., Inc.,* Comp. Gen. Dec. B-401988.2, 2010 CPD ¶ 1, stating:

> [A] selection decision may not be made on point scores alone where the agency selection official has inadequate documentation on which to base a reasoned decision. *J.A. Jones Mgmt. Servs., Inc*., B-276864, July 24, 1997, 97-2 CPD ¶ 47 at 4…. Since the record provides no contemporaneous tradeoff comparing Aquatic to C&B, other than on the basis of their point scores, we sustain the protest. *See, Shumaker Trucking & Excavating Contractors, Inc.*, B-290732, Sept. 25, 2002, 2002 CPD ¶ 169 at 8 (protest sustained where Forest Service relied solely on point scores and failed to document any comparison of protester's lower-priced and lower-rated proposal to awardee's higher-priced, higher-rated proposal, in source selection decision).

See also *Harrison Sys., Ltd.*, 63 Comp. Gen. 244 (B-212675), 84-1 CPD ¶ 572 (recommending that a total point system not be used in combination with a statement that award will be made to the offeror receiving the highest number of points); *Storage Tech. Corp.,* Comp. Gen. Dec. B-215336, 84-2 CPD ¶ 190 (dollar values assigned to non-price factors only to be used as a *guide* to the selection official); and *Moran Assocs.*, Comp. Gen. Dec. B-240564.2, 91-2 CPD ¶ 495 (cost/technical ratio formula only one tool to assure that the government was getting the best buy). In addition, a number of agencies have prohibited or strongly discouraged the use of such formulas.

When the tradeoff process is selected, the agency must decide whether negotiations will be necessary after the proposals have been evaluated or whether the award should be made without negotiations. The statutes give agencies broad discretion in making this decision. 10 U.S.C. § 2305(b)(4)(A) states:

> The head of an agency shall evaluate competitive proposals in accordance with paragraph (1) and may award a contract —
>
> > (i) after discussions with the offerors, provided that written or oral discussions have been conducted with all responsible offerors who submit proposals within the competitive range; or
> >
> > (ii) based on the proposals received, without discussions with the offerors (other than discussions conducted for the purpose of minor clarification) provided that the solicitation included a statement that proposals are intended to be evaluated, and award made, without discussions, unless discussions are determined to be necessary.

Substantially the same language is contained in 41 U.S.C. § 253b(d)(1).

Under the original Competition in Contracting Act of 1984 (CICA), award without

negotiations could be made only when it could be clearly demonstrated that such award would result in the lowest overall cost to the government. However, statutory changes in the 1990s deleted this requirement and gave agencies full discretion to use this process whenever they found it desirable. Furthermore, House Report 101-665, 101st Cong., 2d Sess. (accompanying Pub. L. No. 101-510, which initially changed the statutory requirement) stated that "the committee proposing the change did not recommend a preference" for one technique over the other but noted the following benefits of making award without negotiations:

Significant reduction of acquisition lead time

Permitting award on technical superiority when discussions are not needed

Lessening the chances of wrongful disclosure of source selection information

Reduction of the Government's overall acquisition costs by reducing the amount a contractor is spending on bid and proposal costs

An additional benefit is the avoidance of final proposal revisions that include arbitrary price reductions. Such reductions have resulted in excessively low prices, which can create serious difficulties during contract performance.

Considering these benefits, agencies have decided to award competitively negotiated procurements without negotiations as a way to streamline their process. The use of this technique should be considered when it appears that the offerors will have a sufficient understanding of the contract requirements to negate any requirement for negotiations.

2. Lowest-Price, Technically Acceptable Process

This strategy has been used for many years. The FAR now describes it as a best value procedure, but the best value determination is made by the agency *at the time the strategy is chosen*, before receipt or analysis of proposals. Thus, when an agency has decided to use this strategy, it has decided that the best value will be obtained by paying the lowest price offered by any offeror that submits an acceptable "technical proposal." FAR 15.101-2 describes this process:

> (a) The lowest price technically acceptable source selection process is appropriate when best value is expected to result from selection of the technically acceptable proposal with the lowest evaluated price.

(b) When using the lowest price technically acceptable process, the following apply:

> (1) The evaluation factors and significant subfactors that establish the requirements of acceptability shall be set forth in the solicitation. Solicitations shall specify that award will be made on the basis of the lowest evaluated price of proposals meeting or exceeding the acceptability standards for non-cost factors. If the contracting officer documents the file pursuant to 15.304(c)(3)(iii), past performance need not be an evaluation factor in lowest price technically acceptable source selections. If the contracting officer elects to consider past performance as an evaluation factor, it shall be evaluated in accordance with 15.305. However, the comparative assessment in 15.305(a)(2)(i) does not apply. If the contracting officer determines that a small business' past performance is not acceptable, the matter shall be referred to the Small Business Administration for a Certificate of Competency determination, in accordance with the procedures contained in subpart 19.6 and 15 U.S.C. § 637(b)(7).
>
> (2) Tradeoffs are not permitted.
>
> (3) Proposals are evaluated for acceptability but not ranked using the non-cost/price factors.
>
> (4) Exchanges may occur (see 15.306).

A key element of this technique is that the non-cost evaluation factors are all of equal importance. The failure of a proposal to meet any of the factors will preclude award to the offeror submitting the proposal. See, for example, *Synoptic Sys. Corp*., Comp. Gen. Dec. B-290789.4, 2003 CPD ¶ 42, where two offerors were properly dropped from the competition after being scored unacceptable on two of a large number of factors. See also *Dubinsky v. United States*, 44 Fed. Cl. 509 (1999), holding that an agency may not award to an offer that has material failures to meet mandatory requirements. However, the offeror may be given an opportunity to cure the noncompliance through oral or written discussions if award on initial proposals will not be made and the proposal would otherwise be in the competitive range. Of course, this would require the agency to hold discussions with all other offerors in the competitive range and to permit them to submit final proposal revisions - with the potential result that one of them would become the low price offeror.

One major benefit of this strategy is that the agency can greatly shorten the evaluation process because, once the low price proposal has been found to be technically acceptable, there is no need to evaluate the acceptability of any of the other proposals. This streamlined process can be used as long as the agency has used the Instruction to Offerors - Competitive Acquisition solicitation provision in FAR 52.215-1 which states in ¶ (f)(4) that the agency intends to award without discussions.

The term "technically acceptable proposals" as used in the FAR refers to all non-cost factors. It includes factors dealing with the capability of the offerors, as well as the technical details of the performance that is offered in the proposal. Although FAR

15.101-2(b)(1) refers only to determinations of unacceptable past performance as requiring reference to the Small Business Administration (SBA), the same rule would apply to lack of acceptability based on any other capability factor. See, e.g., *Vantex Serv. Corp.*, Comp. Gen. Dec. B-266199, 96-1 CPD ¶ 29, holding that when traditional responsibility factors such as "experience" are evaluated on a go/no-go basis, the matter must be referred to the SBA if the proposal is determined unacceptable because of such factors. See also *R. L. Campbell Roofing Co.*, Comp. Gen. Dec. B-289868, 2003 CPD ¶ 37; *Dynamic Aviation — Helicopters*, Comp. Gen. Dec. B-274122, 96-2 CPD ¶ 166; and *Environsol, Inc.*, Comp. Gen. Dec. B-254223, 93-2 CPD ¶ 295.

The lowest-price, technically acceptable proposal technique has been used extensively in the past. See, for example, *Weinschel Eng'g Co.*, 64 Comp. Gen. 524 (B-217202), 85-1 CPD ¶ 574, where the GAO agreed with a source selection when the Navy awarded a fixed-price contract to the lowest-priced offeror meeting the RFP's technical specifications. In *Saxon Corp.*, Comp. Gen. Dec. B-216148, 85-1 CPD ¶ 87, the RFP provided for award to the offeror with the lowest overall price among those offers found acceptable in the technical and management areas. Technical and management factors were thus scored on a go/no-go basis. In *Computer Sciences Corp.*, Comp. Gen. Dec. B-213287, 84-2 CPD ¶ 151, the RFP for a data base management system called for award to the vendor with the lowest evaluated price offering a system judged to have a "user-friendly, English-like syntax." Award may also be made to the technically acceptable proposal with the lowest total discounted life-cycle cost, *Hawaiian Tel. Co.*, Comp. Gen. Dec. B-187871, 77-1 CPD ¶ 298; *University Sys.*, GSBCA 10600-P, 90-3 BCA ¶ 23,085.

It has been held that "no narrative justifications" are required to support the assessment that an element of a technical proposal is unacceptable, *Al Ghanim Combined Group Co. Gen. Trad. & Cont. W.L.L. v. United States*, 56 Fed. Cl. 502 (2003) (evaluators merely circled "pass" or "fail" on an evaluation sheet). The court derived this rule from FAR 15.305(a)(3) stating that an "assessment of each offeror's ability to accomplish the technical requirements" was required only in tradeoff procurements. The court did not consider FAR 15.305(a) calling for documentation of "relative strengths, significant weaknesses, and risks."

The use of this method has on several occasions led to protests that sealed bidding was required for the procurement. In *Saxon Corp.*, Comp. Gen. Dec. B-216148, 85-1 CPD ¶ 87, the GAO upheld the use of negotiation, finding that it was impossible to draft sufficiently precise specifications for a sealed bid procurement where a high level of technical and management competence was needed. Similarly, in *Essex Electro Eng'rs ,*

Inc., 65 Comp. Gen. 242 (B-221114), 86-1 CPD ¶ 92, the use of negotiation was upheld because of the agency's need to conduct discussions with offerors. The protester's argument that the agency could have obtained the necessary information through a preaward survey was rejected, as the discussion process can be used to negotiate contractual terms, as well as to obtain responsibility-related information. See also *Vantex Serv. Corp.*, Comp. Gen. Dec. B-266199, 96-1 CPD ¶ 29, where the RFP listed three technical evaluation factors that the agency stated would be evaluated on a go/no-go basis to determine the acceptability of an offeror's proposal. Once technical acceptability was established based on the evaluation factors, price would become the determinative factor for award. The GAO found proper the use of competitive negotiation because the agency reasonably determined that discussions were necessary.

3. Other Approaches

As discussed earlier, the FAR now permits the use of any other competitive negotiation approach that complies with the procurement statutes. One such approach is a combination of the tradeoff process and the lowest-price, technically acceptable proposal process suggested by FAR 15.101. Another possibility is a process calling for negotiations with only the winning contractor. A third possibility is a competitive negotiation process based solely on low price.

a. Combination of Tradeoff and Lowest-Price, Technically Acceptable Processes

Although FAR Part 15 does not directly address the combination of these two processes, FAR 15.101 indicates that a "combination of source selection approaches" may be used. Thus, an agency could subject some of the evaluation factors to a go/no-go test, while providing that others can be evaluated on a tradeoff logic. This technique would enable tradeoffs to be made for those factors subject to evaluation on their relative merits while requiring rejection of the proposals not meeting the minimum requirements for those subject to the go/no-go test. Another strategy might be to subject all factors to a go/no-go test for the proposal to receive further consideration and then to evaluate the relative merits of those determined to be acceptable. These types of strategies were discussed in Chapter 2 of the GSA Handbook, *Source Selection Procedures*, APD P 2800.2, July 21, 1987, which provided the following guidance:

> [A] go, no-go approach can be applied to some or all of the major evaluation factors or subfactors identified in the solicitation. When all factors are go, no-go the process is equivalent to the lowest-priced acceptable

> proposal approach discussed above. When the "greatest value concept" is used, some evaluation factors may be used as discriminators and be evaluated on a go, no-go basis. An evaluation factor such as "management" may be used as a discriminator for evaluation on a go, no-go basis. If the "management" factor is scored adequate, it may, or may not, have further relevance in the evaluation process…. The evaluation process may be structured so that the factor has no further relevance … if it is scored adequate. On the other hand, the evaluation process may be structured so that the factor is scored and the merits of the proposal considered in the ultimate award decision. An adequate score in such an area is therefore a minimum requirement for selection…. This approach is frequently used in situations in which the product is subject to testing to establish whether it meets certain requirements outlined in the solicitation.

This method has been used in a number of situations and has been approved by the GAO. See *Integrated Concepts & Research Corp*., Comp. Gen. Dec. B-309803, 2008 CPD ¶ 117 (proper tradeoff of proposal risk, past performance and price among the acceptable technical proposals); *Utility Tool & Trailer, Inc.*, Comp. Gen. Dec. B-310535, 2008 CPD ¶ 1 (proper tradeoff of delivery, small business participation and price among the acceptable technical proposals); *Brewbaker White Sands JV*, Comp. Gen. Dec. B-295582.4, 2005 CPD ¶ 176 (proper tradeoff between past performance and price among the offerors that had submitted acceptable technical proposals); *Sterling Servs., Inc.*, Comp. Gen. Dec. B-286326, 2000 CPD ¶ 208 (proper evaluation of past performance in a "Technically Acceptable - Performance/Price Tradeoff" procurement); and *ECI Telecom, Inc.*, 64 Comp. Gen. 688 (B-218533), 85-2 CPD ¶ 73 (upholding a selection based on a go/no-go evaluation of all technical subfactors). See also *FMB Laundry, Inc.*, Comp. Gen. Dec. B-261837.2, 95-2 CPD ¶ 274, where the protester argued that the RFP was deficient because it failed to specify what weight would be accorded to the technical factors in relation to price. The GAO stated that the fact that relative weight of acceptability versus price was not spelled out was irrelevant because the solicitation did not contemplate gradations in acceptability rankings as it was essentially a go/no-go determination. This procedure has been upheld in a procurement containing a "5000 round service life" requirement, *Smith & Wesson Div., Bangor Punta Corp. v. United States*, 782 F.2d 1074 (1st Cir. 1986), *reh'g and reh'g en banc denied*, *Unpub*. (1986), where a product was excluded from further consideration based on tests of samples that cracked before firing 5,000 rounds. The GAO has approved similar procedures where offerors had an opportunity to correct deficiencies found in initial testing, *Centennial Computer Prods., Inc.*, Comp. Gen. Dec. B-212979, 84-2 CPD ¶ 295.

b. Negotiations After Source Selection

The "alternative source selection procedures" that were identified in the earlier FAR 15.613 were the NASA "source evaluation board" and the DOD "four-step"

procedures for use in contracting for research and development. The essential distinguishing element of these procedures was the selection of the winning offeror before the conduct of negotiations. They are no longer alluded to in the FAR, but they appear to be acceptable procedures in contracting for technically complex work. This is explained in a comment by DOD in its promulgation of proposed revisions to the DFARS to implement the FAR Part 15 rewrite. This comment states at 62 Fed. Reg. 63050, Nov. 26, 1997:

> DFARS guidance on the four-step source selection process and the alternate source selection process have been removed, as the new guidance at FAR 15.101, best value continuum, clearly allows such source selection processes.

For an example of the current use of this procedure, see *Veterans Tech., LLC*, Comp. Gen. Dec. B-310303.2, 2008 CPD ¶ 31.

Under the Four-Step procedure, technical and cost proposals were submitted sequentially. Preselection discussions were conducted only to permit clarification of proposals, restricted best and final offers were solicited and followed by full negotiation with the winner. The major differences in this technique from the conventional competitive negotiation technique was the amount of discussion permitted prior to source selection and the extent of negotiation that occurred after source selection. The major purpose of the Four-Step technique was to select the source based on its original proposal rather than on its proposal as enhanced by discussions. Its fundamental premise was that the most competent contractor was the one submitting the best original proposal. In order to ensure that the government ultimately got the best possible contract, the Four-Step technique permitted full negotiation after source selection where the government agency had the opportunity to press for changes in the winner's proposal as long as they did not alter the basis for the source selection.

The original guidance on the procedure was contained in the 1970 NASA Procurement Directive 70-15, which stated in part:

> In cost-reimbursement type contracts and all research and development contracts, ambiguities and uncertainties in the proposals of such firms shall be pointed out during discussions by the contracting officer, but not deficiencies.

Although the GAO refused to rule that this original NASA procedure was in violation of the statutory requirement for discussions, it did find that it needed clarification, stating in 51 Comp. Gen. 621 (B-173677) (1972) at 622-23:

> We think the propriety of the prohibition in NASA Procurement Directive 70-15 against discussing "deficiencies" must be considered in the light of these problems. We think certain weaknesses,

inadequacies, or deficiencies in proposals can be discussed without being unfair to other proposers. There well may be instances where it becomes apparent during the course of negotiations that one or more proposers have reasonably placed emphasis on some aspect of the procurement different from that intended by the solicitation. Unless this difference in the meaning given the solicitation is removed, the proposers are not competing on the same basis. Similarly, if a proposal is deemed weak because it fails to include substantiation for a proposed approach or solution, in the circumstance where the inadequacy appears to have arisen because of a reasonable misunderstanding of the amount of data called for, we believe the proposer should be given the opportunity, time permitting, to furnish such substantiation. Thus, it seems to us that the prohibition in NASA Procurement Directive 70-15 against discussing "deficiencies" needs clarification.

Subsequently, NASA made minor modifications to the policy. The complete regulatory statement was contained in NFS 18-15.613-71(b)(5):

(ii) Cost-reimbursement contracts and all contracts for research and development.

(A) The contracting officer, in concert with or on behalf of the SEB, will conduct written and/or oral discussions of the effort to be accomplished and the cost of the effort with all offerors determined to be within the competitive range. The discussions are intended to assist the SEB or other evaluators (1) in understanding fully each offeror's proposal and its strengths and weaknesses based upon the individual efforts of each offeror; (2) in assuring that the meanings and the points of emphasis of RFP provisions have been adequately conveyed to the offerors so that all are competing equally on the basis intended by the Government; (3) in evaluating the personnel proposed by each firm; and (4) in presenting a report to the Source Selection Official that makes the discriminations among proposals clear and visible. In this process, prior to contractor selection, the Government's interests are not served by its assuming the role of an information exchange or clearinghouse.

(B) In cost-reimbursement type contracts and all research and development contracts, the contracting officer shall point out instances in which the meaning of some aspect of a proposal is not clear and instances in which some aspects of the proposal failed to include substantiation for a proposed approach, solution, or cost estimate.

(C) However, where the meaning of a proposal is clear and the Board has sufficient information to assess its validity and the proposal contains a weakness which is inherent in an offeror's management, engineering, or scientific judgment, or which is the result of its own lack of competence or inventiveness in preparing its proposal, the contracting officer shall not point out the weaknesses. Discussions are useful in ascertaining the presence or absence of strengths and weaknesses. The possibility that such discussions may lead an offeror to discover that it has a weakness is not a reason for failing to inquire into a matter where the meaning is not clear or where insufficient information is available, since understanding of the meaning and validity of the proposed approaches, solutions, and cost estimates is essential to a sound selection. Offerors should not be informed of the relative strengths or weaknesses of their proposals in relation to those of other offerors.

This guidance was deleted from the regulation in 63 Fed. Reg. 44,408, Aug. 19, 1998.

The GAO commented on the revised procedure in *Sperry Rand Corp.*, 54 Comp. Gen. 408 (B-181460), 74-2 CPD ¶ 276:

The NASA procedure represents one approach to meeting the statutory requirement for written and oral discussions, 10 U.S.C. § 2304(g) [now 10 U.S.C. § 2304(a)]. In part, at least, the underlying rationale is that

> to point out deficiencies during the discussions would compromise the competition, because weaker proposals would be improved, and a leveling effect would occur. To avoid this, discussions are limited to clarification of proposals; after selection, the agency then negotiates the best possible contract on terms most advantageous to the Government. Considered in the abstract, potential conflicts between the procedure and the statutory requirement can be envisioned; for instance, as appears to be contemplated by [the protester], a situation where the discussions are so limited in scope and content that they amount to little more than a ceremonial exercise, with the meaningful discussions transposed almost entirely into the final negotiations stage.

NASA decisions to limit discussions based on this policy were affirmed in *Program Resources, Inc*., Comp. Gen. Dec. B-192964, 79-1 CPD ¶ 281; *Pioneer Contract Servs., Inc*., Comp. Gen. Dec. B-197245, 81-1 CPD ¶ 107; and *Taft Broadcasting Corp*., Comp. Gen. Dec. B-222818, 86-2 CPD ¶ 125. However, discussions were not meaningful where NASA waived a regulation concerning interest rates for one offeror yet failed to inform the other offeror of the waiver during discussions. The GAO held that discussions were required because this was not a question of technical transfusion, *Union Carbide Corp*., 55 Comp. Gen. 802 (B-184495), 76-1 CPD ¶ 134.

DOD adopted a similar procedure for R&D procurements when it developed its Four-Step negotiation process, DFARS 215.613 (pre-rewrite). Step one called for very limited discussions. DFARS 215.613-70(f) provided:

> (2) In conducting step one — (i) Limit discussions to only what is necessary to ensure that both parties understand each other; (ii) Do not tell offerors about deficiencies in their proposals; and (iii) Provide written clarifications to all offerors when it appears the Government's requirements have been misinterpreted.

The regulations concerning Four-Step negotiation did not cite technical transfusion as the reason for limiting discussions. Rather, this limitation on discussions was based on the premise that the competition was fairer if source selection was made on the basis of the initial position of the competitors rather than on their final position, which included modifications suggested or induced by the procuring agency through the process of discussions. The reason for not invoking technical transfusion as the reason for limiting discussions in step one may have been that the regulations anticipated that technical transfusion would take place with the selected offeror in step four. The DOD Four-Step procedure was challenged in *GTE Sylvania, Inc*., 57 Comp. Gen. 715 (B-188272), 77-2 CPD ¶ 422, where the GAO made an extensive analysis of the procedure and concluded that the limited discussions actually conducted met the statutory requirement. For a full evaluation of the Four Step procedure, questioning whether it meets the statutory requirement for discussions, see Smith, *The New "Four Step" Source Selection Procedure: Is the Solution Worse Than the Problem?*, 11 Pub. Ct. L. Rev. 322 (1980).

EPA's version of the Four-Step procedure, PIN 77-15, was challenged in *Roy F. Weston, Inc.*, Comp. Gen. Dec. B-197949, 80-1 CPD ¶ 340. Although the protester contended that the items not brought up in discussion were deficiencies, the GAO stated:

> [W]e think a more accurate description would be that they were the differences in the relative merits of the proposals, as viewed by the [technical evaluation panel]. If they were truly weaknesses or deficiencies, then there would have been an obligation on the part of EPA to discuss the areas with Weston, assuming no danger of technical transfusion, notwithstanding PIN 77-15.

This would appear to indicate that the limitation on discussions in Four-Step procurement will not be permitted in some circumstances.

c. Price-Only Competitive Negotiation

A few agencies have used a competitive negotiation procedure with award to be made to the low-price proposal with no other evaluation factors. The justification for the use of negotiation in such cases has been the need to conduct discussions to ensure that the winning offeror understands the specifications. In *JT Constr. Co.*, Comp. Gen. Dec. B-244404.2, 92-1 CPD ¶ 1, the GAO held that the use of competitive procedures was appropriate because the contracting officer reasonably determined that discussions were necessary in order to gauge offeror understanding of specifications on a renovation project. See also *Claude E. Atkins Enters., Inc.*, Comp. Gen. Dec. B-241047, 91-1 CPD ¶ 42, where the GAO held that negotiation in such circumstances was proper on a contract for renovation of two buildings because of the complexity of the specifications, holding:

> The agency was faced with a complex procurement in which it anticipated possible problems with its specifications. It is clear from the record that one problem was whether the specifications reflected the agency's actual needs. Another was whether offerors could be expected to fully understand what the specifications required. Under these circumstances, we think the contracting officer had a reasonable basis for believing that discussions would be necessary prior to award so that offeror understanding could be gauged (we see no reason why price breakdowns alone, without technical proposals, could not be used for that purpose) and offeror input could be obtained for improving the specifications.
>
> In fact, the record shows that helpful changes to the project requirements, such as modifications to the phasing of the construction, were developed as the result of the discussions. When this is considered against the backdrop of the contracting officer's expected difficulty in receiving accurate pricing from offerors, the past performance problems which arose from misunderstandings about the technical requirements in a sealed bid procurement for a similar project and the problems with A/E firm's specification development efforts, we cannot conclude that the agency's judgment in choosing to use competitive negotiation here was unreasonable.

The use of negotiation procedures without technical/management proposals was also permitted in *Carter Chevrolet Agency, Inc.*, Comp. Gen. Dec. B-228151, 87-2 CPD ¶

584. In this procurement of 19,349 vehicles of different types, the agency used competitive negotiation because it had experienced many problems on past sealed bid procurements — with regard to frequent exceptions to the specification, misunderstandings on statutory price limitations, and problems with model year changes. The GAO seemed to agree that these were valid reasons for using negotiation but based the decision primarily on the fact that competitive bids had not been received on many of the line items on past sealed bid procurements. The decision contains this interesting statement:

> [T]he purpose of the negotiation process is to develop through discussions, if necessary, the contractual terms themselves and thereby to define and frame the terms of a firm's offer…. Here since the specifications were varied, rather than just complicated, and it reasonably could be expected that offerors would propose numerous variations from the specifications for many of the vehicles, we cannot object to GSA's position that discussions were necessary.

See also *Military Base Mgmt., Inc.*, 66 Comp. Gen. 179 (B-224115), 86-2 CPD ¶ 720, where the GAO permitted the use of negotiation procedures without technical/management proposals because the agency had experienced difficulties in the past on sealed bid procurements, stating that it was proper to use negotiation procedures "to insure that a vendor understands just what the agency believes is required by the specifications."

This technique should be used with care because the GAO will carefully analyze its use to ensure that it does not violate the statutory requirement to use sealed bidding when the four statutory factors are present. See 10 U.S.C. § 2304(a)(2) and 41 U.S.C. § 253(a)(2), which states:

> In determining the competitive procedures appropriate under the circumstance, an executive agency —
>
> (A) shall solicit sealed bids if —
>
> (i) time permits the solicitation, submission, and evaluation of sealed bids;
>
> (ii) the award will be made on the basis of price and other price-related factors;
>
> (iii) it is not necessary to conduct discussions with the responding sources about their bids; and
>
> (iv) there is a reasonable expectation of receiving more than one sealed bid; and
>
> (B) shall request competitive proposals if sealed bids are not appropriate under clause (A).

These factors were held to be present in *Racal Corp.*, 70 Comp. Gen. 127 (B-240579), 90-2 CPD ¶ 453, rejecting the use of price-only competitive negotiation in order to conduct discussions, stating at 129:

> The Army asserts that discussions are necessary to ensure that all firms have a complete understanding of the specifications. The agency has failed to demonstrate, however, how it intended to utilize discussions to evaluate the understanding of responding offerors. In this regard, an offeror's understanding is typically reflected in its technical proposal, which the agency did not require in this case. … The agency has not explained how it would otherwise evaluate an offeror's understanding in this procurement.
>
> Instead, the record reflects that the Army is in reality concerned that offerors may not have the capability to produce the canisters…. In this regard, the agency notes that one prior producer went bankrupt and unproven producers have submitted low priced proposals on previous RFPs. On the other hand, except for the bankrupt contractor, only experienced producers, that is, Racal and Mine Safety Appliance Co., have received awards for this item. While the agency's concern that prospective contractors have the capability to perform is legitimate, we think that where no technical proposal is required, an investigation of the offeror's responsibility, using such tools as a preaward survey, is generally the proper mechanism to ameliorate the agency's concerns…. Moreover, sealed bid procedures have a specific mechanism, pre-bid conferences, for the explicit purpose of briefing prospective bidders and explaining complicated specifications. FAR 14.207 (FAC 84-58). Under the circumstances, we find the agency's concerns here, that offerors be capable and understand the requirements, do not support a conclusion that discussions are therefore required.
>
> Nor do we think the agency's other basic reason that negotiated procedures would better allow for possible changes in quantity, delivery schedules, opening dates, etc., serves as a rationale for discussions. Such changes are properly accomplished by an amendment, regardless of the procurement type.

The use of price-only competitive negotiation was also rejected in *Northeast Constr. Co.*, 68 Comp. Gen. 406 (B-234323), 89-1 CPD ¶ 402 (repair and improvement project is routine construction project where there is no need to have discussions to ensure understanding of specifications); and *ARO Corp.*, Comp. Gen. Dec. B-227055, 87-2 CPD ¶ 165 (no need for price discussion to ensure that price is fair and reasonable when item being procured is commercial pump). See also *Knoll North America, Inc.*, Comp. Gen. Dec. B-240234, 93-1 CPD ¶ 26, where the GAO rejected a protester's argument that competitive negotiation should have been used because the specifications were unclear and discussion was needed to work out specification problems.

B. Specifying Mandatory Requirements

In structuring the procurement strategy, the agency must determine which mandatory requirements will be specified. Agencies have frequently included numerous mandatory requirements in their specifications in order to ensure that the contractor would meet their needs. However, there are two significant disadvantages to this procedure. First, the specification of detailed requirements may keep the agency from obtaining the most current product or the most effective service. This was discussed in detail in the consideration of the specification in Chapter 1.

The second disadvantage of specifying numerous mandatory requirements is the

inflexibility that it introduces into the procurement process. Because a contract may not be awarded to an offeror that does not agree to meet all of the mandatory requirements, the solicitation must be either amended or canceled if an advantageous offer proposes to deviate from such a requirement. See FAR 15.206, which states:

> (a) When, either before or after receipt of proposals, the Government changes its requirements or terms and conditions, the contracting officer shall amend the solicitation.
>
> * * *
>
> (d) If a proposal of interest to the Government involves a departure from the stated requirements, the contracting officer shall amend the solicitation, provided this can be done without revealing to the other offerors the alternate solution proposed or any other information that is entitled to protection (see 15.207(b) and 15.306(e)).
>
> (e) If, in the judgment of the contracting officer, based on market research or otherwise, an amendment proposed for issuance after offers have been received is so substantial as to exceed what prospective offerors reasonably could have anticipated, so that additional sources likely would have submitted offers had the substance of the amendment been known to them, the contracting officer shall cancel the original solicitation and issue a new one, regardless of the stage of the acquisition.

In view of these disadvantages, agencies should specify only their most essential requirements as mandatory. Other specific requirements can be specified as targets, FAR 11.002(e), or for guidance only, FAR 11.002(c). Alternatively, the agency can include a clause in the solicitation providing that failure to meet a mandatory requirement will not preclude award. Flexibility can also be achieved by avoiding the specification of detailed requirements and using performance requirements, FAR 11.002(a) (general guidance), FAR 37.602(b) (performance-based service contracts).

When agencies provide for flexibility in meeting their requirements, award can be made to an offeror that does not meet the requirement without amending the solicitation and informing other offerors of the deviation. See, for example, *Litton Sys., Inc. v. Dep't of Transportation*, GSBCA 12911-P, 94-3 BCA ¶ 27,263, holding that it was proper to award a contract without amending the solicitation to an offeror that had not agreed to meet the contract requirements. The board reached this conclusion because the solicitation stated that exceptions and deviations would not make the proposal automatically unacceptable. Similarly, in *Mantech Telecommunications & Information Sys. Corp. v. United States*, 49 Fed. Cl. 57 (2001), the court found that an experience requirement was not a mandatory minimum requirement because the RFP stated that proposals would be excluded from the competition if *"significant deficiencies"* were identified. See also *Morse-Diesel Int'l , Inc*., Comp. Gen. Dec. B-274499.2, Dec. 16, 1996, *Unpub*., reaching the same conclusion when the solicitation contained the following language:

> Individual deficiencies do not necessarily render the whole proposal unacceptable to the Government. A proposal is considered unacceptable to the Government, as a whole, when it is deficient to the extent that, to allow an offeror to correct those deficiencies would constitute a complete rewrite of the proposal. The determination as to whether a proposal is deficient to that extent is made at the discretion of the Evaluation Board. In making such a determination, the Board will consider such things as the number and severity of the deficiencies.

In deciding whether to provide for such flexibility in the acquisition process, an agency must consider the ramifications for contract performance. Clearly, the flexible specification gives the contractor the power to select the precise manner of performance and an agency order to perform in a different manner will be a contract change for which the agency must provide an equitable adjustment. See, for example, *A.S. McGaughan Co. v. Barram*, 113 F.3d 1256 (Fed. Cir. 1997), where the court reversed GSBCA 13367, 96-1 BCA ¶ 28,261, and held that a constructive change had occurred when the contracting officer ordered the contractor to comply with a requirement that was noted on the drawings as "suggested" and "for design intent only." On the other hand, the government will less likely be subject to claims for defective specifications when it uses flexible specifications. See, for example, *Intercontinental Mfg. Co. v. United States*, 4 Cl. Ct. 591 (1984), where the court rejected a defective specification claim because the contractor had chosen the manufacturing processes used to meet the specifications. The court stated the general rule pertaining to performance specifications as follows at 595:

> [T]he planned methods of manufacture were of the contractor's own choosing and no representations as to their suitability had been made by the Government. In such a situation then, a case for defective specifications could exist only if performance had proven impossible, either actually or from a standpoint of commercial impracticability (i.e., commercial senselessness). Short of these extremes, however, the risk of unanticipated performance costs remains upon the contractor's shoulders alone.

For a complete discussion of the ramifications of using flexible specifications in the context of contract performance see Chapters 3 and 4 of Cibinic, Nagle & Nash, *Administration of Government Contracts* (4th ed. 2006).

C. Techniques for Limiting the Number of Competitors

Another issue that should be addressed in formulating the procurement strategy is whether a procedure that limits the number or type of competitors should be used. When an agency believes that it will receive a large number of proposals, such a procedure can be an effective way of initially screening the offerors to ensure that only those that are fully qualified participate in the competition. This saves the less qualified

companies from incurring the proposal preparation costs and reduces the administrative burden on the agency from having to evaluate large numbers of proposals.

The legal authority to prevent offerors from competing on later stages of competitively negotiated procurement has been the subject of considerable contention. The early drafts of the FAR rewrite that were published for comment contained a proposed rule on a mandatory multistep procurement process, but the rule was criticized because it required almost full proposals in the first step. As a result, the final rule issued in FAC 97-02, Sept. 30, 1997, contained no provision on mandatory multistep procurement — only a provision on voluntary multistep procurement. Nonetheless, there are a number of procedures permitting a mandatory multistep process, and there are indications that some agencies have used mandatory multistep procedures in the course of conducting competitive negotiations. This section will consider the new advisory (voluntary) multistep procedure and the mandatory multistep procedures that are identified in statutes or regulations.

1. Advisory Multistep Procedure

The FAR rewrite added the following procedure in FAR 15.202:

> Advisory multi-step process.
>
> (a) The agency may publish a presolicitation notice (see 5.204) that provides a general description of the scope or purpose of the acquisition and invites potential offerors to submit information that allows the Government to advise the offerors about their potential to be viable competitors. The presolicitation notice should identify the information that must be submitted and the criteria that will be used in making the initial evaluation. Information sought may be limited to a statement of qualifications and other appropriate information (e.g., proposed technical concept, past performance, and limited pricing information). At a minimum, the notice shall contain sufficient information to permit a potential offeror to make an informed decision about whether to participate in the acquisition. This process should not be used for multi-step acquisitions where it would result in offerors being required to submit identical information in response to the notice and in response to the initial step of the acquisition.
>
> (b) The agency shall evaluate all responses in accordance with the criteria stated in the notice, and shall advise each respondent in writing either that it will be invited to participate in the resultant acquisition or, based on the information submitted, that it is unlikely to be a viable competitor. The agency shall advise respondents considered not to be viable competitors of the general basis for that opinion. The agency shall inform all respondents that, notwithstanding the advice provided by the Government in response to their submissions, they may participate in the resultant acquisition.

This procedure can be an effective way to eliminate potential competitors that do not have the qualifications to perform the work. However, to be used successfully, the agency must make a reasoned assessment of the minimum qualifications required for the contract and of the qualifications of each potential offeror. Although the regulation calls

for written advice of the agency assessment, agencies should consider meeting with companies that are found to be unqualified in order to explain the decision fully.

An agency cannot turn this into an involuntary downselect procedure, *Kathpal Techs., Inc*., Comp. Gen. Dec. B-283137.3, 2000 CPD ¶ 6 (agency improperly excluded qualified offeror from making an oral presentation as called for by the RFP without considering price). An example of use of this procedure is found in *Spherix, Inc*., Comp. Gen. Dec. B-294572, 2005 CPD ¶ 3 (three of ten companies found qualified but protest of one granted for defects in conducting competition).

2. Prequalification

Prequalification of offerors has been a controversial subject because it has the appearance of avoiding the full and open competition requirement. However, it was formally recognized by Congress in 1984, shortly after the passage of the CICA, with the enactment of 41 U.S.C. § 253c and 10 U.S.C. § 2319. These statutes provide that before enforcing any prequalification requirement with regard to a firm or a product, the head of the contracting agency must (1) demonstrate in writing a need for establishing the requirement; (2) specify all requirements that must be satisfied to become qualified in the least restrictive manner possible in the circumstances; (3) specify an estimate of the costs of testing and evaluation likely to be incurred by a potential offeror in order to become qualified; (4) ensure that prospective contractors are given a prompt opportunity to demonstrate their ability to meet the requirement; and (5) ensure that a potential offeror seeking qualification is promptly informed as to whether qualification is attained and, if not attained, is promptly furnished specific information explaining the outcome. These requirements are implemented in FAR Subpart 9.2. Neither the regulation nor the statutes contain any guidance as to the situations that can justify the necessity for qualification requirements.

These statutes authorize greater use of prequalification procedures than had been authorized prior to 1984. See *Vac-Hyd Corp.*, 64 Comp. Gen. 658 (B-216840), 85-2 CPD ¶ 2, commenting that although the applicable prequalification statute was not yet applicable to the procurement being protested, it "establishes a framework for future procurements." In *Vac-Hyd*, the GAO stated that the protested prequalification process for jet engine repair contracts was proper because it

> serves a bona fide need of the government — that is, it ensures a high level of maintenance on a critical aircraft part — yet it also allows nonapproved sources to submit proposals and become qualified.

However, the GAO criticized the way the agency had implemented the prequalification procedure because it had not given the protester sufficient opportunity to become qualified. Compare *Advanced Seal Tech., Inc*., Comp. Gen. Dec. B-400088, 2008 CPD ¶ 137 (five days reasonable time to qualify product); *CM Mfg., Inc*., Comp. Gen. Dec. B-293370, 2004 CPD ¶ 69 (reasonable opportunity given by placing requirements in procurement notice); and *Newguard Indus., Inc*., Comp. Gen. Dec. B-257052, 94-2 CPD ¶ 70 (reasonable opportunity given by notification that item did not meet agency requirements).

Award of a long-term contract to the only prequalified source is improper when another source is in the process of qualifying, *Barnes Aerospace Group*, B-298864, 2006 CPD ¶ 217 (two year contract with three one-year options).

Prequalification procedures have been approved for repair and alteration of nuclear ships, *Southwest Marine, Inc*., Comp. Gen. Dec. B-225559, 87-1 CPD ¶ 431; production of films and videos, *Video Educ. Television*, Comp. Gen. Dec. B-248596, May 19, 1992, *Unpub*.; and ship dismantling under master ship repair contracts, *Stevens Tech. Servs., Inc.*, Comp. Gen. Dec. B-250515.2, 93-1 CPD ¶ 385.

FAR 9.202 sets forth a number of procedures that an agency must follow to prequalify sources:

> (a)(1) The head of the agency or designee shall, before establishing a qualification requirement, prepare a written justification —
>
> > (i) Stating the necessity for establishing the qualification requirement and specifying why the qualification requirement must be demonstrated before contract award;
> >
> > (ii) Estimating the likely costs for testing and evaluation which will be incurred by the potential offeror to become qualified; and
> >
> > (iii) Specifying all requirements that a potential offeror (or its product) must satisfy in order to become qualified. Only those requirements which are the least restrictive to meet the purposes necessitating the establishment of the qualification requirements shall be specified.
>
> (2) Upon request to the contracting activity, potential offerors shall be provided —
>
> > (i) All requirements that they or their products must satisfy to become qualified;
> >
> > (ii) At their expense (but see 9.204(a)(2) with regard to small businesses), a prompt opportunity to demonstrate their abilities to meet the standards specified for qualification using qualified personnel and facilities of the agency concerned, or of another agency obtained through interagency agreements, or under contract, or other methods approved by the agency (including use of approved testing and evaluation services not provided under contract to the agency).
>
> (3) If the services in (a)(2)(ii) above are provided by contract, the contractors selected to provide testing

and evaluation services shall be —

(i) Those that are not expected to benefit from an absence of additional qualified sources; and

(ii) Required by their contracts to adhere to any restriction on technical data asserted by the potential offeror seeking qualification.

(4) A potential offeror seeking qualification shall be promptly informed as to whether qualification is attained and, in the event it is not, promptly furnished specific reasons why qualification was not attained.

These prequalification procedures must be carefully followed. See *Stevens Tech. Servs., Inc.*, Comp. Gen. Dec. B-250515.2, 93-1 CPD ¶ 385, ruling that the protester was entitled to have the agency's determination that it was not a qualified contractor referred to the SBA in order to obtain a Certificate of Competency. The GAO reached this conclusion because the factors evaluated by the agency were the normal responsibility factors and did not include any of the exceptions in FAR 9.202(d) such as special testing requirements or quality assurance demonstrations. In *Digicomp Research Corp.*, Comp. Gen. Dec. B-262139, 95-2 CPD ¶ 246, the GAO held that the prequalification statutes, including all their procedural requirements, are applicable to procurements where the agency has justified limited competition rather than full and open competition.

FAR 9.206-2 requires that agencies include the Qualification Requirements clause in FAR 52.209-1 in all procurements subject to a qualification requirement. If this clause is not expressly incorporated in the solicitation, an agency may not enforce any qualification provisions, *Warren Pumps, Inc.*, Comp. Gen. Dec. B-258710, 95-1 CPD ¶ 79, *recons. denied*, 95-2 CPD ¶ 20 (inclusion of qualification requirement in specification not controlling when FAR clause omitted from solicitation); *Comspace Corp.*, Comp. Gen. Dec. B-237794, 90-1 CPD ¶ 217 (offer of product not meeting qualification requirement improperly rejected when only such requirement was in specifications). Furthermore, the absence of this clause is a clear indication that no such requirement pertains to the procurement, *Gentex Corp.*, Comp. Gen. Dec. B-271381, 96-1 CPD ¶ 281, *recons. denied*, 96-2 CPD ¶ 88.

Prior to 1984, prequalification of offerors — the limiting of competitors to those firms that had been determined to be responsible prior to the solicitation — had been held by the GAO to be a restriction on competition. See 53 Comp. Gen. 209 (B-178624) (1973), stating at 211:

It is the cornerstone of the competitive system that bids and/or proposals be solicited in such a manner as to permit the maximum amount of competition consistent with the nature and extent of the services or items being procured. Any establishment of presolicitation procedures for determining a prospective bidder's /offeror's responsibility whether relating to the manner of manufacture or capability to manufacture, is a

> restriction of full and free competition [the pre-CICA standard]. The question to be answered concerning the validity of the procedure is not whether it restricts competition per se, but whether it unduly restricts competition.
>
> * * *
>
> While determinations concerning a contractor's responsibility must be made before contract award, we have not ordinarily sanctioned such determinations prior to bid opening since to do so might foreclose the receipt of proposals from responsible contractors of whom the procurement agency is not aware. Thus, in the usual case, such prebid opening determinations have been considered as unduly restricting competition within the meaning of the statutes governing competition.

Following this reasoning, the GAO ruled that prequalification procedures were improper in contracts for restoration of historic buildings, 52 Comp. Gen. 569 (B-176940) (1973); supply of aircraft parts, *D. Moody & Co.*, 55 Comp. Gen. 1 (B-180732), 75-2 CPD ¶ 1; and operation of a sonobuoy test program, *VAST, Inc.*, Comp. Gen. Dec. B-182844, 75-1 CPD ¶ 71. None of these cases directly addressed the issue of whether there was a compelling agency need for prequalification. In *Dep't of Agriculture's Use of Master Agreement*, 54 Comp. Gen. 606 (B-182337), 75-1 CPD ¶ 50, the GAO ruled that mere administrative convenience was not a valid reason for the use of prequalification procedures. In that case the agency had used a system of prequalifying the 10 most qualified companies for each type of consulting services being procured. The GAO noted that this was considerably more restrictive than a system that prequalified all qualified firms. In *Dep't of Agriculture's Use of Master Agreements*, 56 Comp. Gen. 78 (B-182337), 76-2 CPD ¶ 390, the GAO approved modified prequalification procedures, awarding a master agreement to all qualified firms, on the grounds that this would enhance competition by permitting more firms to compete than the alternative of awarding a single requirements contract for the consulting services.

In spite of the general view that prequalification was restrictive, a number of prequalification systems were approved before 1984 as not being unduly restrictive. For example, prequalification of film and videotape producers was approved to permit more meaningful evaluation of offerors, *John Bransby Productions, Ltd.*, Comp. Gen. Dec. B-198360, 80-2 CPD ¶ 419, and prequalification of production lines for microcircuitry by NASA was also approved on the basis that such prequalification was necessary to assure a continuous supply of these items under stringent quality requirements, 50 Comp. Gen. 542 (B-171597) (1971). The GAO also permitted the Navy to require contractors to have or be eligible for a master ship repair contract (MSRC), which is a certification of responsibility, in order to receive an award, *Carolina Drydocks, Inc.*, Comp. Gen. Dec. B-218186.2, 85-1 CPD ¶ 629; *Fairburn*

Marine Aviation, Comp. Gen. Dec. B-187062, 76-2 CPD ¶ 523. The GAO in *Carolina Drydocks* upheld a determination that the protester would not qualify for an MSRC. The determination was based on a survey revealing inadequate facilities and organization. Prequalification was also approved for use in the cut-make-and-trim industry where the agency demonstrated that reputable firms would not submit bids under normal sealed bidding conditions, Comp. Gen. Dec. B-135504, May 2, 1958, *Unpub.* See Lieblich, *Bidder Prequalifications: Theory in Search of Practice*, 5 Pub. Cont. L.J. 32 (1972).

The lack of fair prequalification procedures was the basis for sustaining a protest in *Algonquin Parts, Inc.*, 60 Comp. Gen. 361 (B-198464), 81-1 CPD ¶ 270. In that case the GAO stated that the Navy failed to institute formal qualification procedures for a known supplier or to act in conjunction with the Air Force in its qualification process of the same supplier for similar parts.

Prequalification has also been permitted by other statutes. See, for example, 10 U.S.C. § 2865, permitting prequalification of contractors to enter into shared energy savings contracts at military bases. In *Strategic Resource Solutions Corp.*, Comp. Gen. Dec. B-278732, 98-1 CPD ¶ 74, the GAO ruled that it was proper to restrict the competition to the 1997 list of prequalified companies even though the award was not going to be made until 1998. See also 10 U.S.C. § 2687, permitting prequalification of contractors to enter into contracts for certain environmental restoration activities.

The DOD suggests procurement of replenishment parts only from qualified contractors. DFARS 217.7502(b)(2) provides as follows:

> Replenishment parts must be acquired so as to ensure the safe, dependable, and effective operation of the equipment. Where this assurance is not possible with new sources, competition may be limited to the original manufacturer of the equipment or other sources that have previously manufactured or furnished the parts as long as the action is justified.

An agency may use a basic ordering agreement when procuring replenishment parts. However, when a basic ordering agreement is used in such cases, an agency must have procedures in place for qualifying additional suppliers. See *Rotair Indus.*, 58 Comp. Gen. 149 (B-190392), 78-2 CPD ¶ 410, where the agency used a basic ordering agreement for the procurement of helicopter parts. The protester contended that the procedures used by the Navy in procuring helicopter parts was unduly restrictive of competition. Specifically, the protester asserted that the lack of procedures for qualifying additional suppliers, continued use of restrictive procurement method coding on orders, and failure to publicize orders promptly in the *Commerce Business Daily* resulted in virtually automatic procurement of orders under Sikorsky's basic ordering

agreement on a noncompetitive basis. The GAO agreed and sustained the protest.

3. Multiple Award Task and Delivery Order Contracts

The most common multistep procedure in use at the present time is the issuance of multiple-award task and delivery order contracts. Under a single solicitation, an agency awards separate task or delivery order contracts for the same or similar services or supplies to two or more contractors. Task or delivery orders can then be issued under these contracts through competitive or sole source procedures. However, FAR 16.505(b) states a preference for competition, as follows:

> (1) *Fair opportunity*. (i) The contracting officer must provide each awardee a fair opportunity to be considered for each order exceeding $3,000 issued under multiple delivery-order contracts or multiple task-order contracts, except as provided for in paragraph (b)(2) of this section.
>
> (ii) The contracting officer may exercise broad discretion in developing appropriate order placement procedures. The contracting officer should keep submission requirements to a minimum. Contracting officers may use streamlined procedures, including oral presentations. In addition, the contracting officer need not contact each of the multiple awardees under the contract before selecting an order awardee if the contracting officer has information available to ensure that each awardee is provided a fair opportunity to be considered for each order and the order does not exceed $5 million. The competition requirements in part 6 and the policies in subpart 15.3 do not apply to the ordering process. However, the contracting officer must -
>
> (A) Develop placement procedures that will provide each awardee a fair opportunity to be considered for each order and that reflect the requirement and other aspects of the contracting environment;
>
> (B) Not use any method (such as allocation or designation of any preferred awardee) that would not result in fair consideration being given to all awardees prior to placing each order;
>
> (C) Tailor the procedures to each acquisition;
>
> (D) Include the procedures in the solicitation and the contract; and
>
> (E) Consider price or cost under each order as one of the factors in the selection decision.
>
> (iii) Orders exceeding $5 million. For task or delivery orders in excess of $5 million, the requirement to provide all awardees a fair opportunity to be considered for each order shall include, at a minimum -
>
> (A) A notice of the task or delivery order that includes a clear statement of the agency's requirements;
>
> (B) A reasonable response period;
>
> (C) Disclosure of the significant factors and subfactors, including cost or price, that the

agency expects to consider in evaluating proposals, and their relative importance;

(D) Where award is made on a best value basis, a written statement documenting the basis for award and the relative importance of quality and price or cost factors; and

(E) An opportunity for a postaward debriefing in accordance with paragraph (b)(4) of this section.

(iv) The contracting officer should consider the following when developing the procedures:

(A)(1) Past performance on earlier orders under the contract, including quality, timeliness and cost control.

(2) Potential impact on other orders placed with the contractor.

(3) Minimum order requirements.

(4) The amount of time contractors need to make informed business decisions on whether to respond to potential orders.

(5) Whether contractors could be encouraged to respond to potential orders by outreach efforts to promote exchanges of information, such as -

(i) Seeking comments from two or more contractors on draft statements of work;

(ii) Using a multiphased approach when effort required to respond to a potential order may be resource intensive (e.g., requirements are complex or need continued development), where all contractors are initially considered on price considerations (e.g., rough estimates), and other considerations as appropriate (e.g., proposed conceptual approach, past performance). The contractors most likely to submit the highest value solutions are then selected for one-on-one sessions with the Government to increase their understanding of the requirements, provide suggestions for refining requirements, and discuss risk reduction measures.

(B) Formal evaluation plans or scoring of quotes or offers are not required.

(2) *Exceptions to the fair opportunity process*. The contracting officer shall give every awardee a fair opportunity to be considered for a delivery-order or task-order exceeding $3,000 unless one of the following statutory exceptions applies:

(i) The agency need for the supplies or services is so urgent that providing a fair opportunity would result in unacceptable delays.

(ii) Only one awardee is capable of providing the supplies or services required at the level of quality required because the supplies or services ordered are unique or highly specialized.

(iii) The order must be issued on a sole-source basis in the interest of economy and efficiency because it is a logical follow-on to an order already issued under the contract, provided that all awardees were given a fair opportunity to be considered for the original order.(iv) It is necessary to place an order to satisfy a minimum guarantee.

This is a multistep procedure because the government can effectively limit the number of competitors by issuing orders only to competitors with those awarded contracts. In addition, 10 U.S.C. § 2304c(e) and 41 U.S.C. § 253j(e) preclude protesting

of the issuance of task or delivery orders of $10 million or less except "on the ground that the order increases the scope, period, or maximum value of the contract under which the order is issued." The issuance of task or delivery orders over $10 million can be protested to the GAO only.

The GAO has granted protests when a task or delivery order was, in effect, a "downselect" for the balance of the agency's needs. See *OTI America, Inc.*, Comp. Gen. Dec. B-295455.3, 2005 CPD ¶ 157, stating:

> Where … an agency uses parallel contracts for the development and production of products to conduct a competition among the contractors resulting in the elimination of one or more contractors as sources for the agency's requirements for the duration of the contracts in question, we will consider protests concerning that competition and the decisions to eliminate contractors. *Electro-Voice, Inc*., B-278319, B-278319.2, Jan. 15, 1998, 98-1 CPD ¶ 23 at 5; *Fermont Div., Dynamics Corp. of Am.*, B-257373.3, et al., Dec. 22, 1995, 96-1 CPD ¶ 78 at 1-2 n.1; *Mine Safety Appliances Co.*, B-238597.2, July 5, 1990, 90-2 CPD ¶ 11 at 4; see *Westinghouse Elec. Corp*., B-189730, Mar. 8, 1978, 78-1 CPD ¶ 181 at 6. In the above cited cases, there was a "downselection" of a contractor based on a limited competition among the contract holders, as contemplated by the terms of the parallel contracts, and this downselection was implemented by issuing or not issuing delivery orders under the contracts, or exercising or not exercising contract options.

The Court of Federal Claims has followed this reasoning in taking jurisdiction of downselect protests of the issuance of task or delivery orders, *OTI America, Inc. v. United States*, 68 Fed. Cl. 108 (2005). Compare the court's narrow view of its jurisdiction in *A&D Fire Protection, Inc. v. United States*, 72 Fed. Cl. 126 (2006). See also *Global Communications Solutions, Inc*., Comp. Gen. Dec. B-291113, 2002 CPD ¶ 194 (changing basis for selecting low price on contract line items to be procured from single contractor an improper downselect); *Teledyne-Commodore, LLC*, Comp. Gen. Dec. B-278408.4, 98-2 CPD ¶ 121 (task order being competed was for all work contemplated by base contract). Most protests of this nature have been denied because the GAO found that the order did not constitute a downselect, *L-3 Communications Co.*, Comp. Gen. Dec. B-295166, 2004 CPD ¶ 245 (order calling for design of product and stating that agency "may" order additional items left room for future competition); *Professional Performance Dev. Group, Inc*., Comp. Gen. Dec. B-294054.3, 2004 CPD ¶ 191 (setting aside some work for small contractors not a downselect when large companies would be allowed to compete for other work); *Intrados Group*, Comp. Gen. Dec. B-280130, 98-1 CPD ¶ 168 (protester had successfully competed on prior task orders and would be able to compete for other task orders under the contract).

The statutes provide that agencies must provide an alternate procedure to ensure that orders are issued fairly by establishing "ombudsmen" to hear complaints regarding task or delivery orders. See FAR 16.505(b)(6) stating:

> The head of the agency shall designate a task-order and delivery-order ombudsman. The ombudsman must review complaints from contractors and ensure they are afforded a fair opportunity to be considered, consistent with the procedures in the contract. The ombudsman must be a senior agency official who is independent of the contracting officer and may be the agency's competition advocate.

The use of task and delivery order contracts as multistep procedures has been significantly enlarged in recent years by statutory provisions permitting multiple agencies to order from contracts issued by a single agency. See Chapter 8. However, these "government-wide agency contracts" and "multiple agency contracts" generally are awarded to a large number of contractors with the result that do not restrict the competition to the extent that occurs with some multiple award contracts issued for use by a single agency.

4. Award of Program Definition Contract

For many years the military services have awarded multiple contracts to define programs and have limited future competition to those companies or teams that have performed a program definition contract. Paragraph 1.4.3 of DOD Regulation 5000.2-R, *Mandatory Procedures for Major Defense Acquisition Programs (MDAPs) and Major Automated Information System (MAIS) Acquisition Programs* (Mar. 15, 1996), contained the following description of the work to be done on such a contract:

> During this phase, the program shall become defined as one or more concepts, design approaches, and/or parallel technologies are pursued as warranted. Assessments of the advantages and disadvantages of alternative concepts shall be refined. Prototyping, demonstrations, and early operational assessments shall be considered and included as necessary to reduce risk so that technology, manufacturing, and support risks are well in hand before the next decision point. Cost drivers, life-cycle cost estimates, cost-performance trades, interoperability, and acquisition strategy alternatives shall be considered to include evolutionary and incremental software development.

This regulation was replaced by DOD Instruction 5000.02, *Operation of the Defense Acquisition System* (Dec. 8, 2008), which replaces this phase with a "technology development phase" where contracts are to be awarded to "two or more competing teams producing prototypes of the system and/or key system elements." The instruction contains no guidance on whether other contractors will be permitted to compete for the following "engineering and manufacturing development" phase but prior practice would indicate that competition for that contract is likely to be limited to the contractors in the technology phase.

In *Hughes Missile Sys. Co.*, Comp. Gen. Dec. B-272418, 96-2 CPD ¶ 221, Hughes protested the award of a contract for the definition and development of the joint air-to-

surface standoff missile to Lockheed Martin and McDonnell Douglas. The solicitation contemplated the award of two cost-plus-fixed-fee contracts for a 24-month program definition and risk reduction (PDRR) phase, which would include priced options for a follow-on cost-plus-incentive-fee engineering, management and development phase, to be exercised on the basis of a downselect competition between the two PDRR contractors. Hughes contended that the agency did not adequately consider the complexity of the products being developed or procured when evaluating past cost/schedule performance and arriving at an overall rating. The GAO denied the protest, finding that the offerors were advised that the agency viewed program similarity as more important than product similarity. See also *Gentex Corp. - Western Operations*, Comp. Gen. Dec. B-291793, 2003 CPD ¶ 66, and *Gentex Corp. v. United States*, 58 Fed. Cl. 634 (2003), holding it was proper to allow a subcontractor on one of the two teams that had the PDRR contract to assume the role of lead contractor on the competition for the follow-on contract.

5. Two-Phase Design-Build Procedure

Traditionally, the federal government has obtained new buildings and other civil works by contracting with an architect/engineering firm (A/E) for design of the project, soliciting competitive bids or proposals for the construction of the project, and awarding a contract to the successful offeror. This is known as the design-bid-build delivery system. Although this system has worked well, it is relatively slow, and it separates design responsibility from construction responsibility. The system has been criticized for not bringing sufficient consideration of constructibility into the design process and for subjecting the government to claims of the construction contractor for design defects. In using detailed construction drawings, the government is liable to the contractor on a standard that approaches strict liability, yet its claim against the A/E for defective design is generally judged by a standard of negligence.

In order to overcome these problems, federal agencies such as the Postal Service, the General Services Administration, and the Army Corps of Engineers began to use a design-build delivery system where the tasks of both design and construction were combined into a single contract. This was done using the standard competitive negotiation process with extensive technical proposals. See the General Services Administration publication "Design-Build Request for Proposals Guide" (Nov. 1991) and the Corps of Engineers publication "Design-Build Instructions for Military Construction" (Sept. 26, 1994). This procedure placed a heavy burden on offerors because the agency frequently required extensive design work as a part of the

competitive proposal.

Section 4105 of the Clinger-Cohen Act of 1996 amended 10 U.S.C. § 2305a and 41 U.S.C. § 253m to include new design-build selection procedures. This section of the Act establishes a series of new acquisition rules — known as two-phase selection procedures — that must be followed when an agency decides to use the design-build delivery system and concludes that extensive design proposals will be required. The regulatory implementation adds a new FAR Subpart 36.3.

The following statement on when the new procedure should be used is set forth in 10 U.S.C. § 2305a:

> Authorization — Unless the traditional acquisition approach of design-bid-build established under the Brooks Architect-Engineers Act (41 U.S.C. § 541 et seq.) is used or another acquisition procedure authorized by law is used, the head of an agency shall use the two-phase selection procedures for entering into a contract for the design and construction of a public building, facility, or work when a determination is made that the procedures are appropriate for use.

Almost identical language is used in 41 U.S.C. § 253m. FAR 36.104 uses virtually the same language but includes the following sentence:

> Other acquisition procedures authorized by law include the procedures established in this part and other parts of this chapter and, for DOD, the design-build process described in 10 U.S.C. § 2862.

Thus, there are essentially two delivery systems for construction projects — design-bid-build and design-build. If design-bid-build is chosen, the design effort must be done using the Brooks Act procedures. Thereafter, the construction can be procured using sealed bidding, negotiation, or construction management. If design-build is chosen, either a one-step or two-step procedure may be used. The one-step procedure would follow normal competitive negotiation procedures. The two-step procedure would follow this new statutory two-phase procedure.

Contracting officers must consider the following criteria set forth in 10 U.S.C. § 2305a and 41 U.S.C. § 253m to determine whether the two-phase procedure is appropriate:

> Criteria for use — A contracting officer shall make a determination whether two-phase selection procedures are appropriate for use for entering into a contract for the design and construction of a public building, facility, or work when the contracting officer anticipates that three or more offers will be received for such contract, design work must be performed before an offeror can develop a price or cost proposal for such contract, the offeror will incur a substantial amount of expense in preparing the offer, and the contracting officer has considered information such as the following:
>
> (1) The extent to which the project requirements have been adequately defined.

(2) The time constraints for delivery of the project.

(3) The capability and experience of potential contractors.

(4) The suitability of the project for use of the two-phase selection procedures.

(5) The capability of the agency to manage the two-phase selection process.

(6) Other criteria established by the agency.

These criteria are repeated in FAR 36.301(b). The key criteria are the requirement for design work and the resulting incurrence of cost by offerors. If extensive design work will be required with commensurate high proposal costs, the two-phase design-build procedure should be used. If little design work or proposal costs will be required, the normal competitive negotiation procedure will likely be the most efficient procedure.

Even though capability criteria are used to select the Phase 1 contractors, they may also be used again in making the final source selection of the Phase 2 contractor, *Hines/Mortenson*, Comp. Gen. Dec. B-256543.4, 94-2 CPD ¶ 67. Challenges to the criteria used to select the competing contractors have been rejected, *King Constr. Co.*, Comp. Gen. Dec. B-298276, 2006 CPD ¶ 110 (experience in constructing buildings of the same type); *Parcel 47C LLC*, Comp. Gen. Dec. B-286324, 2001 CPD ¶ 44 (control of site to construct leased building). However, the GAO has agreed that it is proper to exclude a contractor from the competition because it has an organizational conflict of interest from drafting the specification and preparing the budget estimate, *SSR Eng'rs , Inc.*, Comp. Gen. Dec. B-282244, 99-2 CPD ¶ 27 (rejecting the argument that FAR 36.302 precludes the application of the OCI rules because it allows the use of contractors to perform these tasks).

Some agencies have awarded multiple award IDIQ contracts for smaller design-build projects. See, for example, holding that it is improper to select such contractors using fixed labor rates, *S. J. Thomas Co.*, Comp. Gen. Dec. B-283192, 99-2 CPD ¶ 73, holding that it is improper to use fixed labor rates, without an estimated quantity of labor, as the evaluation criteria.

6. Federal Aviation Administration Screening Procedure

The Federal Aviation Administration has adopted a multistep procedure as its basic procurement procedure for complex and noncommercial acquisitions. This was

done under Pub. L. No. 104-50, which exempted the Federal Aviation Agency (FAA) from the Federal Property and Administrative Services Act, as well as a number of other designated statutes. As a result, on April 1, 1996, the FAA issued the *Federal Aviation Administration Acquisition Management System* (*AMS*), a separate procurement regulation. The AMS was issued in June 1997 and has been revised several times - the last revision being in October 2008. It is not published in the Federal Register but is available at http://fast.faa.gov/.

The AMS has a "Complex and Noncommercial Source Selection" process that is used for complex, large-dollar, developmental, and noncommercial items and services. Under AMS 3.2.2.3, there are five phases in the process:

Planning

Screening

Selection

Debriefing (as requested); and

Lessons learned

The screening process is the multistep procedure used by the FAA. A screening information request (SIR) is a request by the FAA for documentation, information, presentations, proposals, or binding offers. Once the public announcement has been released, the SIR may be released to start the competitive process, AMS 3.2.2.3.1.2.1. The number of distinct screening steps for a particular procurement will vary depending on the complexity of the procurement. Three categories of SIRs may be used according to the procurement strategy adopted by the procurement team: (1) qualification information, (2) screening information, and (3) requests for offers, AMS 3.2.2.3.1.2.1.

Qualification information is be used to qualify vendors and establish qualified vendor lists (QVLs). It should be used only if it is intended that the resultant QVL will be used for multiple FAA procurements. Requested qualification information should be tailored to solicit information that will allow the FAA to make a determination as to which vendors meet the FAA's minimum qualification requirements for the required products or services. The qualification information is evaluated in accordance with the evaluation plan. A QVL will then be established for the given product or service. Once the list is established, only qualified vendors may compete for the products or services. This list can be updated at the FAA's discretion.

The second category of SIR calls for screening information, AMS 3.2.2.3.1.2.1.

This category allows the FAA to determine which offerors will provide the FAA with the best value. This SIR focuses on information that directly relates to the key discriminators for the procurement. Types of information that may form the basis of a screening request include equipment/products for FAA testing, capability statements, draft/model contracts, technical proposals (including oral presentations, if appropriate), commercial pricing information, financial information, cost or price information, and cost or price proposals, AMS 3.2.2.3.1.2.1. Each SIR requesting screening information must include some cost or pricing information appropriate to the specific SIR level of detail, AMS 3.2.2.3.1.2.1.

The last category of SIR is the request for offer, which is a request for an offeror to commit formally to provide the products or services required by the acquisition, AMS 3.2.2.3.1.2.1. The response to the request for offer is a binding offer and will become a binding contract if signed by the contracting officer, AMS 3.2.2.3.1.2.1. The request for offer may take the form of a formal solicitation, a proposed contract, or a purchase order.

III. EVALUATION FACTORS AND SUBFACTORS

The selection of the evaluation factors and subfactors that will be used for the procurement is a critical part of source selection planning. Evaluation factors and sub-factors describe the matters that are to be considered in determining which proposal will be most advantageous to the government. In selecting the factors and subfactors, the agency should include those elements of the procurement that are critical to the selection of the source offering the best value but, at the same time, should limit the number of factors to permit the evaluation process to be completed in a short period of time — in most cases in one or two weeks and rarely longer than a month. Limiting the number of factors also permits the agency to focus on the key issues in making the source selection, whereas the use of a large number of factors and subfactors tends to obscure the importance of key issues. Striking this balance is difficult, but it must be accomplished to conduct an effective competitively negotiated procurement.

FAR 15.304 provides only minimal general guidance on the selection of evaluation factors:

> (a) The award decision is based on evaluation factors and significant subfactors that are tailored to the acquisition.
>
> (b) Evaluation factors and significant subfactors must —
>
> (1) Represent the key areas of importance and emphasis to be considered in the source selection

decision; and

(2) Support meaningful comparison and discrimination between and among competing proposals.

While this general guidance is imprecise, it does provide a degree of assistance in selecting an appropriate number of evaluation factors. First, it indicates that the decision on the evaluation factors to be used should be made on each source selection. Thus, ¶ (a) calls for "tailoring" the factors to the acquisition. This precludes merely using the same factors that have been used in the past on similar acquisitions and suggests a new analysis for each new source selection. Second, ¶ (b)(1) calls for factors that focus on "key areas of importance" - with the implication that only major areas of importance should be evaluated. In following this guidance, contracting officers must point out to the other members of the acquisition team that, as a general proposition, *all* key areas of importance will be included in the specifications as mandatory requirements. Thus, when the contract is awarded, the contractor will be obligated to meet these requirements. Since this is the case, there is no necessity to evaluate all of the key areas of importance - only the major areas need be evaluated. This proposition is reinforced by ¶ (b)(2) requiring evaluation factors to "support meaningful comparison and discrimination." This required the acquisition team to review past acquisitions of the same or similar products or services to ascertain which evaluation factors have actually discriminated among the competitors. When it is found that a factor has not served this purpose - with the competitors being given similar scores or ratings - that factor should not be used in the new procurement. Following this analytical process, the acquisition team should be able to select a small number of evaluation factors that permit award to the offeror that will provide the best value to the government.

Neither the statutes nor the FAR deal coherently with the classification of evaluation factors. However, they both describe evaluation factors in two categories: price or cost to the government, and non-price factors. From this perspective, non-price factors identify those elements of a tradeoff process procurement for which the agency is willing to pay a higher price. All such non-price factors are lumped together under the broad category "quality of the product or services." See 10 U.S.C. § 2305(a)(3)(A)(i) and 41 U.S.C. § 253a(c)(1)(A) specifying evaluation of the "quality of the product or services to be provided (including technical capability, management capability, prior experience, and past performance of the offeror)." FAR 15.304(c) contains this same classification, expanding on the quality factor and adding past performance and other factors:

The evaluation factors and significant subfactors that apply to an acquisition and their relative importance are within the broad discretion of agency acquisition officials, subject to the following requirements:

(1) Price or cost to the Government shall be evaluated in every source selection (10 U.S.C. 2305(a)(3)(A)(ii) and 41 U.S.C. 253a(c)(1)(B)) (also see part 36 for architect-engineer contracts);

(2) The quality of the product or service shall be addressed in every source selection through consideration of one or more non-cost evaluation factors such as past performance, compliance with solicitation requirements, technical excellence, management capability, personnel qualifications, and prior experience (10 U.S.C. 2305(a)(3) (A)(i) and 41 U.S.C. 253a(c) (1)(A)); and

(3)(i) Except as set forth in paragraph (c)(3)(iii) of this section, past performance shall be evaluated in all source selections for negotiated competitive acquisitions expected to exceed the simplified acquisition threshold.

(ii) For solicitations involving bundling that offer a significant opportunity for subcontracting, the contracting officer must include a factor to evaluate past performance indicating the extent to which the offeror attained applicable goals for small business participation under contracts that required subcontracting plans (15 U.S.C. 637(d)(4)(G)(ii)).

(iii) Past performance need not be evaluated if the contracting officer documents the reason past performance is not an appropriate evaluation factor for the acquisition.

(4) The extent of participation of small disadvantaged business concerns in performance of the contract shall be evaluated in unrestricted acquisitions expected to exceed $550,000 ($1,000,000 for construction) subject to certain limitations (see 19.201 and 19.1202).

(5) For solicitations involving bundling that offer a significant opportunity for subcontracting, the contracting officer must include proposed small business subcontracting participation in the subcontracting plan as an evaluation factor (15 U.S.C. 637(d)(4)(G)(I)).

(6) If telecommuting is not prohibited, agencies shall not unfavorably evaluate an offer that includes telecommuting unless the contracting officer executes a written determination in accordance with FAR 7.108(b).

This regulation emphasizes the long-standing rule of the GAO that agencies have broad discretion in selecting the factors and in determining their relative importance. See *Augmentation, Inc*., Comp. Gen. Dec. B-186614, 76-2 CPD ¶ 235, stating:

> [I]t is well settled that a determination of an agency's minimum needs and the selection and weights of evaluation criteria to be used to measure how well offerors will meet those needs are within the broad discretion entrusted to agency procurement officials.

A more coherent way to classify evaluation factors can be derived from a recognition that they are used to evaluate two different considerations in the source selection process — the *offer* made by each offeror and the *capability* of each offeror. The offer is comprised of those *promises* made by the offeror that will be included in the contract and will thus be contractually binding. This will be price or estimated cost and fee, at a minimum, plus other features that constitute contractual promises or undertaking. These other features might be the precise product or service to be furnished, an offered delivery schedule, a specific warranty, or any other promise

solicited from the offeror that the agency concludes should be contractually binding. In contrast, the evaluation of capability of the offerors does not result in contractual promises. Rather, it is an evaluation of the offeror's ability to perform the promised work in order to assess the risk that the offeror will fail to carry out the contractual promises. Thus, there are two distinct types of evaluation factors — "offer factors" and "capability factors." In selecting the evaluation factors and subfactors for a procurement, it is helpful to distinguish between the two.

The distinction between "capability factors" and "offer factors" is blurred when the agency incorporates capability issues into the contract as contractually binding promises. For example, an agency might evaluate proposed key personnel to determine an offeror's capability and incorporate the names of key personnel into a Key Personnel clause. Similarly, an agency might evaluate the technique that the offeror intends to use to perform the work to determine its capability and also decide to make the technique contractually binding. In such cases the classification of the evaluation factors in these terms is not important, but it will guide the agency in specifying how the information to be used for evaluation should be submitted. In this regard it is good practice for the solicitation to inform the offerors which factors will be made contractual promises and which will be used solely for evaluation purposes. This matter will be discussed in Chapter 6.

This section deals with the types of evaluation factors and subfactors that might be used by an agency — organized in terms of offer factors and capability factors.

A. Offer Factors

Offer factors, as discussed in this book, are those factors that will result in contractual promises beyond the promises embodied in the request for proposals (RFPs). In the normal competitive procurement, the government spells out the greater portion of the offer it is soliciting in the RFP — including the contract specifications and the terms and conditions. If an offeror signs the proposal without taking exception to any mandatory element of the RFP, it has agreed to make the offer solicited by the government and those promises play no further role in the evaluation process. If an offeror takes exception to a mandatory element of the RFP, award to that offeror is precluded until the matter has been cleared up by amending the RFP or having the offeror withdraw the exception. See Chapter 6 for a full discussion of this process.

Every procurement has one offer evaluation factor — cost to the government; and

in many procurements, this is the only offer factor. However, the agency may choose to solicit non-cost offers, of various types, when it desires to evaluate promises that are not contained in the RFP. Both cost and non-cost offer factors are considered in the following material.

1. Cost to the Government

The one offer evaluation factor that is present in every negotiated procurement is cost to the government. Offerors submit this offer by filling out Section B of the Uniform Contract Format when they submit their proposals. This discussion of cost to the government includes the amount to be paid to the contractor and other costs that the government might incur in procuring and using articles or services that are to be evaluated in dollar terms.

a. Amount to Be Paid to the Contractor

The amount to be paid to the contractor depends on the pricing arrangement to be used in the contract. When a firm-fixed-price contract is involved, the offeror's proposed price, not a mere estimate of the realistic cost, is the criterion that must be used in evaluating the proposal, *IBM Corp*., Comp. Gen. Dec. B-299504, 2008 CPD ¶ 64; *Verestar Gov't Servs. Group*, Comp. Gen. Dec. B-291854, 2003 CPD ¶ 68; *Litton Sys., Inc.*, 63 Comp. Gen. 585 (B-215106), 84-2 CPD ¶ 317. This rule is followed because the contractor bears the risk of costs exceeding the price of a firm-fixed-price contract. However, an agency can evaluate whether a price is unrealistically low if it includes an evaluation factor in the RFP calling for such an evaluation. See *Pemco Aeroplex, Inc*., Comp. Gen. Dec. B-310372.3, 2008 CPD ¶ 126, stating:

> Price realism is not ordinarily considered in the evaluation of proposals for the award of a fixed-price contract, because these contracts place the risk of loss upon the contractor. However, in light of various negative impacts on both the agency and the contractor that may result from an offeror's overly optimistic proposal, an agency may, as here, expressly provide that a price realism analysis will be applied in order to measure the offerors' understanding of the requirements and/or to assess the risk inherent in an offeror's proposal. See, e.g., *Wackenhut Servs., Inc*., B-286037, B-286037.2, Nov. 14, 2000, 2001 CPD ¶ 114 at 3; *Molina Eng'g , Ltd./Tri-J Indus., Inc. Joint Venture*, May 22, 2000, B-284895, 2000 CPD ¶ 86 at 4. Although the Federal Acquisition Regulation (FAR) identifies permissible price analysis techniques, FAR § 14.404-1, it does not mandate any particular approach; rather, the nature and extent of a price realism analysis, as well as an assessment of potential risk associated with a proposed price, are generally within the sound exercise of the agency's discretion. See *Legacy Mgmt. Solutions, LLC*, B-299981.2, Oct. 10, 2007, 2007 CPD ¶ 197 at 3; *Comprehensive Health Servs., Inc*., B-310553, Dec. 27, 2007, 2007 CPD ¶ 9 at 8. In reviewing protests challenging an agency's evaluation of these matters, our focus is whether the agency acted reasonably and in a way consistent with the solicitation's requirements. See, e.g., *Grove Res. Solutions, Inc*., B-296228, B-296228.2, July 1, 2005, 2005 CPD ¶ 133 at 4-5.

Thus, an agency may not adjust a fixed price if it doubts the offeror's ability to perform at the offered price, *IBM Corp*., Comp. Gen. Dec. B-299504, 2008 CPD ¶ 64, but the low price may be addressed in the evaluation of non-price factors, such as performance risk, or as a matter of responsibility, *Pemco Aeroplex* (risk of low price properly evaluated because RFP called for evaluation of "proposal risk" by assessing "price realism"); *Alabama Aircraft Indus., Inc. - Birmingham v. United States*, 83 Fed. Cl. 666 (2008) (risk of low price in *Pemco Aeroplex* procurement not properly assessed because of flaws in agency reasoning); *Guam Shipyard*, Comp. Gen. Dec. B-311321, 2008 CPD ¶ 124 (low price properly assessed as "very high" risk when it was 23% under government estimate); *CSE Constr*., Comp. Gen. Dec. B-291268.2, 2002 CPD ¶ 207 (where the RFP contains no relevant evaluation factor pertaining to price realism or understanding, a determination that an offeror's price on a fixed-price contract is a responsibility issue). Similarly, if the agency believes that the offeror's price indicates a lack of understanding of the work to be performed, this should be taken into consideration in the evaluation of capability or the determination of responsibility. See *Wackenhut Servs., Inc*., Comp. Gen. Dec. B-286037, 2001 CPD ¶ 114 (low price of two offerors properly led to assessment of lack of understanding of the work but no requirement to make detailed assessment of elements of price of offeror with total price in line with other offerors); *Centech Group, Inc*., Comp. Gen. Dec. B-278715, 98-1 CPD ¶ 108 (low option year prices indicated "an inherent lack of technical competence"). Furthermore, an agency may eliminate an offeror from the competitive range if it fails to submit information demonstrating that its low price is reasonable, *International Outsourcing Servs., LLC v. United States*, 69 Fed. Cl. 40 (2005). The GAO has taken note of the fact that there is no regulatory requirement for a price realism analysis because FAR 15.305(a)(1) merely provides that cost realism analyses may be used "in exceptional cases, on other competitive fixed-price-type contracts (see 15.404-1(d)(3))," *Team BOS/Naples - Gemmo S.p.A./DelJen*, Comp. Gen. Dec. B-298865.3, 2008 CPD ¶ 11. However, the GAO appears to be holding that price realism analysis will be required when the RFP states that the agency "may" make such an analysis, *Al Qabandi United Co.,* Comp. Gen. Dec. B-310600.3, 2008 CPD ¶ 112; *Computer Sciences Corp.*, Comp. Gen. Dec. B-298494.2, 2007 CPD ¶ 103.

There has been considerable confusion over the evaluation factor to be used with fixed-price incentive contracts, and the FAR does not address this issue. In the past the GAO stated that target cost should be used to evaluate the prices, *Televiso Elecs.*, 46 Comp. Gen. 631 (B-159922) (1967). See also *Serv-Air, Inc.*, 58 Comp. Gen. 362, 79-1 CPD ¶ 212, where the GAO held that the target price of one offeror could be contrasted with the ceiling price of another offeror in a "best case/worst case" comparison, and

Motorola, Inc., Comp. Gen. Dec. B-236294, 89-2 CPD ¶ 484, where the GAO condoned the use of the ceiling price to evaluate cost. The use of target prices alone might be logical if all offerors are proposing to use the same fixed-price incentive formula with the same ceiling. However, if the RFP permits offerors to proposed different formulas, it is better practice to use the ceiling price as the evaluation factor because this is the only element of the formula that is comparable for all offerors. With respect to realism of target cost proposals, FAR 15.305(a)(1) states that "Cost realism analyses may also be used on fixed-price incentive contracts" - apparently permitting use of probable target cost as an evaluation factor. The GAO reached this conclusion in *Eurest Support Servs*., Comp. Gen. Dec. B-285813.3, 2003 CPD ¶ 139, holding that an agency must assess the realism of proposed target costs and adjust them for evaluation purposes if they are unrealistic. See also *Allied-Signal Aerospace Co.*, Comp. Gen. Dec. B-250822, 93-1 CPD ¶ 201, finding an agency decision to adjust target cost to reflect unrealistically low estimate "a prudent exercise of agency discretion;" and *Universal Techs., Inc*., Comp. Gen. Dec. B-241157, 91-1 CPD ¶ 63, finding that the agency properly compared a realistic proposed target cost of one offeror with the proposed ceiling price of a competitor in making the source selection trade-off decision. If realistic target price is used as the evaluation factor, the target profit should be adjusted if a cost realism analysis indicates an adjustment of the target cost. However, the GAO has held that it is improper to adjust the ceiling price upward in connection with increasing the target cost based on a cost realism analysis, *Raytheon Co.*, Comp. Gen. Dec. B-242484.2, 91-2 CPD ¶ 131.

In cost-reimbursement contracts, both the realistic expected cost of performance and the proposed fee should be used as evaluation factors. FAR 15.305(a)(1) requires that a cost realism analysis be conducted "to determine what the Government should realistically expect to pay for the proposed effort," and FAR 15.404-1-(d)(i) states that the probable cost "shall be used for purposes of evaluation to determine the best value." This is consistent with GAO decisions, 50 Comp. Gen. 739 (B-171663) (1971); *DOT Sys., Inc.*, Comp. Gen. Dec. B-185558, 76-2 CPD ¶ 186; *Boeing Sikorsky Aircraft Support*, Comp. Gen. Dec. B-277263.2, 97-2 CPD ¶ 91. The GAO has held that where the RFP is amended to call for a cost-reimbursement rather than fixed-price contract, the agency should also amend the RFP to explicitly include cost realism as an evaluation factor and notify offerors that proposed costs may be adjusted accordingly, *Varian Assocs., Inc.*, Comp. Gen. Dec. B-209658, 83-1 CPD ¶ 658. In that case, the initial RFP had listed "Lowest Evaluated Cost to the Government" as a factor, but although the protest was denied the GAO stated that the better practice was to amend the solicitation.

The evaluation of fee depends on what type of cost-reimbursement contract is used.

In a cost-plus-fixed-fee contract, the proposed fixed fee, rather than a realistic estimate of the fee, should be used as the evaluation factor because the former reflects a more reliable judgment, *Booz, Allen & Hamilton*, 63 Comp. Gen. 599 (B-213665), 84-2 CPD ¶ 329. In a cost-plus-award-fee contract, it is proper to use the offeror's proposed fee structure as the evaluation factor, *Management Servs., Inc.*, Comp. Gen. Dec. B-206364, 82-2 CPD ¶ 164. Thus, it is permissible to give a higher evaluation to an offeror that proposes a higher maximum fee on the theory that this will provide more incentive for good performance, *Boeing Sikorsky Aircraft Support*, Comp. Gen. Dec. B-277263.2, 97-2 CPD ¶ 91, or to an offeror that proposes to share its award fees with its employees on the theory that this will motivate them to perform better, *Cleveland Telecommunications Corp.*, 73 Comp. Gen. 303 (B-257294), 94-2 CPD ¶ 105. Compare *Research Triangle Inst.*, Comp. Gen. Dec. B-278254, 98-1 CPD ¶ 22, where an offeror was given a higher evaluation for proposing a low award fee.

b. Other Costs to the Government

Products or services purchased by the government, on either a fixed-price or cost-reimbursement basis, may result in the government incurring costs of acquisition or ownership that are not included in the contract price or cost. There is little clear guidance on the consideration of such costs as evaluation factors. The procurement statutes might be interpreted to require that other costs to the government be specified as evaluation factors. They state that solicitations "shall at a minimum include" evaluation factors, "including cost or price, cost-related or price-related factors and subfactors," 10 U.S.C. § 2305(a)(2)(A)(i) and 41 U.S.C. § 253a(b)(1)(A). However, the FAR does not repeat this language. FAR 15.304(c)(1) merely states: "Price or cost to the Government shall be evaluated in every source selection." The GAO has not interpreted the statutes or the regulations as requiring the consideration of such costs in evaluating proposals, *Kastle Sys., Inc.*, Comp. Gen. Dec. B-231990, 88-2 CPD ¶ 415. See also *Sensis Corp.*, Comp. Gen. Dec. B-265790.2, 96-1 CPD ¶ 77 (life-cycle costs are not required to be evaluated as part of the cost/price evaluation). However, the failure to consider other costs to the government could lead to poor procurement decisions. As a matter of practice, other costs to the government are frequently used as evaluation factors or subfactors, whether objectively quantified or subjectively determined.

The most common cost of acquisition used as an evaluation criterion is transportation costs. This is one of the few areas in which evaluation of costs incurred by the government is mandated. FAR 47.305-2 provides that a solicitation for supplies will specify that offers may be f.o.b. origin, f.o.b. destination, or both, and that they will

be evaluated on the basis of the lowest overall cost to the government. In such cases, the solicitation must require the offeror to furnish the government with applicable data necessary to compute transportation costs.

Costs incurred as a result of owning an item are part of what is known as "life cycle" costs, and, as discussed in Chapter 1, such costs should be considered during acquisition planning, FAR 7.105(a)(3)(i). FAR 7.101 defines life cycle costs as "the total cost to the Government of acquiring, operating, supporting, and (if applicable) disposing of the items being acquired." The magnitude of the costs beyond the original acquisition cost can greatly exceed the item's purchase price or production cost, but there are very few procurements that attempt to quantify life-cycle costs for evaluation purposes. See, for example, *Lockheed Missiles & Space Co. v. Dep't of the Treasury*, GSBCA 11776-P, 93-1 BCA ¶ 25,401, *aff'd* , 4 F.3d 955 (Fed. Cir. 1993), in which such costs resulted in awarding the contract to an offeror whose price totaled $1.4 billion over others whose prices were $900 and $700 million. Extensive agency analysis, quantified in dollar figures, illustrated the differences between the technical proposals and justified paying the price premium.

Quantification of life-cycle costs in dollar amounts in not required. Thus, life-cycle costs can be evaluated as a noncost evaluation factor. See *Ingalls Shipbuilding, Inc.*, Comp. Gen. Dec. B-275830, 97-1 CPD ¶180, stating:

> Ingalls argues that NAVSEA improperly failed to quantify probable LCC savings for each offer. Noting that the solicitation advised that the agencymight be willing to pay a premium for the "approach that demonstrates the potential for greater life cycle cost reductions," Ingalls argues that NAVSEA "could not determine whether (or how much) to pay as a premium for a potentially greater life cycle cost saving, unless it had first determined how much potential saving was present in each offeror's proposed approach." NAVSEA explains that it was not possible to quantify the most likely LCC savings and the resulting most probable LCC for each proposal, given the early stage of the LPD 17 program and the information available to the agency.
>
> Ingalls's argument is without merit. Ingalls's position fails to account for provisions of the solicitation providing that the agency would evaluate offerors' approaches to LCC cost reduction without actually quantifying LCC savings and the resulting most probable LCC for each proposal. In this regard, under the solicitation's statement of evaluation criteria, category 3 is entitled "Ownership Cost Reduction Approach," and category 3 proposals were to be "evaluated and assigned one of the following adjective ratings: (1) unacceptable, (2) marginal, (3) acceptable, (4) outstanding." At the same time, the RFP nowhere expressly stated that the agency would conduct a traditional most probable cost analysis with respect to LCC. Further, the solicitation's instructions for the preparation of proposals provided that:
>
> > "Cost analyses required to support the Ship Propulsion Drive Train and Diesel Engines portion of the Offeror's proposal shall be the only portion of the Non-Price Proposal where dollars must be used.
> >
> > "The Offeror shall fully explain how it derives and establishes the baseline against which all savings are measured. All savings shall be shown with percentages only and not with dollars."

* * *

> In our view, the solicitation supports NAVSEA's position that it was not required to quantify the most probable LCC reductions for each proposal and resulting most probable cost. Indeed, we believe that it was clear from the very use in the solicitation of such abstract language as "the highest likelihood" of reducing LCC and "the potential for" greater LCC reduction that the agency was not going to quantify the most probable LCC reductions and resulting most probable cost for each proposal.

However, quantification of life-cycle costs has been accomplished in several procurements. See, for example, *Sundstrand Corp.*, Comp. Gen. Dec. B-227038, 87-2 CPD ¶ 83 (life-cycle costs quantified by establishing "production price ceilings on future quantities … and sole-source components, spare and repair parts"); *American Airlines Training Corp.*, Comp. Gen. Dec. B-217421, 85-2 CPD ¶ 365 (cost of additional training added to proposed contract price for training to reflect retraining believed necessary to ensure that trainees were fully qualified).

DFARS PGI 207.105(b)(13)(i) states that the acquisition plan should describe "the extent of integrated logistics support planning, including total life cycle system management and performance based logistics." However, this apparently does not require the use of life-cycle costs as evaluation factors, as more definitive language contained in DAR 1-335 was not interpreted as imposing such a requirement, *Big Bud Tractors, Inc. v. United States*, 2 Cl. Ct. 188, *aff'd* , 727 F.2d 1118 (Fed. Cir. 1983); *Big Bud Tractors, Inc.*, Comp. Gen. Dec. B-209858, 83-1 CPD ¶ 127. The GAO found that although the regulation requires that life-cycle costs be considered as a factor during the procurement cycle, "we do not read the regulation as requiring that [life-cycle costs] be an evaluation factor for each award." Accord *Prudential-Maryland Joint Venture Co. v. Lehman*, 590 F. Supp. 1390 (D.D.C. 1984). Whether to use life-cycle costs as evaluation factors in defense procurements is thus left to the discretion of the contracting officer. Other decisions affirming an agency decision not to evaluate life-cycle costs include *General Tel. Co. Of Cal.*, Comp. Gen. Dec. B-190142, Feb. 22, 1978, Unpub. (evaluation of the cost of government self-insurance would have been too "indefinite" and "speculative"); *Hawaiian Tel. Co.*, Comp. Gen. Dec. B-187871, 77-1 CPD ¶ 298 (evaluation of possible termination costs would be too speculative); *General Elec. Aerospace Sys.*, Comp. Gen. Dec. B-250514, 93-1 CPD ¶ 101 (no requirement to evaluate cost of limited rights in technical data).

If life cycle costs are not identified as an evaluation factor, they may not be evaluated, *Marquette Medical Sys., Inc.*, Comp. Gen. Dec. B-277827.5, 99-1 CPD ¶ 90 (agency improperly evaluated the savings from receiving new equipment versus the costs of receiving upgraded equipment). See also *Interspiro, Inc. v. United States*, 72

Fed. Cl. 672 (2006), holding that the agency properly did not evaluate life cycle costs because the RFP contained no statement they would be evaluated. Compare *Engineered Air Sys., Inc*., Comp. Gen. Dec. B-283011, 99-2 CPD ¶ 63, where the GAO found that the agency properly evaluated extended warranties when the RFP merely stated that the agency would "give evaluation credit for proposed features that met or exceeded the stated objectives."

Agencies are given broad discretion in selecting the life cycle costs that will be evaluated. In *ViON Corp.*, Comp. Gen. Dec. B-256363, 94-1 CPD ¶ 373, the solicitation clearly set forth what factors would be considered in determining life cycle costs. The protester argued that the solicitation's model for evaluating life cycle cost was incomplete and unreasonable because it did not consider environmental costs, such as cooling, electricity, and space. The GAO denied the protest, stating that the agency properly decided not to consider environmental factors as part of life cycle costs because the agency's prior experience indicated that this was not a useful discriminator between technical solutions.

When the RFP states that life cycle costs are to be evaluated and requests data as to the costs that a proposed item will produce, the agency must use the data to assess the amount of life cycle costs to be attributed to each proposal, *Sikorsky Aircraft Co.*, Comp. Gen. Dec. B-299145, 2007 CPD ¶ 45. In that case, the GAO sustained a protest because the agency had obtained maintenance data for each proposed helicopter but had used a normalized number attributing the same maintenance costs to different helicopters. See also *Boeing Co.*, Comp. Gen. Dec. B-311344, 2008 CPD ¶ 114, sustaining a protest because the agency did not correctly use the data submitted by the protester to calculate the life cycle costs of proposed air tankers.

2. Non-Cost Offer Factors

Where the contractor is merely required to comply with specifications furnished by the government and the terms and conditions in the RFP, there will be no non-cost offer evaluation factors. However, in many procurements the government solicits or permits offerors to propose additions or alterations to the specifications or terms and conditions and treats these offers as evaluation factors. When such additions or alterations are used as evaluation factors, the agency is indicating to offerors that they are of value to the agency and that the agency will therefore consider paying a higher price to obtain that value. When this is done, the general practice is to subsequently rewrite the affected specifications or terms and conditions so that the awarded contract makes these offers

contractually binding. However, agencies can treat these factors as capability factors and not incorporate them into the contract if they do not want to be contractually bound to them. See *DGR Assocs., Inc*., Comp. Gen. Dec. B-285428, 2000 CPD ¶ 145, denying a protest asserting that the agency should not have assessed enhancements proposed by an offeror because they were not incorporated into the contract as promises.

The use of non-cost offer factors greatly complicates the task of offerors because they must attempt to anticipate the value that the agency will give to different amounts of enhanced performance or alteration of terms and conditions. To ease this problem, the best practice is for agencies to use such factors only when they can not specify their precise requirements in the RFP.

a. Enhancements

Probably the most common type of non-cost offer factor is enhancements to the work or results called for by the specifications. In such cases the specification generally will call for a minimum or target level of performance and the RFP will indicate that the agency will evaluate greater performance. The best practice is for the agency to clearly delineate the range of enhancements it is willing to consider so that offerors do not propose enhancements that are of no benefit to the agency. It is also good practice to obtain price proposals for different levels of enhancements to enable the agency to compare proposals at each level of performance. However, the use of general language stating that specified enhancements will be evaluated has been approved even when the offerors had to speculate as to the value of specific enhancements, *Telos Sys. Integration v. Administrative Office of the Courts*, GSBCA 13315-P, 96-1 BCA ¶ 27,990. See also *Lexis-Nexis*, Comp. Gen. Dec. B-260023, 95-1 CPD ¶ 14, where the GAO held that the RFP was sufficiently specific as to enhancements when it listed the areas where enhancements would be evaluated and gave some examples of features that were of value to the agency.

General statements in the RFP indicating that the agency was seeking superior performance have also been found to be sufficient to alert offerors that the agency was going to evaluate enhancements. See, for example, *Moreland Corp*., Comp. Gen. Dec. B-283685, 2002 CPD ¶ 4, rejecting a protest that the agency should not have evaluated certain enhancements in a competition for the design of a clinic, and stating:

> Where, as here, detailed technical proposals are sought and technical evaluation criteria are used to enable the agency to make comparative judgments about the relative merits of competing proposals, offerors are on notice that qualitative distinctions among the technical proposals will be made under the various evaluation factors. *Doss Aviation, Inc.; Dominion Aviation, Inc*., B-275419 et al., Feb. 20, 1997, 97-1 CPD ¶ 117 at

8. Evaluation credit properly may be given, under these circumstances, where a proposal includes enhancements or features not specifically required by the solicitation. *Id*.

See also *IPlus, Inc*., Comp. Gen. Dec. B-298020, 2006 CPD ¶ 90 (statement that award would be made to the "offeror whose proposal represented the best value" sufficient to alert offerors that agency would evaluate "innovations and creative approached"); *SGT, Inc*., Comp. Gen. Dec. B-294722.4, 2005 CPD ¶ 151 (dedicated person to perform required job an enhancement when RFP evaluation factor was "comprehensiveness of the proposed approach, and likelihood of successfully meeting the solicitation requirements"); *Rome Research Corp*., Comp. Gen. Dec. B-291162, 2002 CPD ¶ 209 (RFP sought "enhancements of value" in management proposals); *Engineering & Professional Servs., Inc*., Comp. Gen. Dec. B-262179, 95-2 CPD ¶ 266 (RFP requirement that each offeror submit a matrix detailing where their systems met or exceeded the RFP requirements and desirable features alerted offeror that enhancements would be evaluated); and *Medical Dev. Int'l* , Comp. Gen. Dec. B-281484.2, 99-1 CPD ¶ 68 (RFP requirement for technical proposals indicated that enhancements would be evaluated).

If the RFP does not call for evaluation of enhanced performance, an agency is free to disregard proposed enhancements that it concludes do not benefit the agency, *U-Tech Servs. Corp*., Comp. Gen. Dec. B-284183.3, 2002 CPD ¶ 78.

Enhancements have been used in procurements for a variety of products and services. See *Omega World Travel, Inc*., Comp. Gen. Dec. B-276387.3, 98-2 CPD ¶ 73 (enhancements used in travel agency contract); *Technology Servs. Int'l , Inc*., Comp. Gen. Dec. B-276506, 97-2 CPD ¶ 113 (enhancements used in grounds maintenance contract); *Canadian Commercial Corp./Polaris Inflatable Boats (Canada), Ltd*., Comp. Gen. Dec. B-276945, 97-2 CPD ¶ 40 (enhancements used in inflatable boat contract); *Dube Travel Agency & Tours, Inc*., Comp. Gen. Dec. B-270438.2, 96-1 CPD ¶ 141 (enhancements used in travel agency contract); *Holmes & Narver, Inc*., Comp. Gen. Dec. B-266246, 96-1 CPD ¶ 55 (enhancements used in contract for design and construction of military housing); and *Cherry Hill Travel Agency, Inc*., Comp. Gen. Dec. B-240386, 90-2 CPD ¶ 403 (agency may consider general and specific enhancements that are logically encompassed or related to stated evaluated criteria).

As discussed above, elements of the life-cycle cost of a product can also be evaluated as non-cost evaluation factors. See, for example, *Caterpillar, Inc*., Comp. Gen. Dec. B-280362, 98-2 CPD ¶ 87, where the GAO found reasonable an agency's assessment that the awardee's vehicles had a higher capability to isolate and diagnose

faults accurately, which, with the ease of access to problem areas as indicated by their lower maintainability index, had the potential to greatly reduce life-cycle costs.

b. Technical Solutions

It has been common practice to request technical proposals providing solutions to meet a government requirement. This originated in competitions for development contracts where an agency wanted to evaluate proposed designs of a new system to assess which was most likely to meet its needs. The technique has been carried over into service contracts where competing solutions to a need are sought. These solutions can be an offer factor if the technical proposal is incorporated into the contract as a promise to perform in accordance with the proposal. More often they are a capability factor where the contract does not make the solution mandatory but uses it to assess the capability of the offeror.

Making technical proposals contractually binding has the effect of making them the baseline against which to measure the contractor's performance. This will arguably benefit the government if the proposal contains performance requirements that are more demanding than the original government specification. In that case, the government will be able to hold the contractor bound to perform in accordance with its proposal (assuming that it contains promissory language), but it will have deprived the contractor of some of the flexibility that it would have had if it was performing to a government performance requirement. Alternatively, making the proposal contractually binding will harm the government if the proposal contains performance requirements that are less demanding than the original government specification. In that case, effort demanded by the government to meet its original performance requirements may well be construed as a contractual change for which the government will be required to give an equitable adjustment. See, for example, *Northrop Grumman Corp. v. United States*, 47 Fed. Cl. 20 (2000), holding that the contractor was not entitled to equitable adjustments for work not required by its technical proposal because the proposal was not incorporated into the contract.

Agencies vary widely in their practice of incorporating these technical proposals into their contracts and the practice usually cannot be discerned from protests involving this type of evaluation factor. However, there are many examples of protests involving competing technical solutions. See, for example, *Northrop Grumman Sys. Corp.*, Comp. Gen. Dec. B-298954, 2007 CPD ¶ 63 (evaluation of proposed radars in response to a government statement of objectives); *ViaSat, Inc.*, Comp. Gen. Dec. B-291152, 2002

CPD ¶ 211 (evaluation of proposed communication satellite terminals to meet stated performance requirements); and *DRS Sys., Inc*., Comp. Gen. Dec. B-289928.3, 2002 CPD ¶ 192 (evaluation of proposed thermal imaging systems against an agency purchase description).

c. Specific Products or Services

In some cases an agency will use a performance specification and evaluate specific products or services that will meet that specification. This technique is most practicable when there are a variety of products or services in the marketplace that will meet the agency's performance requirements and the agency will benefit by obtaining competitive prices for each product or service in order to identify the best value at the time of contract award. See, for example, *MD Helicopters, Inc*., Comp. Gen. Dec. B-298502, 2006 CPD ¶ 164 (commercially available helicopters); and *Integrated Sys. Group*, Comp. Gen. Dec. B-272336, 96-2 CPD ¶ 144 (central processing units). This technique may not be practicable when the offered product or service has not been sold or provided, because in such cases the agency may have little ability to evaluate the feasibility of meeting a contract requirement to provide the offered product or service. The best practice is to perform a risk analysis in an attempt to ensure that the best value decision is based not only on the quality of the offered product or service, but also on the risk of being unable to perform as promised. See, for example, *Alliant Techsys., Inc*., Comp. Gen. Dec. B-276162, 97-1 CPD ¶ 141, where the GAO denied a protest challenging the risk assessment of the technical feasibility of manufacturing the proposed product at the offered price. See also *Martin Marietta Corp.*, Comp. Gen. Dec. B-259823.4, 96-1 CPD ¶ 265, denying a protest that the agency had found that the protester's technical approach to meeting the specification was "unsatisfactory," and had awarded the contract to an offeror whose approach was rated "good."

d. Process or Techniques to Be Used

Another non-cost offer factor is the process or technique that the offeror intends to use to meet the government's performance requirements. This factor can be used in two ways. If it is used only to evaluate the offeror's understanding of the work or capability to perform the work, it is a capability factor. However, if the agency intends to incorporate the technique or process into the contract, making it contractually binding, it will be an offer factor. In most instances, where the agency determines that such a factor is necessary, the best practice is to treat this as a capability factor — giving the

contractor the freedom to meet the performance requirements using some other technique or process; but there are some instances where an agency has determined that the specific technique or process has an identified value that will not be achieved by the use of any other technique or process. In such cases this should be treated as an offer factor.

When a proposed process or technique is used as an evaluation factor, it is good practice to evaluate the comparative risk of using different techniques. See, for example, *Robbins-Gioia, Inc.*, Comp. Gen. Dec. B-274318, 96-2 CPD ¶ 222, denying a protest that the agency had evaluated a proposal for the use of state-ofthe-art software architecture as having moderate risk as compared to a proposal to use off-the-shelf software. In such cases the agency is conducting a form of design competition, requiring the evaluation of the potential effectiveness of the offered designs. See, for example, *AT&T Corp.*, Comp. Gen. Dec. B-261154.4, 96-1 CPD ¶ 232, where the GAO agreed that the agency's evaluation of competing designs was performed effectively.

e. Terms or Conditions

A fifth type of non-cost offer factor is the enhanced or specific term or condition. Enhanced terms and conditions should be treated in the same manner as other enhancements — the agency should state the minimum acceptable level and the range of enhanced performance that it considers to be of potential value. Specific terms and conditions that the agency requires to be filled out with explicit information should be clearly stated so that the offerors clearly understand the information that will be incorporated in the contract.

A common enhanced term or condition is a warranty clause where the agency solicits better warranty coverage than the minimum specified in the RFP. See *Integrated Sys. Group*, Comp. Gen. Dec. B-272336, 96-2 CPD ¶ 144, where offers were obtained for extended warranties of one and two years. A warranty evaluation factor can also be stated as an open-ended factor, allowing each offeror to propose the warranty offered. See *Eomax Corp.*, Comp. Gen. Dec. B-311391, 2008 CPD ¶ 130 (protester properly downgraded for proposing only a one year warranty on a high price product); *Scot, Inc.*, Comp. Gen. Dec. B-295569, 2005 CPD ¶ 66 (proposed extended warranty properly evaluated as providing only a small advantage when equipment was going to be stored for long periods); and *Landoll Corp.*, Comp. Gen. Dec. B-291381, 2003 CPD ¶ 40 (longer warranty properly evaluated as a strength).

Another common example of a specific term or condition is the Key Personnel clause that is used in many service procurements. As discussed below, key personnel is a frequently used as a capability factor, but when the names of the key personnel are incorporated into a Key Personnel clause, this factor becomes an offer factor because the contractor promises to use the specified personnel unless they become unavailable. Although the evaluation of key personnel can be a strong predictor of performance, it is completely valid only if the personnel proposed by the offer actually work on the contract. Yet, that is not the effect of a Key Personnel clause. Almost all the clauses in use call for the use of key personnel listed in the clause or equally qualified personnel approved by the contracting officer. This is, of course, a necessary part of the process because the contractor cannot guarantee that employees will stay with the company or be willing to work on the contract. The GAO has given contractors a substantial amount of freedom to operate under these clauses. See, for example, *Laser Power Techs., Inc.*, Comp. Gen. Dec. B-233369, 89-1 CPD ¶ 267, where the protester argued that a competing offeror had to propose "permanent" employees to meet the key personnel requirements in the solicitation. The GAO denied the protest, stating:

> Laser Power essentially contends the RFP requires that proposed key personnel must be for permanent positions. However, the RFP, which contains the "key personnel" clause referenced above, does not require designated key personnel to be permanent, nor even that the contractor commence performance with the personnel listed in its proposal, so long as the contractor provides personnel as qualified as those listed in the proposal and obtains the Air Force's approval for all substituted key personnel. *A.B. Dick Co*., B-233142, Jan. 31, 1989, 89-1 CPD ¶ [106]. Indeed, there is nothing unusual or inherently improper for an awardee to recruit and hire personnel employed by the incumbent contractor. *A.B. Dick Co*., 233142, *supra*, at 5; *Applications Research Co*., B-230097, May 25, 1988, 88-1 CPD ¶ 499.

On the other hand, the GAO will intervene if there is a substitution of lesser qualified personnel. See *KPMG Peat Marwick, LLP*, Comp. Gen. Dec. B-259479.2, 95-2 CPD ¶ 13, *recons. denied*, 95-2 CPD ¶ 26, where GAO stated the following rule:

> The agency asserts that under the RFP's "Key Personnel" clause, a standard provision which allows the contracting officer to authorize substitutions of personnel so long as the replacement personnel qualifications "are equal to or better [than] the qualifications of the personnel being replaced," it had unfettered authority to change [the contractor's] proposed personnel. Contrary to [the agency's] position, the RFP's key personnel clause cannot be used by the agency if the effect of the substitution is to significantly modify the contract awarded; such an interpretation would render meaningless the competition on the original solicitation requirements. *See Planning Research Corp. v. United States*, 971 F.2d 736 (Fed. Cir. 1992). Rather, the key personnel clause is simply intended to permit the natural turnover of personnel that tends to occur during the performance of a contract.

Thus, the GAO will find that the competition has not been fairly conducted if the Key Personnel clause is not enforced as written and will require that the procurement be recompeted. The same result was reached by the General Services Administration Board of Contract Appeals in *PSI Int'l , Inc. v. Dep't of Energy*, GSBCA 11521-P, 92-2

BCA ¶ 24,775, where it was held that it was improper to award a contract to an offeror that had not named its key personnel but had reserved the right to staff the contract with competent personnel.

f. Delivery or Completion Schedule

The agency may use the delivery or completion schedule as an offer factor. In such cases the RFP generally will state the time of performance that the agency must have and will permit offerors to propose shorter times of performance. This technique should never be used unless the agency has determined that it will benefit from faster performance, and the RFP should clearly state the amount of faster performance that will be of value. See *Rotair Indus., Inc.*, Comp. Gen. Dec. , 97-2 CPD ¶ 17, finding that the agency's selection of a higher-priced vendor with a shorter delivery schedule was reasonable because the agency determined that a longer delivery schedule would have a detrimental impact on the continuing back-order status of the critical application item being procured. Like other enhancements, it is also good practice to obtain price proposals on a stepladder basis so that offers can be rationally compared. When delivery is listed as an evaluation factor, offerors should understand that the agency will favorably evaluate faster delivery. See, for example, *Utility Tool & Trailer, Inc.*, Comp. Gen. Dec. , 2008 CPD ¶ 1 (proper to not pay significantly higher price for small delivery advantage); *Charles Kendall & Partners, Ltd.*, Comp. Gen. Dec. B-310093, 2007 CPD ¶ 210 (proper to pay significantly higher price for substantial delivery advantage); and *American Material Handling, Inc.*, Comp. Gen. Dec. B-297536, 2006 CPD ¶ 28 (proper to pay somewhat higher price for delivery advantage).

3. Capability Factors

Capability factors" are those factors that are used to evaluate the relative ability of the competing offerors to perform the contract. These factors are never made part of the contract because they do not constitute contractual promises made by the offeror. However, as discussed above, they frequently include enhancements, technical solutions, or descriptions of a process or technique to be used that are included in technical or management proposals that are required to be submitted by each offeror. Whether such evaluation factors are offer factors or capability factors depends entirely on whether the agency intends to incorporate them into the contract as promises or merely use them to evaluate capability. When they are treated as capability factors, they will be discussed below as part of the "understanding the work" factor.

The evaluation of capability is essentially an assessment of the risk that an offeror will not successfully perform the proposed contract. Thus, performance risk is an inherent evaluation factor even though it is undisclosed in the RFP, *AHNTECH, Inc.*, Comp. Gen. Dec. B-299806, 2007 CPD ¶ 213; *AIA Todini-Lotos*, Comp. Gen. Dec. B-294337, 2004 CPD ¶ 211. Performance risk is most frequently assessed with regard to past performance. See *Lockheed Martin MS2 Tactical Sys.*, Comp. Gen. Dec. B-400135, 2008 CPD ¶ 157 (high performance risk proper based on poor past performance of major subcontractor); *Midwest Metals*, Comp. Gen. Dec. B-299805, 2007 CPD ¶ 131 (risk determined from past performance data system); *Boersma Travel Servs.*, Comp. Gen. Dec. B-297986.2, 2006 CPD ¶ 175 (moderate risk because agency could not understand information submitted by protester); and *TPL, Inc.*, Comp. Gen. Dec. B-297136.10, 2006 CPD ¶ 104 (moderately low risk because of "fair" past performance ratings on most comparable contracts). However, it can be used with regard to any evaluation factor. See, for example, *MCT JV*, Comp. Gen. Dec. B-311245.2, 2008 CPD ¶ 121, *recons. denied*, 2008 CPD ¶ 167 (significant risk from unrealistically capped overhead rates); *Fintrac, Inc.*, Comp. Gen. Dec. B-311462.2, 2008 CPD ¶ 191 (no perceived risk from lack of fixed fee in proposal); *Commercial Window Shield*, Comp. Gen. Dec. B-400154, 2008 CPD ¶ 134 (risk of vague staffing plan); *Global Solutions Network, Inc.*, Comp. Gen. Dec. B-298682.3, 2008 CPD ¶ 131 (risk of single person staffing two key positions); *Guam Shipyard*, Comp. Gen. Dec. B-311321, 2008 CPD ¶ 124 (high risk of unrealistically low price and mediocre past performance); *AT&T Corp.*, Comp. Gen. Dec. B-299542.3, 2008 CPD ¶ 65 (staffing plan created performance risk); *Raytheon Co.*, Comp. Gen. Dec. B-298626.2, 2007 CPD ¶ 185 (lack of data on product created high performance risk); and *Savantage Financial Servs., Inc.*, Comp. Gen. Dec. B-299798, 2007 CPD ¶ 214 (high performance risk based on evaluation of technical proposal submitted to demonstrate understanding of the work).

Air Force Mandatory Procedure 5315.305.5.2.2. describes this risk assessment as a "performance confidence assessment," which is applied to the evaluation of past performance using the evaluation technique described in the next section. This is an affirmative means of describing a risk assessment which has been accepted as rational, *CCITE/SC*, Comp. Gen. Dec. B-400782, 2008 CPD ¶ 216 (unknown confidence rating justified because of lack of relevant past performance); *United Paradyne Corp.*, Comp. Gen. Dec. B-297758, 2006 CPD ¶ 47 (technique acceptable but not used rationally). See also *Consolidated Eng'g Servs., Inc.*, Comp. Gen. Dec. B-311313, 2008 CPD ¶ 146, describing a Social Security Administration "confidence/performance risk" assessment covering both past performance and experience, and granting the protest

because different assessments were given to the two final competitors even though they were both highly rated.

a. Responsibility Determinations Distinguished

Because these factors deal with the same matters that are considered in making responsibility determinations, it is important to distinguish between them. Agencies commonly evaluate factors and subfactors related to responsibility, notwithstanding the fact that a formal responsibility determination must ultimately be made before award of the contract. Such factors and subfactors frequently include experience, staffing, and past performance. This process does not officially constitute a responsibility determination as long as these factors are evaluated on a variable basis. Therefore, such evaluation does not conflict with the Small Business Administration's (SBA's) authority to resolve questions concerning the responsibility of small businesses. In *Electrospace Sys., Inc.*, 58 Comp. Gen. 415 (B-192574), 79-1 CPD ¶ 264, the GAO stated at 425:

> Since neither 10 U.S.C. § 2304(g) nor applicable regulations in any way restrict the "other factors" that may be used by agencies in selecting the proposal having the greatest value to the Government, we have not prohibited procuring agencies from using responsibility-related factors in making relative assessments of the merits of competing proposals. There is no indication on the face of Public Law 95-89 or in the legislative history of the law that Congress intended to eliminate this long-standing practice as far as the evaluation of small business proposals are concerned. Thus, neither the cited precedent (40 Comp. Gen., *supra*) of advertised procurements nor the 1977 Public Law prevents the relative-assessment evaluation of responsibility-related information contained in small business proposals.

See also *Nomura Enters., Inc.*, Comp. Gen. Dec. B-277768, 97-2 CPD ¶ 148, where the protester, which was a small business concern, asserted that the evaluation of its past performance concerned a matter of its responsibility and was thus subject to SBA's Certificate of Competency (COC) procedures. The GAO disagreed, stating:

> An agency may use traditional responsibility factors, such as experience or past performance, as technical evaluation factors, where, as here, a comparative evaluation of those areas is to be made. *Dynamic Aviation — Helicopters*, B-274122, Nov. 1, 1996, 96-2 ¶ 166 at 3. A comparative evaluation means that competing proposals will be rated on a scale relative to each other, as opposed to a pass/fail basis. *Id*. The record shows that the award here clearly was based on a comparative assessment of Nomura's and Defense's past performance records. Where a proposal is downgraded or found deficient pursuant to such an evaluation, the matter is one of relative technical merit, not nonresponsibility which would require a referral to the SBA.

In *T. Head & Co.*, Comp. Gen. Dec. B-275783, 97-1 CPD ¶ 169, the GAO held that an evaluation of capability factors that resulted in the conclusion that the offeror's proposal was "unacceptable" was not a determination of nonresponsibility because the evaluation had been arrived at in the course of a best value procurement where past

performance was being evaluated on a variable basis and "unacceptable" was merely the lowest adjectival rating available. Compare *Phil Howry Co.*, Comp. Gen. Dec. B-291402.3, 2003 CPD ¶ 33, where the GAO ruled that refusing to award to the only company that had submitted a proposal because its past performance was rated "marginal/little confidence" was a nonresponsibility determination because there had been no comparative assessment (no other offeror to compare with). This appears to indicate that an agency will be required to allow a small business offeror to apply for a COC when it refuses to award to that offeror because of poor past performance when it is the only offer received.

It is improper to use responsibility-related factors or subfactors if the evaluation is merely to determine acceptability of a proposal, *Sanford & Sons Co.*, 67 Comp. Gen. 612 (B-231607), 88-2 CPD ¶ 266; *Angelo Warehouses Co.*, Comp. Gen. Dec. B-196780, 80-1 CPD ¶ 228. In *Sanford*, the agency determined that the offeror's past performance did not meet the minimum acceptable standard of performance. The GAO ruled that because this was tantamount to a determination that the protester was not responsible, Sanford, who was a small business, was entitled to request a Certificate of Competency from the Small Business Administration. See also *Federal Support Corp.*, 71 Comp. Gen. 152 (B-245573), 92-1 CPD ¶ 81, and *Clegg Indus., Inc.*, 70 Comp. Gen. 679 (B-242204.3), 91-2 CPD ¶ 145, finding that an agency had improperly used responsibility factors to determine technical acceptability and pointed out that responsibility factors should be used only to make a comparative evaluation of the proposals. These cases could be read to preclude the use of responsibility factors or subfactors in any procurement where the award was to be made to the offeror that submitted the lowest-priced, technically acceptable proposal because any negative evaluation of responsibility could be used only to disqualify the offeror. However, there are other decisions of the GAO permitting rejection of proposals submitted by large businesses as being technically unacceptable based on responsibility-type factors related to the experience of the offeror, *Oak Ridge Associated Univ.*, Comp. Gen. Dec. B-245694, 92-1 CPD ¶ 86 (lack of experience required by RFP); *Aerostat Servs. Partnership*, Comp. Gen. Dec. B-244939.2, 92-1 CPD ¶ 71 (failure to propose staffing adequate to meet specifications); *Color Ad Signs & Displays*, Comp. Gen. Dec. B-241544, 91-1 CPD ¶ 154 (lack of required experience); *Sach Sinha & Assocs., Inc.*, 69 Comp. Gen. 108 (B-236911), 90-1 CPD ¶ 50 (personnel did not meet education and experience requirement of RFP). These decisions indicate that responsibility-type factors may be used to determine lack of acceptability of proposals from large businesses but not from small ones.

b. Past Performance

The Federal Acquisition Streamlining Act of 1994 (FASA) amended 10 U.S.C. § 2305(a) to require the use of past performance as an evaluation factor in source selection. This requirement is implemented in FAR 15.304(c), which provides:

> (3)(i) Except as set forth in paragraph (c)(3)(iii) of this section, past performance shall be evaluated in all source selections for negotiated competitive acquisitions expected to exceed the simplified acquisition threshold.
>
> (ii) For solicitations involving bundling that offer a significant opportunity for subcontracting, the contracting officer must include a factor to evaluate past performance indicating the extent to which the offeror attained applicable goals for small business participation under contracts that required subcontracting plans (15 U.S.C. 637(d)(4)(G)(ii)).
>
> (iii) Past performance need not be evaluated if the contracting officer documents the reason past performance is not an appropriate evaluation factor for the acquisition.

See also the OFPP publication, *Best Practices for Collecting and Using Current and Past Performance Information*, May 2000 (www.acquisition.gov/comp/seven_steps/library/OFPPbp-collecting.pdf), and the DOD publication, *A Guide to Collection and Use of Past Performance Information*, May 2003 (www.acq.osd.mil/dpap/Docs/PPI_Guide_2003_final.pdf)..

The evaluation of past performance reduces the emphasis on merely writing good proposals in favor of focusing on actual performance on prior contracts. Past performance can be evaluated as a separate evaluation factor or as a subfactor. Even before the FAR requirement, there was no question that this was a proper factor in the evaluation process, *Ferranti Int'l Defense Sys., Inc.*, Comp. Gen. Dec. B-237555, 90-1 CPD ¶ 239, even though it may give the incumbent contractor with a good performance record an advantage in the competition, *Bendix Field Eng'g Corp.*, Comp. Gen. Dec. B-241156, 91-1 CPD ¶ 44; *Eng'g & Computation, Inc.*, Comp. Gen. Dec. B-275180.2, 97-1 CPD ¶ 47.

While past performance can be used as either a factor or a subfactor, it is good practice to avoid using it as both simultaneously. For example, in *Center for Educ. & Manpower Resources*, Comp. Gen. Dec. B-191453, 78-2 CPD ¶ 21, it was held impermissible to evaluate past performance as a factor and also use past performance in the evaluation of technical and management factors. The GAO reasoned that this gave more weight to past performance than was indicated in the RFP. A similar result was reached in *Metric Sys. Corp.*, Comp. Gen. Dec. B-210218.2, 83-2 CPD ¶ 394. Compare *Global Assoc., Ltd.*, Comp. Gen. Dec. B-275534, 97-1 CPD ¶ 129, where the

GAO rejected a protest that undue weight had been given to past performance. See also *Halter Marine, Inc.*, B-255429, 94-1 CPD ¶ 161, where the GAO found the evaluation to be unreasonable because the agency gave overwhelming emphasis to past performance by repeated consideration of that factor in both the technical merit and quality control capability factors. In *United Ammunition Container, Inc.*, Comp. Gen. Dec. B-275213, 97-1 CPD ¶ 58, the solicitation identified technical approach, management, and past performance as separate and independent evaluation factors. The protester asserted that the agency's evaluation of the awardee's proposal was flawed because the agency only considered the awardee's past performance record under the past performance factor but should have considered the awardee's past performance record under the other evaluation factors as well. The GAO denied the protest stating that this would have resulted in an exaggeration of the importance of the past performance factor.

The FAR guidance on past performance contains several references to the importance of the relevance of past performance, including the following statements in FAR 15.305(a)(2):

> (i) … The currency and relevance of the information, source of the information, context of the data, and general trends in contractor's performance shall be considered
>
> (ii) … The source selection authority shall determine the relevance of similar past performance information.

The GAO has interpreted these provisions are imposing a mandatory requirement on agencies to assess the relevance of past performance, *DRS C3 Sys., LLC*, Comp. Gen. Dec. B-310825, 2008 CPD ¶ 103; *Clean Harbors Envtl. Servs., Inc.*, Comp. Gen. Dec. B-296176.2, 2005 CPD ¶ 222.

While the regulation contains no explanation of the term "relevance of past performance information," it would appear to mean that an agency should give more weight to past performance on work that is like the work being procured (and conversely little or no weight to past performance of work that is dissimilar to the work being procured). Thus, the RFP should be clear that the offerors should refer their most relevant projects for consideration of past performance. This is particularly important because there are numerous instances where the GAO has ruled that agencies properly downgraded an offeror because of lack of relevant past performance even though it had very good past performance on dissimilar projects. In effect, such reasoning allows an agency to consider lack of comparable experience in the evaluation of past performance. For example, NASA uses an evaluation scheme that rates offerors' past performance in accordance with the relevance of their experience. Thus, to receive an

"excellent" past performance rating, an offeror must have experience that is "highly relevant." GAO has accepted this scheme without comment in many protests including *ASRC Research & Tech. Solutions, LLC*, Comp. Gen. Dec. B-400217, 2008 CPD ¶ 202 (protest granted because scheme not followed); *Wackenhut Servs., Inc*., Comp. Gen. Dec. B-400240, 2008 CPD ¶ 184 (protest denied because scheme followed). See also *AT&T Corp*., Comp. Gen. Dec. B-299542.3, 2008 CPD ¶ 65 (to obtain "excellent" past performance rating, offeror had to have "highly relevant" experience); *Sherrick Aerospace*, Comp. Gen. Dec. B-310359.2, 2008 CPD ¶ 17 (agency determination that winning offeror had relevant experience justified low risk past performance evaluation); *JWK Int'l Corp*., Comp. Gen. Dec. B-297758.3, 2006 CPD ¶ 142 (agency rating of little confidence justified when offeror had very good past performance on contract that was "somewhat relevant").

Agencies must use care in stating in the RFP what projects are relevant to the current project because the GAO has granted protests when an agency did not follow its own relevance guidelines. See, for example, *Clean Harbors Envtl. Servs., Inc.*, Comp. Gen. Dec. B-296176.2, 2005 CPD ¶ 222 (improper to fail to consider the lack of relevance of services that were smaller and less complex when RFP called for consideration of relevance); *Martin Elecs., Inc*, Comp. Gen. Dec. B-290846.3, 2003 CPD ¶ 6 (improper to fail to consider late deliveries on incomplete contract when RFP called for consideration of performance "occurring within the past three years to the date of the solicitation closing"). Compare *All Phase Envtl., Inc.*, Comp. Gen. Dec. B-292919.2, 2004 CPD ¶ 62, agreeing that pest control work was relevant to ground maintenance when the RFP called for relevant performance on "contracts of a similar size, scope, dynamic environment, and complexity." The GAO has also agreed that an agency is not bound by an experience relevance standard if the past performance relevance standard is stated in very general terms, *KIC Dev., LLC*, Comp. Gen. Dec. B-309869, 2007 CPD ¶ 184. In an unusual case, both the GAO and the Court of Federal Claims agreed that an agency properly considered large contracts not relevant to a procurement where most of the work would be on projects in the range of $15,000 to $1.7 million, *J.C.N. Constr. Co. v. United States*, 60 Fed. Cl. 400 (2004); *J.C.N. Constr. Co.,* Comp. Gen. Dec. B-293063, 2004 CPD ¶ 12.

In using past performance as an evaluation factor, the agency should state the scope of the factor in the RFP. See FAR 15.305(a)(2), which states:

> (iii) The evaluation should take into account past performance information regarding predecessor companies, key personnel who have relevant experience, or subcontractors that will perform major or critical aspects of the requirement when such information is relevant to the instant acquisition.

When an agency sees that two companies have the same key person, the operations manager, it can reasonably attribute the past performance of one company to the other, *Daylight Tree Serv. & Equip., LLC*, Comp. Gen. Dec. B-310808, 2008 CPD ¶ 22. However, in spite of the seemingly mandatory requirement to evaluate key personnel, the GAO has ruled that it is proper to exclude key personnel from the evaluation of past performance, *JWK Int'l Corp.*, Comp. Gen. Dec. B-297758.3, 2006 CPD ¶ 142 (accepting explanation that information on skills of key personnel does not assist in evaluation of past performance of offeror). In addition, an agency may reasonably determine that prior experience of key personnel does not overcome lack of corporate experience, *Blue Rock Structures, Inc.*, Comp. Gen. Dec. B-287960, 2001 CPD ¶ 184.

With regard to subcontractors to be used by the offeror, the GAO has held that agencies can evaluate their past performance even though the RFP does not explicitly call for such evaluation, *AC Techs., Inc.*, Comp. Gen. Dec. B-293013, 2008 CPD ¶ 26; *Singleton Enters.*, Comp. Gen. Dec. B-298576, 2006 CPD ¶ 157; *Science & Tech., Inc.*, Comp. Gen. Dec. B-272748, 97-1 CPD ¶ 121. Thus, subcontractor performance is a frequent element of the past performance evaluation. See *Lock-heed Martin MS2 Tactical Sys.*, Comp. Gen. Dec. B-400135, 2008 CPD ¶ 157 (high risk rating justified when 50% subcontractor had poor past performance); *STG, Inc.*, Comp. Gen. Dec. B-298543, 2006 CPD ¶ 166 (proper to limit subcontractor evaluations to work with government agencies); *Arora Group, Inc.*, Comp. Gen. Dec. B-297838.3, 2006 CPD ¶ 143 (proper to reduce performance rating because of mediocre subcontractor past performance); *Neal R. Gross & Co.*, Comp. Gen. Dec. B-275066, 97-1 CPD ¶ 30 (noting that the contractor always bears responsibility for the work of subcontractors); and *GZA Remediation, Inc.*, Comp. Gen. Dec. B-272386, 96-2 CPD ¶ 155 (good past performance rating properly based on a proposed subcontractor's prior contracts). Compare *USATREX Int'l, Inc.*, Comp. Gen. Dec. B-275592, 98-1 CPD ¶ 99, limiting past performance/experience to the offeror only. Agencies can properly assign a median rating when a proposed subcontractor has excellent past performance/experience but the offeror has no relevant past performance/experience, *Iplus, Inc.*, Comp. Gen. Dec. B-298020, 2006 CPD ¶ 90.

The current guidance on past performance is somewhat more detailed than that given in prior regulations. Under those regulations the GAO held that it was unreasonable to fail to obtain past performance information on the prior contract with the agency for the same services, *International Business Sys., Inc.*, Comp. Gen. Dec. B-275554, 97-1 CPD ¶ 114, and that evaluators may use their personal knowledge in evaluating an offeror's past performance, *Omega World Travel, Inc.*, Comp. Gen. Dec. B-271126.2, 96-2 CPD ¶ 44. Agencies are generally given broad discretion on the

information that is obtained. Random sampling has been permitted, *MilTech, Inc*., Comp. Gen. Dec. B-275078, 97-1 CPD ¶ 208, and an agency has been permitted to contact a different number of sources for different offerors, *IGIT, Inc*., Comp. Gen. Dec. B-275299.2, 97-2 CPD ¶ 7, or only a single reference, *Neal R. Gross & Co*., Comp. Gen. Dec. B-275066, 97-1 CPD ¶ 30; *HLC Indus., Inc*., Comp. Gen. Dec. B-274374, 96-2 CPD ¶ 214. Agencies also have considerable discretion in selecting the prior work that is relevant to the work being procured, *Roy F. Weston, Inc*., Comp. Gen. Dec. B-274945, 97-1 CPD ¶ 92; and the GAO has denied protests when the agency determined that dissimilar work was relevant, *All Star Maint., Inc*., Comp. Gen. Dec. B-271119, 96-1 CPD ¶ 278; *Hughes Missile Sys. Co*., Comp. Gen. Dec. B-272418, 96-2 CPD ¶ 221. Compare *Ogden Support Servs., Inc*., Comp. Gen. Dec. B-270012.2, 96-1 CPD ¶ 137, where the GAO granted a protest where the agency had considered dissimilar work relevant but the RFP had used an evaluation factor of "demonstrated successful performance on similar efforts." See also *PMT Servs., Inc*., Comp. Gen. Dec. B-270538.2, 96-2 CPD ¶ 98, where the GAO granted a protest because an agency had rated an offeror's past performance as poor because it had no prior contracts of the same size as the current procurement, finding that complexity of the work on prior contracts was more important than dollar value of the contracts. Some agencies have used questionnaires to obtain past performance information, and this practice has been approved by the GAO, *Continental Serv. Co*., Comp. Gen. Dec. B-274531, 97-1 CPD ¶ 9; *SWR, Inc*., Comp. Gen. Dec. B-276878, 97-2 CPD ¶ 34. However, the GAO has ruled that it is improper to use surveys obtained from evaluations on prior procurements unless those surveys are based on comparable data and rating schemes, *Cooperativa Muratori Riunite*, Comp. Gen. Dec. B-294980, 2005 CPD ¶ 21.

The FAR requires that offerors be permitted to submit information on corrective action that has been taken to overcome past performance problems, but agencies have been given broad discretion in refusing to adjust past performance ratings to reflect such corrective action, *Laidlaw Envtl. Servs. (GS), Inc*., Comp. Gen. Dec. B-271903, 96-2 CPD ¶ 75; *Macon Apparel Corp.*, Comp. Gen. Dec. B-272162, 96-2 CPD ¶ 95. In *Hughes Missile Sys., Co.*, Comp. Gen. Dec. B-272418, 96-2 CPD ¶ 221, the GAO denied a protest where the agency had adjusted a rating of one competitor based on corrective action but had refused to adjust the rating of another competitor that had overcome some of the problems encountered on a development contract by taking action on a follow-on production contract.

c. Experience

In most procurements the capability of an offeror cannot be determined accurately without considering the type and extent of its experience. FAR 15.304(c)(2) suggests that agencies evaluate "prior experience." It appears to be a common belief that an evaluation of relevant past performance entails an evaluation of experience, but this is only an indirect way of assessing experience. In fact, while past performance and experience are both components of a contractor's capability that involve inquires into the past, their evaluation requires asking entirely different questions. To determine a contractor's experience the questions are: What have you done? and How many times or for how long have you done it? The question for past performance is: How well have you done it? To further complicate this issue, the protest decisions contain conflicting statements on the relationship of experience and past performance. See, for example, *Telcom Sys. Servs., Inc. v. Dep't of Justice*, GSBCA 13272-P, 95-2 BCA ¶ 27,849, where the board stated that experience must be considered when evaluating past performance. In that case the board stated: "It is unreasonable to suggest that past performance does not encompass experience." In contrast, in *Hughes Georgia, Inc.*, Comp. Gen. Dec. B-272526, 96-2 CPD ¶ 151, the GAO indicated that experience was not included in the evaluation of past performance. Other cases appear to indicate that there is a good deal of confusion on this issue. For example, many GAO decisions have allowed an agency to evaluate experience in the course of evaluating "relevant" past performance, *TPL, Inc.*, Comp. Gen. Dec. B-297136.10, 2006 CPD ¶ 104, while in *Ameriko, Inc.*, Comp. Gen. Dec. B-272989, 96-2 CPD ¶ 167, the GAO did not object to the consideration of past performance when the evaluation factor in the RFP was "experience." It has also been acceptable to treat corporate experience as a subfactor to past performance and "client satisfaction," *McGoldrick Constr. Servs. Corp.*, Comp. Gen. Dec. B-310340.3, 2008 CPD ¶ 120. In *Alpha Genesis, Inc.*, Comp. Gen. Dec. B-299859, 2007 CPD ¶ 167, the GAO provided the following summary of acceptable ways to assess experience:

> [A] solicitation may require the agency to evaluate "the extent, depth, and quality" of corporate experience. *JWK Int'l*, B-256609.4, Sept. 1, 1994, 95-1 CPD ¶ 166 at 9. Corporate experience may be combined with other factors such as "quality of work," *NWT, Inc.; PharmChem Labs., Inc.*, B-280988, B-280988.2, Dec. 17, 1998, 98-2 CPD ¶ 158 at 2, or past performance. *D.O.N. Protective Servs., Inc.*, B-249066, Oct. 23, 1992, 92-2 CPD ¶ 277 at 6-7. Agencies may make corporate experience an evaluation factor, with past performance as a subfactor. *Defense Tech., Inc.*, B-271682, July 17, 1996, 96-2 CPD ¶ 54 at 2.

See, however, *United Paradyne Corp.*, Comp. Gen. Dec. 297758, 2006 CPD ¶ 47, where the GAO disapproved factoring an average of an offeror's experience into its past performance rating (in effect reducing the past performance rating for experience on work that was not similar to the work to be performed on the proposed contract). The decision describes the improper technique as follows:

> After rating the relevance of each contract identified by the offeror in its proposal, the Air Force averaged these ratings to arrive at an overall "relevance" rating. It then integrated this rating with an overall past performance rating, also obtained by averaging the point scores on the performance questionnaires furnished by the offeror's references. This process yielded an overall performance confidence rating. Thus, for example, an average relevance rating of "highly relevant" combined with an average past performance rating of "exceptional/high confidence" yielded an overall performance confidence rating of "exceptional/high confidence"; an average relevance rating of "relevant" combined with an average past performance rating of "exceptional/high confidence" yielded an overall performance confidence rating of "very good/significant confidence"; an average relevance rating of "somewhat relevant" combined with an average past performance rating of "exceptional/high confidence" yielded an overall performance confidence rating of "satisfactory/confidence"; and an average relevance rating of "not relevant" combined with an average past performance rating of "exceptional/high confidence" yielded an overall performance confidence rating of "neutral/unknown confidence."

Thus, it is highly desirable to evaluate past performance and experience separately. See *Executive Court Reporters, Inc.*, Comp. Gen. Dec. B-272981, 96-2 CPD ¶ 227, where the GAO stated that past performance and experience should be separate factors and evaluated separately. See also *Smart Innovative Solutions*, Comp. Gen. Dec. B-400323.3, 2008 CPD ¶ 220 (lack of "relevant experience" properly considered); *Engineering Constr. Servs., Inc.*, Comp. Gen. Dec. B-310311.2, 2008 CPD ¶ 6 ("relevant experience" properly evaluated as separate subfactor); *JAVIS Automation & Eng'g, Inc*., Comp. Gen. Dec. B-290434, 2002 CPD ¶ 140 (past performance and experience evaluated together); *PW Constr., Inc.*, Comp. Gen. Dec. B-272248, 96-2 CPD ¶ 130 (evaluation of both experience and past performance properly performed).

The RFP should state whether the agency intends to evaluate corporate experience, experience of key personnel, or both. There is a great deal of discretion in making this determination and the GAO has held that the experience of key personnel can be evaluated under a "corporate experience" factor unless the RFP precludes such evaluation, *Data Mgmt. Servs. Joint Venture*, Comp. Gen. Dec. B-299702, 2007 CPD ¶ 139; *Dix Corp*., Comp. Gen. Dec. B-293964, 2004 CPD ¶ 143. Nonetheless, it is better practice to state in the RFP precisely what experience is to be evaluated. See *Johnson Controls Sec. Sys., LLC*, Comp. Gen. Dec. B-296490.3, 2007 CPD ¶ 100 (corporate experience and experience of proposed staff); *Leader Communications Inc*., Comp. Gen. Dec. B-298734, 2006 CPD ¶ 192 (experience of key personnel and corporate experience); *KIC Dev., LLC*, Comp. Gen. Dec. B-297425.2, 2006 CPD ¶ 27 (RFP stated that experience requirement could be met by experience of key personnel or subcontractors); *Sigmatech, Inc.*, Comp. Gen. Dec. B-271821, 96-2 CPD ¶ 101 (corporate experience plus "sufficient personnel with ample qualifications"). It has also been held to be proper to evaluate corporate experience and key personnel experience separately, giving a low rating on corporate experience even though the key personnel have good experience, *Population Health Servs., Inc*., Comp. Gen. Dec. B-292858,

2003 CPD ¶ 217. In *Ashe Facility Servs., Inc.*, Comp. Gen. Dec. B-292218.3, 2004 CPD ¶ 80 the GAO granted a protest because the agency had considered the key personnel experience of the winning offeror but not of the protester, concluding that such information should have been considered because the RFP stated that the agency would consider "any information supplied by the offeror."

Once it has been determined that experience is to be evaluated, the types of experience relevant to the procurement must be determined. Often, RFPs merely indicate that experience on "similar" projects will be considered. There are many factors to be considered in determining similarity, including dollar value, complexity, and nature of the work. Some RFPs go into great detail specifying the types of experience considered important and, in some cases, their relative importance, *Vox Optima, LLC*, Comp. Gen. Dec. B-400451, 2008 CPD ¶ 212 ("40,000 annual billable hours in public affairs work"); *Burns and Roe Servs. Corp.*, Comp. Gen. Dec. B-296355, 2005 CPD ¶ 150 ("similar in complexity (i.e., type of work, size (contracts in excess of $5,000,000 per year) and volume"); *Planning Sys., Inc.*, Comp. Gen. Dec. B-292312, 2004 CPD ¶ 83 ("similar or directly related work experience within the past five years of similar scope, magnitude or complexity to that detailed in the SOW"); *Telestar Corp.*, Comp. Gen. Dec. B-275855, 97-1 CPD ¶ 150 (projects "of similar size and scope related to this effort"); *Sigmatech, Inc.*, Comp. Gen. Dec. B-271821, 96-2 CPD ¶ 101 (corporate experience plus "sufficient personnel with ample qualifications"), and agencies have been permitted to specify very limited types of relevant experience, *SKE Int'l, Inc.*, Comp. Gen. Dec. B-311383, 2008 CPD ¶ 111 (construction of multiple vertical construction multi-discipline projects simultaneously); *Zolon Tech, Inc.*, Comp. Gen. Dec. B-299904.2, 2007 CPD ¶ 183 (experience in specific technology to be used in design of information system - consultant's experience properly downgraded because he was not a subcontractor); *MELE Assocs., Inc.*, Comp. Gen. Dec. B-299229.4, 2007 CPD ¶ 140 (experience in four tasks to be performed); *Systems Application & Techs., Inc.*, Comp. Gen. Dec. B-270672, 96-1 CPD ¶ 182 (experience with contracting agency); *CAN Indus. Eng'g, Inc.*, Comp. Gen. Dec. B-271034, 96-1 CPD ¶ 279 (experience with the agency's system that was to be tested under the contract).

Even where solicitations use terms such as "similar" or "relevant" in describing the nature of the experience, the cases have been quite liberal in permitting the government to use specific discriminators that are not stated in the solicitation. See *EastCo Bldg.Servs., Inc.*, Comp. Gen. Dec. B-275334.2, 97-1 CPD ¶ 83, holding that the totality of the RFP will be considered in determining whether offerors were given appropriate notice of the factors to be considered, and stating

> EastCo argues that the agency improperly applied - and downgraded its proposal under the past performance/experience on similar projects factor based on - two undisclosed criteria: whether previously performed contracts were of at least a 3-year duration, and whether the areas of the buildings maintained under prior contracts had been at least 500,000 square feet.
>
> This argument is without merit. The RFP required offerors to list prior contracts, which would be evaluated for past performance/experience, and to indicate for each contract (among other things) the type of facility, gross square footage, services performed, and duration. EastCo and the other offerors were on notice from these requirements that, in judging whether a prior contract would be deemed a "similar project," the agency would consider the similarity of the contracts to the RFP requirement in these areas, and reading these requirements together with the rest of the RFP should have put EastCo on notice of the agency's intent to consider these specific elements of its listed contracts. *See ORI Servs. Corp.*, B-261225, July 28, 1995, 95-2 CPD ¶ 55.

See also *Aviate L.L.C.*, Comp. Gen. Dec. B-275058.6, 97-1 CPD ¶ 162 (a factor used was the awardee's experience on "performance based contracting" although the RFP did not specifically call for that type of experience). Compare *Omniplex World Servs. Corp.*, Comp. Gen. Dec. B-290996.2, 2003 CPD ¶ 7, where the GAO held that it was improper to eliminate an offeror from the competition for not having experience running a detention facility when the RFP called for the evaluation of "'guard/custody officer' experience similar in size, scope and complexity to the RFP work requirements."

Experience of major subcontractors is usually considered relevant to an evaluation of an offeror's experience, *Kellogg Brown & Root Servs., Inc.*, Comp. Gen. Dec. B-298694.7, 2007 CPD ¶ 124, and, if the RFP includes a statement to this effect, the experience of proposed subcontractors must be included in the evaluation, *KC Dev., LLC*, Comp. Gen. Dec. B-297425.2, 2006 CPD ¶ 27.

In many procurements the agency can make a valid assessment of the capability of the offerors by using only the past performance and experience evaluation factors. When doing so, the agency should avoid the use of other capability factors that make the procurement more complex and costly. However, this decision will depend on the specific procurement. For example, in some manufacturing contracts, the agency may believe that it is essential to evaluate the facilities of each offeror. Some agencies believe it is crucial in service contracts to evaluate key personnel. Most agencies believe it is advantageous in research and development contracts to evaluate understanding of the work. It is important to select an array of factors that provide a balanced assessment of the capability of each offeror to perform the work called for by the contract but to limit the number of capability factors as much as practicable.

d. Key Personnel

One of the most commonly used evaluation factors in best value procurements is the key personnel that the offeror intends to use to perform the contract. It is an especially useful means of assessing the capability of offerors in research and development and service contracts, where the quality of the people will likely be a major determinant of the quality of the performance. However, this is so only if the contractor that wins the competition actually uses the key personnel that have been proposed. Many agencies attempt to make key personnel an offer factor by using key personnel clauses in solicitations requiring the offeror to use the personnel designated in the proposal (or equal personnel). This raises a question about the effectiveness of these clauses. See the discussion in Chapter 3.

Key personnel can be a useful evaluation factor if an agency obtains sufficient information to make a meaningful assessment of the qualifications of the people that are proposed. This generally requires obtaining more than merely resumes. See, for example, *Savannah River Alliance, LLC*, Comp. Gen. Dec. B-311126, 2008 CPD ¶ 88 (RFP required resumes, references, letters of commitment and participation in oral presentation); *Systems Res. & Applications Corp.*, Comp. Gen. Dec. B-299818, 2008 CPD ¶ 28 (RFP required evidence that personnel had experience with type of work being procured); and *Maden Techs.*, Comp. Gen. Dec. B-298543.2, 2006 CPD ¶ 167 (RFP required degree requirements and related experience for stated number of years). Nonetheless, agencies have been permitted to depend entirely on resumes. See *D&J Enters., Inc.*, Comp. Gen. Dec. B-310442, 2008 CPD ¶ 8 (protester properly excluded from competition range when it submitted experience of key personnel in lieu of required resumes); *Operational Res. Consultants, Inc.*, Comp. Gen. Dec. B-299131.1, 2007 CPD ¶ 38 (protester properly downgraded because resume of proposed project manager did not clearly show required type of experience); *Critical Incident Solutions, LLC*, Comp. Gen. Dec. B-298077, 2006 CPD ¶ 88 (quotation unacceptable because resume did not show required experience and agency not required to review other material which allegedly showed experience); *Tessada & Assocs., Inc.,* Comp. Gen. Dec. B-293942, 2004 CPD ¶ 170 (proposal properly downgraded because resume did not clearly show that person met experience requirement); and *Aerotek Scientific LLC*, Comp. Gen. Dec. B-293089, 2004 CPD ¶ 21 (resume improperly evaluated with regard to experience requirement). This reliance on resumes may be appropriate if the RFP calls for sufficient information in the resumes. See, for example, *Advanced Tech. Sys., Inc.*, Comp. Gen. Dec. B-296493.5, 2006 CPD ¶ 147 (resumes had to contain also been proposed for another contract being competed at the same time.

When this factor is used, the agency should decide which personnel are sufficiently important to the success of contract performance to be designated as key personnel. As a

general rule, this should be a limited number of contractor employees. See, for example, *Dynamic Resources, Inc*., Comp. Gen. Dec. B-277213, 97-2 CPD ¶ 100 (program manager, technical manager, senior reliability engineer, computer programmers, aircraft maintenance analysts, programmer/analyst, and software engineer are key personnel).

e. Facilities

Another evaluation factor that may be used in best value procurements is the evaluation of an offeror's facilities. See *The American Indian Center, Inc.*, Comp. Gen. Dec. B-278678, 98-1 CPD ¶ 66 (proposal reasonably downgraded because location of clinic was not accessible by public transportation); *Voith Hydro, Inc.*, Comp. Gen. Dec. B-277051, 97-2 CPD ¶ 68 (proposal properly excluded from competitive range because unproven manufacturing facility posed unacceptable risk); *Conrex, Inc.*, Comp. Gen. Dec. B-266060.2, 96-1 CPD ¶ 46 (proposal reasonably downgraded because offeror failed to describe its facility adequately); and *Bannum, Inc.*, Comp. Gen. Dec. B-270640, 96-1 CPD ¶ 167 (agency reasonably excluded protester from competitive range because the facility that the protester proposed would require major renovations that could not be completed within the 60-day commencement time frame). An offeror's facility may also be evaluated as a subfactor. See *Schleicher Community Corrections, Inc.*, Comp. Gen. Dec. B-270499.3, 97-1 CPD ¶ 33.

f. Financial Capability

Earlier, there was considerable controversy over whether the financial ability of offerors should be used as an evaluation factor or subfactor. In *Delta Data Sys. Corp. v. Webster*, 744 F.2d 197 (D.C. Cir. 1984), the court followed the general rule that factors related to responsibility could be used for comparative purposes and applied this rule to permit the comparative evaluation of the financial condition of the offerors in a long-term contract. In arriving at this result, the court reversed a contrary conclusion of the GAO on the same case, *Delta Data Sys. Corp.*, Comp. Gen. Dec. B-213396, 84-1 CPD ¶ 430. The GAO continued to adhere to the premise that financial condition should be used as an evaluation factor only when there is some special justification for doing so. See *Flight Int'l Group, Inc.*, 69 Comp. Gen. 741 (B-238953.4), 90-2 CPD ¶ 257, where the GAO ruled that downgrading an offeror's management capabilities on the basis of financial weakness was actually a finding of nonresponsibility. However, there are cases where the GAO has permitted the use of financial condition as a specific evaluation factor, *Greyback Concession*, Comp. Gen. Dec. B-239913, 90-2 CPD ¶ 278

(no discussion of special justification used to justify evaluation of financial condition); *E.H. White & Co.*, Comp. Gen. Dec. B-227122.3, 88-2 CPD ¶ 41 (competition between small businesses). In the normal procurement situation there is little justification for making a comparative evaluation of financial condition, and generally this should be left to the responsibility determination.

g. Understanding the Work/Soundness of Approach

A common practice of agencies is to require the submission of technical and management proposals to assess each offeror's understanding of the work or the soundness of the approach of the offerors. As discussed above, such proposals can also be used to solicit non-cost elements of the offer such as enhancements, technical solutions, or processes or techniques to be used to perform the work. Some agencies make it mandatory to include such an evaluation factor. Thus, Air Force Mandatory Procedure 5315.304.4.4.1.1 requires the factor "Mission Capability" on all procurements of $1 million or more (to assess "the offeror's capability to satisfy the government's requirements"), and NASA Source Selection Guide 1815.304-70 requires the factor "Mission Suitability" on all procurements of $50 million or more (optional on smaller procurements).

This factor assumes that an offeror's capability can be evaluated by requiring it to submit a preliminary design or a technical/management plan that describes, at some specified level of detail, how the contract will be performed. To the extent that these written submissions are created by the personnel that will ultimately perform the contract, this may be a valid assumption. Thus, in research and development procurements, as well as in design build competitions, where preliminary designs prepared by the offerors' own personnel are commonly used as a means of evaluating the capabilities of the competitors, the requirement for such designs is frequently believed to be a valid means of assessing the capability of the offerors. However, while such designs provide an agency with a considerable amount of information concerning the preliminary view of the offeror as to how the needs of the government can be best satisfied, they add a great amount of cost and time to the source selection process. In particular, the costs of the offerors are greatly increased because they are forced to create the preliminary design in order to participate in the competition, and the time required for the competition is greatly increased because the competitors must be given time to create the designs and the agency must allocate a significant period to evaluate the designs. Nonetheless, such design competitions have been accepted as a valid way

of ascertaining the competence of the competitors. See, for example, *ITT Indus. Space Sys., LLC*, Comp. Gen. Dec. B-309964, 2007 CPD ¶ 217 (mission suitability properly evaluated in procurement of new land imaging instrument to be included in satellite); *Sikorsky Aircraft Co.*, Comp. Gen. Dec. B-299145, 2007 CPD ¶ 45 (mission capability properly evaluated but life-cycle cost improperly evaluated in procurement of new helicopter); *Compunetix, Inc.*, Comp. Gen. Dec. B-298489.4, 2007 CPD ¶ 12 (mission suitability properly evaluated in procurement of new mission voice systems). The requirement for a technical proposal describing the precise techniques that will be used to perform complex services has also been found to be an acceptable way to evaluate the offerors' capability. See, for example, *Savannah River Tank Closure, LLC*, Comp. Gen. Dec. B-400953, 2009 CPD ¶ 78 (method of cleaning tanks properly evaluated).

In service contracting, this design-competition technique has been emulated by calling for the submission of technical and management plans to assess the offerors' understanding of the work. Here there is far greater doubt as to the validity of the process because it is far less likely that the plans will be written by the personnel that will ultimately perform the work. In fact, it is well understood that many technical/management plans are prepared by specialized proposal-writing personnel. Furthermore, it is doubtful if such plans are a valid means of assessing capability, since there are numerous instances where fully capable offerors were found to be incapable because of badly written plans. For example, in *ManTech Int'l Corp.*, Comp. Gen. Dec. B-311074, 2008 CPD ¶ 87, an incumbent contractor whose performance had been rated excellent was downgraded for not writing good responses to sample problems; in *HealthStar VA, PLLC*, Comp. Gen. Dec. B-299737, 2007 CPD ¶ 114, an incumbent contractor was downgraded because it left information out of its proposal; in *Management Tech. Servs.*, Comp. Gen. Dec. B-251612.3, 93-1 CPD ¶ 432, an incumbent contractor was downgraded in the scoring for failing to include in its plan the required information on how it intended to obtain and train its workforce; while in *Executive Security & Eng'g Techs., Inc.*, Comp. Gen. Dec. B-270518, 96-1 CPD ¶ 156, an incumbent contractor was downgraded for failing to provide information on its corporate experience. Successful incumbent contractors have also been excluded from the competitive range for poorly written technical/management plans, *Pedus Bldg. Servs., Inc.*, Comp. Gen. Dec. B-257271.3, 95-1 CPD ¶ 135 (sloppy technical proposal); *Premier Cleaning Sys., Inc.*, Comp. Gen. Dec. B-255815, 94-1 CPD ¶ 241 (omission of required documentation on capabilities of project manager currently managing the contract). See also *McAllister & Assoc., Inc.*, Comp. Gen. Dec. B-277029, 98-1 CPD ¶ 85, where an experienced contractor was dropped from the competitive range because it had submitted a poorly written technical proposal.

This type of assessment of understanding of the services to be performed through the use of technical/management plans is particularly questionable when the services being procured are routine, non-technical services. Nonetheless, there are numerous instances of offerors losing competitions for such services based on the evaluation of such plans. See, for example, *AHNTECH, Inc*., Comp. Gen. Dec. B-299806, 2007 CPD ¶ 213 (food services); *Financial & Realty Servs., LLC*, Comp. Gen. Dec. B-299605.2, 2007 CPD ¶ 161 (warehouse operations and labor services); *Meeks Disposal Corp.*, Comp. Gen. Dec. B-299576, 2007 CPD ¶ 127 (refuse collection and recycling services set aside for small businesses); *Cortez, Inc*., Comp. Gen. Dec. B-292178, 2003 CPD ¶ 184 (facility logistics services); *Philadelphia Produce Market Wholesalers, LLC*, Comp. Gen. Dec. B-298751, 2006 CPD ¶ 193 (fresh fruit and vegetable set aside for small businesses); *Leader Communications Inc*., Comp. Gen. Dec. B-298734, 2006 CPD ¶ 192 (business support services); *Advanced Fed. Servs. Corp*., Comp. Gen. Dec. B-298662, 2006 CPD ¶ 174 (administrative support for government facility set aside for 8(a) businesses); *Kola Nut Travel, Inc*., Comp. Gen. Dec. B-296090.4, 2005 CPD ¶ 184 (travel services set aside for small businesses).

In spite of this evidence that the assessment of understanding of the work through the use of technical/management plans is a very questionable business practice in the service contracting area, there is no question that it is legally valid. See *Computerized Project Mgmt. Plus*, Comp. Gen. Dec. B-247063, 92-1 CPD ¶ 401, where the GAO stated:

> CPM complains here that the evaluators, who were familiar with CPM's performance, treated it "unfairly" because they scored its "[offer] within the four corners of the proposal," and did not "consider any knowledge they had of the work presently being performed by CPM" that was not reflected in its proposal. CPM adds that any informational deficiencies in its proposal should have been rectified by examining the performance of CPM on the predecessor contract and through "communication" with CPM.
>
> CPM's reliance on its status as the incumbent is misplaced. A contracting activity's technical evaluation of a proposal is dependent upon the information furnished in the proposal. *All Star Maint., Inc*., B-244143, Sept. 26, 1991, 91-2 CPD ¶ 294. There is no legal basis for favoring a firm with presumptions on the basis of the offeror's prior performance; rather, all offerors must demonstrate their capabilities in their proposals. *Id*. As CPM's sole objection to the evaluation of its technical proposal involves the activity's consideration of only the information furnished in CPM's proposal, and this manner of evaluation comports with the policy objectives in federal procurement statutes and regulations, we have no basis on which to conclude that the contracting activity acted unreasonably in its evaluation of CPM's proposal.

Notwithstanding this legal ruling, many agencies have concluded that the assessment of understanding of the work in service contracting procurements is of doubtful utility and that it adds significantly to the cost and time of the procurement process. Hence, this evaluation factor is being used less frequently than in the past.

It is proper to call for a risk assessment of the probability that a proposed management or technical plan will create performance problems. See Air Force Mandatory Procedure 5315.305.5.1.2. requiring the use of a "mission capability risk rating" and stating:

> The mission capability risk rating focuses on the weaknesses associated with an offeror's proposed approach…. Assessment of a mission capability risk considers potential for disruption of schedule, increased cost, or degradation of performance, the need for increased government oversight, and the likelihood of unsuccessful contract performance…. For any weakness identified, the evaluation shall address the offeror's proposed mitigation … and document why that approach is or is not acceptable. Whenever a strength is identified as part of the mission capability technical rating, (see 5.5.1.1 above), the evaluation shall assess whether the offeror's proposed approach would likely cause an associated weakness which may impact schedule, cost, or performance.

This technique has been upheld in *Trend Western Tech. Corp.*, Comp. Gen. Dec. B-275395.2, 97-1 CPD ¶ 201 (denying a protest that the agency had assessed a plan as having "moderate risk" because the staffing level was low); *Sensis Corp.*, Comp. Gen. Dec. B-265790.2, 96-1 CPD ¶ 77 (agency properly found moderate risk because the protester did not have a mature software development process); and *Hydro Eng'g, Inc. v. United States*, 37 Fed. Cl. 448 (1997) (agency properly found specific elements of a technical and management proposal created a risk of timely performance and technical compliance).

h. Price Realism

Price realism can be used to evaluate capability of an offeror by assessing its understanding of the work, its responsibility or the performance risk that is inherent in a low price. The use of such an evaluation is addressed only peripherally in FAR 15.404-1(d)(3), stating that "cost realism analysis" can be used on fixed-price incentive contracts, or "in exceptional cases, on other competitive fixed-price type contracts," but that, if it is used, prices cannot be adjusted upwards as a result of the analysis. See *IBM Corp*., Comp. Gen. Dec. B-299504, 2008 CPD ¶ 64, granting a protest when the agency increased a contractor's prices in the evaluation process as a result of it's price realism analysis.

In spite of the sparse FAR coverage, the evaluation of price realism is a common practice with some procuring agencies. This use is limited by decisions of GAO holding that price realism can only be assessed if the solicitation contains an evaluation factor indicating that a proposal will be downgraded if the price is unrealistically low, *Possehn Consulting*, Comp. Gen. Dec. B-278579, 98-1 CPD ¶ 10 (where there is no RFP statement on the issue, price realism can only be used to evaluate responsibility of

the offeror); *CSE Constr*., Comp. Gen. Dec. B-291268.2, 2002 CPD ¶ 207 (price realism analysis not permitted when evaluation factors was "unbalanced or unreasonable price" - reasonableness indicates price is too high); *J.A. Farrington Janitorial Servs*., Comp. Gen. Dec. B-296875, 2005 CPD ¶ 187 (price realism analysis not permitted when evaluation factor was "unreasonable as to price"); *Indtai, Inc*., Comp. Gen. Dec. B-298432.3, 2007 CPD ¶ 13 (price realism analysis not permitted if not called for by RFP). See *Pemco Aeroplex, Inc*., Comp. Gen. Dec. B-310372.3, 2008 CPD ¶ 126, stating:

> Price realism is not ordinarily considered in the evaluation of proposals for the award of a fixed-price contract, because these contracts place the risk of loss upon the contractor. However, in light of various negative impacts on both the agency and the contractor that may result from an offeror's overly optimistic proposal, an agency may, as here, expressly provide that a price realism analysis will be applied in order to measure the offerors' understanding of the requirements and/or to assess the risk inherent in an offeror's proposal. See, e.g., *Wackenhut Servs., Inc*., B-286037, B-286037.2, Nov. 14, 2000, 2001 CPD ¶ 114 at 3; *Molina Eng'g, Ltd./Tri-J Indus., Inc. Joint Venture*, May 22, 2000, B-284895, 2000 CPD ¶ 86 at 4. Although the Federal Acquisition Regulation (FAR) identifies permissible price analysis techniques, FAR § 14.404-1, it does not mandate any particular approach; rather, the nature and extent of a price realism analysis, as well as an assessment of potential risk associated with a proposed price, are generally within the sound exercise of the agency's discretion. See *Legacy Mgmt. Solutions*, LLC, B-299981.2, Oct. 10, 2007, 2007 CPD ¶ 197 at 3; *Comprehensive Health Servs., Inc*., B-310553, Dec. 27, 2007, 2007 CPD ¶ 9 at 8. In reviewing protests challenging an agency's evaluation of these matters, our focus is whether the agency acted reasonably and in a way consistent with the solicitation's requirements. See, e.g., *Grove Res. Solutions, Inc*., B-296228, B-296228.2, July 1, 2005, 2005 CPD ¶ 133 at 4-5.

Evaluation factors that have supported the use of price realism analysis are "performance risk," *Trauma Serv. Group*, Comp. Gen. Dec. B-242902.2, 91-1 CPD ¶ 573; *Sabreliner Corp*., Comp. Gen. Dec. B-284240.2, 2000 CPD ¶ 68; *Guam Shipyard*, Comp. Gen. Dec. B-311321, 2008 CPD ¶ 124, "management," *SEEMA, Inc*., Comp. Gen. Dec. B-277988, 98-1 CPD ¶ 12 (low price indicated lack of understanding of the work by the offeror's management), and "understanding the requirements," *Consolidated Servs., Inc*., Comp. Gen. Dec. B-276111.4, 98-1 CPD ¶ 14. A direct statement that price realism will be used to evaluate offers is also satisfactory. In *Team BOS/Naples - Gemmo S.p.A./DelJen*, Comp. Gen. Dec. B-298865.3, 2008 CPD ¶ 11, the RFP statement that "[u]nrealistic, unreasonable, or unbalanced pricing may cause a proposal to be determined unacceptable, or cause a reduction in price proposal rankings" was held to indicate that a price realism analysis would be made. See also *Centech Group, Inc.*, Comp. Gen. Dec. B-278715, 98-1 CPD ¶ 108, approving the price realism analysis and describing the RFP language as follows:

> The RFP emphasized that any proposal that was "unrealistically low in cost(s) and/or price [would] be deemed reflective of an inherent lack of technical competence [or] failure to comprehend the complexity and risk" of the requirements, justifying "rejection of the proposal."

IV. SECTION IV. SCORING METHODS

The source selection plan should prescribe any scoring methods that are to be used to rate the proposals. When the procurement strategy calls for the selection of the acceptable source with the lowest price, the scoring system need only provide information on which offerors are acceptable. But when the tradeoff strategy is adopted, a scoring system may be used to convey more complex information. Agencies have generally prescribed such scoring methods for some of or all the evaluation factors as a means of summarizing the evaluations to assist the source selection authority in making the ultimate tradeoff decision between competing proposals. Scoring systems are no more than notational devices that provide a rough means of measuring differences between proposals.

There is no requirement that a scoring system be used. See FAR 15.305(a), which states:

> Evaluations may be conducted using any rating method or combination of methods, including color or adjectival ratings, numerical weights, and ordinal rankings.

Because scoring systems are primarily a means of aggregating complex information, they are of little use when there are a small number of evaluation factors or when the source selection team is composed of only a few people. In such cases the source selection decision can be made on the basis of the evaluations of the proposals without scores. For example, in a procurement where the only evaluation factors are price and offeror capability, no scores are needed to report the relative risk of the varying levels of capability and the differences in prices between the offerors. In contrast, when there are a large number of evaluation factors, scoring systems have generally been used as a means of summarizing the evaluations.

When an agency decides to use a notational scoring system for some of or all the factors, agencies are free to use any one of a wide variety of scoring systems as long as the system chosen has a rational basis, *Grey Advertising, Inc.*, 55 Comp. Gen. 1111 (B-184825), 76-1 CPD ¶ 325. Because all such systems, whether numerical, adjectival, color coding, or otherwise, convey essentially the same information, the selection of the system is not a critical element of the process. However, a system with a small number of gradations will not provide much discrimination between various levels of proficiency. The result is that systems limited to ratings of "pass/fail" or "excellent, good, fair, and poor" are less useful in communicating the differences between the proposals than systems with more gradations. Because the ultimate decision should be based on the actual strengths and weaknesses of the proposals, this should not be a

serious defect in the source selection process. See, however, *Trijicon, Inc.*, 71 Comp. Gen. 41 (B-244546), 91-2 CPD ¶ 375, rejecting a color coding system that resulted in grades of blue for all elements of the proposal that were acceptable.

In most cases only some of the evaluation factors are scored. NASA scores technical and management ("mission suitability") but does not score cost to the government. See NFS 1815.304-70. The Naval Air Systems Command stated in NavAirInst 4200.27A, Feb. 12, 1985:

> The use of pre-established point systems is prohibited. A pre-established point system is one that is formulated and defined prior to receipt of the proposals. It represents an attempt by members of the SSEB [source selection evaluation board] to prejudge the relative importance of the many unidentified subelements of the selection criteria prior to knowing what all of those subelements are or exactly how they relate. Instead, quantitative factors (for example, speed, range, cost) shall be measured in their normal quantitative units of measure (that is, knots, nautical miles, dollars) and compared against the RFQ/P requirements, if established, and quantitative factors will be rated using descriptive terms.

The types of scoring systems that have been commonly used are discussed below.

A. Adjectival Ratings

Adjectival rating systems are widely used and generally call for a set of four or five ratings, such as excellent, good, fair, and poor; or outstanding, highly acceptable, acceptable, marginally acceptable, and unacceptable. These systems have the disadvantage of providing very few gradations to distinguish between proposals — making the scoring somewhat imprecise as a tool to measure the marginal differences between proposals. However, the GAO has accepted the use of these systems — finding that they can give the source selection official a clear understanding of the relative merit of the proposals, *Dynamics Research Corp.*, Comp. Gen. Dec. B-240809, 90-2 CPD ¶ 471. See also *Metropolitan Contract Servs., Inc.*, Comp. Gen. Dec. B-191162, 78-1 CPD ¶ 435, *recons. denied*, 78-2 CPD ¶ 43, rejecting the argument that the use of an adjectival rating system precluded offerors from access to the rationale employed in the decision-making process, and *Akal Sec., Inc.*, Comp. Gen. Dec. B-261996, 96-1 CPD ¶ 33, where the GAO disagreed with the protester's contention that the use of the adjectival rating "acceptable" was too broad to allow for differences in technical superiority. The acceptance of such systems is justified because they do not form the basis for the ultimate source selection decisions. See *Able-One Refrigeration, Inc.*, Comp. Gen. Dec. B-244695, 91-2 CPD ¶ 384, where the GAO commented that adjectival scores "are useful only as guides to intelligent decision making, and are not generally controlling for award because they often reflect the disparate, subjective

judgments of the evaluators." This reasoning has been stated many times such as in *Stateside Assocs., Inc.*, Comp. Gen. Dec. B-400670.2, 2009 CPD ¶ 120.

B. Color Coding

A scoring system very similar to adjectival scoring is the color coding system. See Air Force Mandatory Procedure 5315.305.5.1.1, which sets forth the following description of this type of system to be used to score mission capability:

Color	Rating	Description
Blue	Exceptional	Exceeds specified minimum performance or capability requirements in a way beneficial to the government. A proposal must have one or more strengths and no deficiencies to receive a blue.
Green	Acceptable	Meets specified minimum performance or capability requirements. A proposal must have no deficiencies to receive a green but may have one or more strengths.
Yellow	Marginal	There is doubt regarding whether an aspect of the proposal meets s specified minimum performance or capability requirements, but any such uncertainty is correctable.
Red	Unacceptable	Fails to meet specified performance or capability requirements. The proposal has one or more deficiencies and is not awardable.

Four colors serve essentially the same purpose as do four adjectives in that they provide minimal gradations to distinguish between proposals. However, the GAO has agreed with the use of color coding, holding that such a system does not produce "an artificial equality in the ratings," *Ferguson-Williams, Inc.*, 68 Comp. Gen. 25 (B-231827), 88-2 CPD ¶ 344. The GAO has also held that a color rating system does not prevent the agency from gaining a clear understanding of the relative merits of the proposals, *Bendix Field Eng'g Corp.*, Comp. Gen. Dec. B-241156, 91-1 CPD ¶ 44. See also *Peterson Bldrs., Inc.*, Comp. Gen. Dec. B-244614, 91-2 CPD ¶ 419, denying a protest that the color coding system obscured the fact that the technical proposals were essentially equal. However, the GAO has questioned a color coding system that rated all factors and subfactors as "green" that were acceptable, *Trijicon, Inc.*, 71 Comp.

Gen. 41 (B-244546), 91-2 CPD ¶ 375. The GAO rejected this system because it did not differentiate between proposals that were merely acceptable and those with superior technical features — thus converting a tradeoff decisional scheme into a lowest-price, technically acceptable proposal scheme.

C. Risk Assessment Systems

Agencies have scored some evaluation factors in terms of risk. See, for example, Air Force Mandatory Procedure 5315.305.5.1.2, which calls for the use of "mission capability risk ratings" as follows:

Rating	Description
Low	Has little potential to cause disruption of schedule, increased cost or degradation of performance. Normal contractor effort and normal government monitoring will likely be able to overcome any difficulties.
Moderate	Can potentially cause disruption of schedule, increased cost or degradation of performance. Special contractor emphasis and close government monitoring will likely be able to overcome difficulties.
High	Likely to cause significant disruption of schedule, increased cost or degradation of performance. Extraordinary contractor emphasis and rigorous government monitoring may be able to overcome difficulties.
Unacceptable	The existence of a significant weakness or combination of weaknesses that is very likely to cause unmitigated disruption of schedule, drastically increased cost or severely degraded performance. Proposals with an unacceptable rating are not awardable.

This regulation also calls for the use of + and − markings to obtain better differentiation, as follows:

> A plus "+" rating may be used as an option when risk is evaluated to be in the upper boundaries of a Mission Capability Risk Rating, but is not high enough to merit the next inferior rating. When assigning the risk rating, teams should endeavor to rate proposals as low, moderate, high, or unacceptable. However, if additional stratification within the Low, Moderate or High Risk ratings is desired, evaluators/teams may (optionally) annotate this by adding a plus "+" to the risk rating. For example, where in the judgment of the evaluator, an offeror has risk that approaches or is nearly rated as a Moderate risk, a Mission Capability Risk Rating of "Low +" could be assigned. Ensure, however, that the source selection record adequately addresses the rationale for assigning this inferior risk rating. The use of a (+) shall not apply to the "Unacceptable" risk rating.

In *Systems Eng'g & Mgmt. Co*., Comp. Gen. Dec. B-275786, 97-1 CPD ¶ 133, the protester argued that the agency improperly evaluated the proposal risk of the awardee's proposal. Specifically, the protester claimed that because the awardee's wages were too low, it would not be able to retain qualified personnel over the course of contract performance. The GAO denied the protest, stating that the awardee's proposal acknowledged the low wages and provided a convincing rationale for its ability to offer such wages. In *Tecom, Inc*., Comp. Gen. Dec. B-275518.2, 97-1 CPD ¶ 221, the GAO found reasonable an agency's determination that even though the agency gave the awardee proposal a "moderate risk" rating because of its minimum staffing numbers and protester had superior rating, the protester's proposal did not justify the higher cost. In *AlliedSignal, Inc*., Comp. Gen. Dec. B-272290, 96-2 CPD ¶ 121, the awardee received an "outstanding/moderate" risk rating for a major weight component of its proposed product. The protester challenged the evaluation claiming that the "outstanding" element of the rating was not in accord with the evaluation criteria in the RFP. The GAO denied the protest, finding that the risk assessment, even if slightly out of line, did not impact significantly on the source selection decision.

The GAO will review an agency's evaluation of proposal risk to determine whether the judgment was reasonable. See *Trend Western Tech. Corp*., Comp. Gen. Dec. B-275395.2, 97-1 CPD ¶ 201 (agency rating of proposal as "moderate risk" due to low staffing reasonable); *Robbins-Gioia, Inc*., Comp. Gen. Dec. B-274318, 96-2 CPD ¶ 222 (agency rating of proposal as "moderate risk" reasonable because protester had limited systems engineering experience and lacked experience overseeing these processes as a general contractor).

Similarly, Air Force Mandatory Procedure 5315.305.5.2.2. uses the following rating system for past performance:

Rating	Definition
SUBSTANTIAL CONFIDENCE	Based on the offeror's performance record, the government has a high expectation that the offeror will successfully perform the required effort.
	Based on the offeror's performance record, the government has an expectation that the offeror will successfully perform the required effort.
LIMITEDCONFIDENCE	Based on the offeror's performance record, the government has a low expectation that the offeror will successfully perform the required effort.
NO CONFIDENCE	Based on the offeror's performance record, the government has no expectation that the offeror will be able to successfully perform the required effort.
UNKNOWN CONFIDENCE	No performance record is identifiable or the offeror's performance record is so sparse that no confidence assessment rating can be reasonably assigned.

D. Numerical Systems

Numerical systems typically assign points (on a scale of 100 or 1000) to the factors being scored. Most agencies that have used numerical scoring have scored only the non-price factors. However, a few agencies have used totally numerical systems — scoring price or cost as well as the other factors.

1. Partially Numerical Systems

The advantage of numerical scoring systems is that they generally contain a large number of gradations, which permits greater differentiation between proposals. However, the GAO has approved systems that reduce the number of gradations by prohibiting the use of certain scores. See *Hoffman Mgmt., Inc.*, 69 Comp. Gen. 579 (B-238752), 90-2 CPD ¶ 15 (10-5-0 scoring system with zero points given for meeting minimum requirements); *American Sys. Corp.*, Comp. Gen. Dec. B-247923.3, 92-2 CPD ¶ 158 (10-4-2-0 system); and *Joint Mgmt. & Tech. Servs.*, Comp. Gen. Dec. B-294229, 2004 CPD ¶ 208 (10-8-5-2-0 system). These systems tend to distort the differences between proposals, but the GAO has not seen the distortion as a serious problem — probably because the scores are not used as the basis of the source

selection decision.

The apparent accuracy of numerical scoring can mislead source selection officials into believing that the total scores provide a precise overall assessment of the relative strengths and weaknesses of the proposals. See, for example, *Serco Inc. v. United States*, 81 Fed. Cl. 463 (2008), where the court granted a protest because the agency had used a point scoring system that resulted in "false statistical precision." The flaw detected by the court was that the agency had scored subfactors adjectivally, converted these scores into whole numbers, averaged the whole number to arrive at a numerical value for each offeror that went to three decimal places, and then used this data to make the source selection decision. Similarly, in *Midland Supply, Inc.*, Comp. Gen. Dec. B-298720, 2007 CPD ¶ 2, the GAO sustained a protest because the source selection official had based the decision on "a mechanical comparison of the offerors' total point scores." Compare *Burchick Constr. Co.*, Comp. Gen. Dec. B-400342.3, 2009 CPD ¶ 102, where the source selection official made the decision on the strengths and weaknesses not the point scores, and *GAP Solutions, Inc.*, Comp. Gen. Dec. B-310564, 2008 CPD ¶ 26, where the source selection official properly ignored minor differences in numerical scores, determined that the offerors were "technically equal," and awarded to the low price offeror.

2. Totally Numerical Systems

Some agencies have used totally numerical scoring systems. Three systems of this nature have been commonly used: total point scoring, conversion to dollar value, and dollars per point.

a. Total Point Scoring

This system assigns point scores to each evaluation factor and makes the source selection decision based on the total point scores. In such a system all criteria, including price or cost, are numerically scored. Generally, price is scored by giving the lowest-price proposal the full number of points assigned to this criteria and computing the number of points for the other proposals in accordance with their relationship to the lowest price. This evaluation technique totally obscures the tradeoff between price and the other evaluation factors. An illustration of this problem is found in *Harrison Sys., Ltd.*, 63 Comp. Gen. 379 (B-212675), 84-1 CPD ¶ 572, where price was assigned 30 points and the proposals were:

A $1,150,782

B $1,392,293

Offeror A was given 30 points and Offeror B was given 24.79 points derived from the following formula:

$$\frac{\$1,150,782}{\$1,392,293} \times 30 = 24.79 \text{ points}$$

After completing the technical evaluation, the agency computed the results of the total evaluation as follows:

Proposal	Cost	Technical	Total
A	30 points	59.88 points	89.88 points
B	24.79 points	70 points	94.79 points

However, the source selection official was unwilling to blindly follow the RFP and award to Offeror B on the basis of the highest point score. The source selection official made an independent analysis and determined that the technical proposals were of equal merit. The contract was therefore awarded to Offeror A, based on its low price. The GAO upheld this decision on the theory that the source selection official had rescored the technical scores but stated that it would have granted the protest if the source selection official had independently analyzed whether the difference in technical merit was worth the difference in price.

The *Harrison Systems* case demonstrates the pitfalls inherent in the total point evaluation system. The summation of points to obtain a total score gives the appearance of mathematical exactitude, but there is no assurance that points assigned to one set of criteria have the same value to the government as points assigned to another set of criteria. Nonetheless, the GAO has accepted the conclusion that the offeror with the most points has properly been awarded the contract when the RFP has stated that would be the basis of the source selection. See *Securiguard/Group 4 Joint Venture*, Comp. Gen. Dec. B-280429, 98-2 CPD ¶ 118; *Barnard Constr. Co.*, Comp. Gen. Dec. B-271644, 96-1 CPD ¶ 18; and *Tulane Univ.*, Comp. Gen. Dec. B-259912, 95-1 CPD ¶ 210. In *Securiguard*, the GAO explained the reasoning as follows:

> The cost/technical tradeoff formula stated in the RFP already accounted for both technical merit and cost. Our Office has specifically recognized the permissibility of using such a formula in selecting an offeror…. Because [the awardee's best and final offer] earned the highest combined cost/technical score under the

specified formula, the agency was not required to perform any further cost/technical tradeoff analysis to justify the selection decision.

See also *Phoebe Putney Memorial Hospital*, Comp. Gen. Dec. B-311385, 2008 CPD ¶ 128, accepting the award to the offeror with the most points when the RFP stated that award would be "based on a scoring system." Like *Harrison Systems* this case illustrates the inherent irrationality of such a system because the assignment of points to prices on a geometric basis totally obscured the actual tradeoff between price and non-price factors.

Some agencies have used the total point evaluation system as a scoring technique but have not stated in the RFP that award would be made to the offeror earning the most points. In that situation it is proper to make a normal tradeoff analysis and award to the offeror with the best value, *DATEX, Inc.*, Comp. Gen. Dec. B-270268.2, 96-1 CPD ¶ 240; *Paxson Elec. Co. v. United States*, 14 Cl. Ct. 634 (1988). See *C&B Constr., Inc.*, Comp. Gen. Dec. B-401988.2, 2010 CPD ¶ 1, and *Midland Supply, Inc*., Comp. Gen. Dec. B-298720, 2007 CPD ¶ 2, holding that the use of a normal tradeoff is required in this situation. Thus, it is not clear what is added to the evaluation process by giving point scores to price when a full tradeoff analysis is going to be made.

The use of numerical scoring methods that produce distorted scores has been discouraged. In *Custom Janitorial Serv.*, Comp. Gen. Dec. B-205023, 82-2 CPD ¶ 163, the GAO criticized the use of "spread scoring," in which the proposal with the lowest realistic cost received the maximum number of points and that with the highest cost received zero. The GAO concluded that this system produced distorted results when applied to the two offerors in the competitive range. See *Serco, Inc.*, 81 Fed. Cl. 463 (2008), where the court criticized the agency for "false statistical precision," describing the derivation of numerical scores for the non-cost evaluation factors at 486:

GSA took the initial observations that it had accumulated in terms of past performance (PP) and the basic contract plans (BCP) and developed a composite technical score…. [T]he agency took slightly different paths in calculating the two numbers that were averaged to create that technical score, again enumerated as the "Weighted BCP/PP Average Score." In calculating the past performance component of that score, GSA first developed a consensus adjectival rating for each subfactor (*e.g.*, S), then converted those subfactors into whole numbers (*e.g.*, 4) and averaged them into an average PP score (*e.g.*, 4.50). Despite instructions to this effect in the SSP, GSA did not make use of consensus adjectival ratings in calculating the weighted BCP average score. Rather, it first assigned adjectival ratings to each of the elements that made up the three BCP subfactors (*e.g.*, S). It then converted those ratings into whole numbers and developed an average number for each element (*e.g.*, 4.25) and used those averages to calculate a value for each subfactor (*e.g.*, 4.21), which were then weighted to calculate the weighted average BCP score (*e.g.*, 3.125). The average PP score and the weighted average BCP score were then averaged, yet again, to produce the "Weighted BCP/PP Average Score," expressed in numbers carried out to three decimals (*e.g.*, 3.813).

After an extensive discussion of statistical writings, the court concluded that the small distinctions arrived at in making the source selection decision were not rational, stating at 488-89:

> [T]here are strong reasons to suspect that these comparisons were undermined by false precision, … For one thing, there is no indication that the initial numerical data generated in evaluating the offerors' proposals - data that, in the first instance, was captured in whole numbers (*e.g.*, 3, 4, or 5) - had anywhere near the level of accuracy reflected in the final evaluation scores (*e.g.*, 3.841). Indeed, in assigning adjectival scores to the various subfactors involved here, agency personnel effectively engaged in rounding (performing a computation with one digit in the operand) - they were, in other words, forced to choose one versus another adjectival rating even when a fraction (*e.g.*, 3.8 rather than 4) would have been more accurate. Such imprecision and rounding is most evident in the evaluation of past performance, the accuracy of which depended, at the least, upon the following variables: (i) the accuracy associated with the scripts that were used by the contractor to query references; (ii) the accuracy of the contractor's various employees in interpreting and transcribing the answers received from the references; and (iii) the accuracy and potential rounding errors that occurred when the narrative answers recorded by the contractor were converted to adjectival scores and then to numbers. That the results of these observations were, by virtue of repeated calculations, eventually expressed in figures that were carried to three decimals gives those figures no more reliability than they had *ab initio*. Again, while repeated division creates decimals that can add an aura of precision, it does not actually increase accuracy.

See also *Tennessee Wholesale Drug Co.*, Comp. Gen. Dec. B-243018, 91-2 CPD ¶ 9, holding that a system that improperly reduced the importance of price as an evaluation factor unfairly distorted the scores. In *Lingtec, Inc.*, Comp. Gen. Dec. B-208777, 83-2 CPD ¶ 279, a form of mathematical analysis in which prices closest to the government estimate received maximum points and deviations from the estimate were penalized was held improper, as it penalized lower prices more than higher ones. It can be argued that any system that assigns scores by formula will potentially produce distorted results and, thus, should not be used.

b. Conversion to Dollar Values

Another completely numerical system determines the relative value of all evaluation factors according to their expected impact on the life-cycle cost of the item being procured. An example of this method is found in *Storage Tech. Corp.*, Comp. Gen. Dec. B-215336, 84-2 CPD ¶ 190, describing the method as follows:

> Section IV.3 of the RFP, "Evaluation of Proposals" … states that award will be "made to that responsible offeror whose proposal is in the best interests of the VA, cost and other factors considered." Section H.1.3 of the RFP lists the additional factors that the VA would consider. These factors were ranked in order of importance based on their maximum dollar impact on ESLC and listed in descending order of importance …. For each of these factors, the VA assigned a dollar credit or assessment commensurate with the cost savings/avoidance or added cost to be incurred by the VA with each proposal system. The VA indicates that the technical evaluation "dollars" are not intended to be precise indicators of actual value, but, rather, like a point score, will serve as a guide to the selecting official. The VA states that the dollar figures arrived at for

these additional factors will be compared to the ESLC to determine which proposal is in the VA's best interests and award will be made on that basis.

See also *C.M.P., Inc.*, Comp. Gen. Dec. B-216508, 85-1 CPD ¶ 156, where the agency made the entire evaluation in dollars by assigning dollar amounts for the value of three years of previous performance, guarantee of performance, and remedial and preventive maintenance services.

Assigning dollar values to all evaluation factors is an extremely rare form of scoring. However, it is not uncommon to assign dollar values to some of the evaluation factors. See, for example, *Cessna Aircraft Co.*, Comp. Gen. Dec. B-261953.5, 96-1 CPD ¶ 132, where this occurred. The GAO indicated that it would accept the judgment of the agency in such cases, stating that life-cycle cost analysis involves the exercise of "informed judgment" and its use will not be questioned "unless it clearly lacks a reasonable basis."

c. Dollars per Point

The third totally numerical system is the dollars per point system. In this system all the criteria other than cost are scored numerically and the prices proposed are used to compute a mathematical relationship. An earlier version of DARCOM Pamphlet 715-3 described this system:

> (3) *Evaluation of lowest dollar per technical quality point ($/q.p.)*. The concept of selecting the best technical proposal for the dollar is supportable by the dollar/technical point relationships. This factor can be determined by dividing the cost of the proposal by the total unweighted raw score developed for "technical." With the knowledge contained in the RFP that this relationship will be given consideration and will force offerors to tradeoff between cost and technical factors in order to prepare the best possible proposal at a fair and reasonable price, $/q.p. relationship by itself is not justification for selection; but is only considered an additional factor to offer to the SSA in making the decision. An example area is below:

Proposal	Cost	Technical	$/ q.p.
1	$30,000	374	$80.21
2	$28,500	355	$80.28
3	$42.500	385	$110.38
4	$32,670	362	$90.24

This technique gives an appearance of greater precision than is justified by the point scores assigned, because point scoring inherently is less precise than price, yet the

use of a ratio between the scores assumes that they are of equal precision. However, it is an acceptable technique to make the initial evaluation of the proposals. See *Moran Assocs.*, Comp. Gen. Dec. B-240564.2, 91-2 CPD ¶ 495, where the agency did this and the GAO stated:

> We have recognized that such a cost/technical ratio formula can be a proper tool for the government to utilize in determining which proposal is the most advantageous to the government. See *Morrison-Knudsen Co., Inc.*, B-237800.2, 90-1 CPD ¶ 443. Here, the ratio was only one tool utilized to assure that the government was getting the best buys, given relative technical rankings and costs. The record shows that awards were not made to the offerors with the best ratios.

See also *Management Sys. Designers, Inc.*, Comp. Gen. Dec. B-244383.3, 91-2 CPD ¶ 310, where the GAO accepted the use of this technique as the sole basis for the source selection even though the RFP reserved the right to make an independent cost/technical tradeoff decision, *Frank E. Basil, Inc.*, Comp. Gen. Dec. B-208133, 83-1 CPD ¶ 91, allowing such an award even though the protester's price was significantly lower

E. Ranking

The direct ranking of proposals without the aid of scores has also been upheld, as numerical scoring does not "transform the technical evaluation into a more objective process," *Development Assocs., Inc.*, Comp. Gen. Dec. B-205380, 82-2 CPD ¶ 37. The GAO has even stated that "ranking proposals may be a more direct and meaningful method" than numerical scoring, *Maximus*, Comp. Gen. Dec. B-195806, 81-1 CPD ¶ 285. However, ranking is infrequently used because it is difficult to do when there are a number of evaluation factors. When an agency uses only a few evaluation factors, ranking becomes a much more feasible method.

V. DECISIONAL RULE

Along with the selection of the evaluation factors and scoring system, the agency must determine the fundamental basis that will be used to make the source selection decision. This discussion refers to the basis for making the decision as the "decisional rule." As discussed earlier, there are two fundamental decisional rules — the lowest-price, technically acceptable proposal rule and the tradeoff rule. However, FAR 15.100 permits the use of other decisional rules, and FAR 15.101 permits a decisional rule that combines the lowest-price, technically acceptable rule with the tradeoff rule.

When the tradeoff rule is adopted, the source selection decision will be made by comparing the marginal differences in the proposed costs or prices with the marginal

differences in the non-cost factors. If an offeror has the lowest cost or price and is ranked highest on the non-cost factors, that offeror will be the winner. But in most procurements this will not be the case. Thus, when the proposal with the lowest cost or price is not given the highest ranking on the non-cost factors, the agency must decide whether the value of the marginal difference in the non-cost factors is worth the difference in price.

The GAO has ruled that it is legally permissible to avoid making a tradeoff analysis after proposal evaluation by adopting a decisional rule that the proposal achieving the highest number of points (when all evaluation factors are point scored) will be the winner. See *Barnard Constr., Co.*, Comp. Gen. Dec. B-271644, 96-2 CPD ¶ 18, which states:

> Our Office has specifically recognized the propriety of using such a formula in selecting an offeror. See *Stone & Webster Eng'g Corp.*, B-255286.2, Apr. 12, 1994, 94-1 CPD ¶ 306; *Management Sys. Designers, Inc.*, B-244383.3, Sept. 30, 1991, 91-2 CPD ¶ 310. Because the awardee's proposal earned the highest combined price/technical score under the specified formula, the agency was not required to perform price/technical tradeoff analysis to justify the selection decision.

The same result was reached in *Tulane Univ.*, Comp. Gen. B-259912, 95-1 CPD ¶ 210, and *Securigard, Inc.*, Comp. Gen. Dec. B-248584, 92-2 CPD ¶ 156. This ruling is based on the questionable proposition that the agency has made the tradeoff at the time it constructed the point scoring system.

Using the same questionable reasoning, the GAO has also approved the use of a dollar per quality point system as the sole basis for source selection, *Shapell Gov. Hous., Inc.*, 55 Comp. Gen. 839 (B-183830), 76-1 CPD ¶ 161. See *Management Sys. Designers, Inc.*, Comp. Gen. Dec. B-244383.3, 91-2 CPD ¶ 310, accepting the use of this technique as the sole basis for the source selection even though the RFP reserved the right to make an independent cost/technical tradeoff decision. See also *Frank E. Basil, Inc.*, Comp. Gen. Dec. B-208133, 83-1 CPD ¶ 91, allowing such an award even though the protester's price was significantly lower. It is not clear why agencies have adopted these mechanical decisional rules in lieu of performing a tradeoff analysis after full evaluation of the competing proposals.

It has been common practice to believe that the statutorily required statement of relative importance is the decisional rule in tradeoff procurements. However, this statement does not state how the ultimate source selection will be made but rather gives the offerors an indication of the priorities of the agency in making the decision. Hence, a statement in the RFP that cost/price is more important than non-cost/price factors is merely a statement that the agency's priority is a low cost/price rather than high scores

in the non-cost/price area. It is neither a statement that the agency will award to the offeror with the low cost/price nor a statement that the agency will not pay more to get a higher-rated offeror in the non-cost/price area. See Chapter 3 for a more complete discussion of the required statement of relative importance in the RFP and Chapter 9 for a complete discussion of how this statement impacts the source selection decision.

VI. OBTAINING INFORMATION FOR EVALUATION

The final issue to be addressed in the source selection plan is the technique that will be used to obtain the information necessary to evaluate the proposals. Three types of information are necessary in most competitively negotiated procurements: (1) pricing information, (2) technical information supporting offers, and (3) capability information.

A. Pricing Information

It is the government's policy that agencies should obtain the minimum amount of information necessary to determine the reasonableness of proposed prices or the realism of proposed costs. See FAR 15.402, which states:

> 15.402 Pricing policy.
>
> Contracting officers shall —
>
> (a) Purchase supplies and services from responsible sources at fair and reasonable prices. In establishing the reasonableness of the offered prices, the contracting officer —
>
> (1) Shall obtain certified cost or pricing data when required by 15.403-4, along with data other than certified cost or pricing data as necessary to establish a fair and reasonable price; or
>
> (2) When certified cost or pricing data are not required by 15.403-4, obtain data other than certified cost or pricing data as necessary to establish a fair and reasonable price, generally using the following order of preference in determining the type of data required:
>
> (i) No additional data from the offeror, if the price is based on adequate price competition, except as provided by 15.403-3(b).
>
> (ii) Data other than certified cost or pricing data such as —
>
> (A) Data related to prices (e.g., established catalog or market prices, sales to non-governmental and governmental entities), relying first on data available within the Government; second, on data obtained from sources other than the offeror; and, if necessary, on data obtained from the offeror. When obtaining data from the offeror is necessary, unless an exception under 15.403-1(b)(1) or (2) applies, such data submitted by the offeror shall include, at a minimum, appropriate data on the prices at which the same or similar items have been sold previously, adequate for evaluating the reasonableness of the price.

(B) Cost data to the extent necessary for the contracting officer to determine a fair and reasonable price.

(3) Obtain the type and quantity of data necessary to establish a fair and reasonable price, but not more data than is necessary. Requesting unnecessary data can lead to increased proposal preparation costs, generally extend acquisition lead time, and consume additional contractor and Government resources. Use techniques such as, but not limited to, price analysis, cost analysis, and/or cost realism analysis to establish a fair and reasonable price. If a fair and reasonable price cannot be established by the contracting officer from the analyses of the data obtained or submitted to date, the contracting officer shall require the submission of additional data sufficient for the contracting officer to support the determination of the fair and reasonable price.

(b) Price each contract separately and independently and not —

(1) Use proposed price reductions under other contracts as an evaluation factor; or

(2) Consider losses or profits realized or anticipated under other contracts.

(c) Not include in a contract price any amount for a specified contingency to the extent that the contract provides for a price adjustment based upon the occurrence of that contingency.

Additional guidance is provided in FAR 15.403-3:

15.403-3 Requiring data other than certified cost or pricing data.

(a)(1) In those acquisitions that do not require certified cost or pricing data, the contracting officer shall —

(i) Obtain whatever data are available from Government or other secondary sources and use that data in determining a fair and reasonable price;

(ii) Require submission of data other than certified cost or pricing data, as defined in 2.101, from the offeror to the extent necessary to determine a fair and reasonable price (10 U.S.C. 2306a(d)(1) and 41 U.S.C. 254b(d)(1)) if the contracting officer determines that adequate data from sources other than the offeror are not available. This includes requiring data from an offeror to support a cost realism analysis;

(iii) Consider whether cost data are necessary to determine a fair and reasonable price when there is not adequate price competition;

(iv) Require that the data submitted by the offeror include, at a minimum, appropriate data on the prices at which the same item or similar items have previously been sold, adequate for determining the reasonableness of the price unless an exception under 15.403-1(b)(1) or (2) applies; and

(v) Consider the guidance in section 3.3, chapter 3, volume I, of the Contract Pricing Reference Guide cited at 15.404-1(a)(7) to determine the data an offeror shall be required to submit.

(2) The contractor's format for submitting the data should be used (see 15.403-5(b)(2)).

(3) The contracting officer shall ensure that data used to support price negotiations are sufficiently current to permit negotiation of a fair and reasonable price. Requests for updated offeror data should be limited to data that affect the adequacy of the proposal for negotiations, such as changes in price lists.

(4) As specified in section 808 of the Strom Thurmond National Defense Authorization Act for Fiscal Year 1999 (Pub. L. 105-261), an offeror who does not comply with a requirement to submit data for a contract or subcontract in accordance with paragraph (a)(1) of this subsection is ineligible for award unless the HCA determines that it is in the best interest of the Government to make the award to that offeror, based on consideration of the following:

(i) The effort made to obtain the data.

(ii) The need for the item or service.

(iii) Increased cost or significant harm to the Government if award is not made.

(b) Adequate price competition. When adequate price competition exists (see 15.403-1(c)(1)), generally no additional data are necessary to determine the reasonableness of price. However, if there are unusual circumstances where it is concluded that additional data are necessary to determine the reasonableness of price, the contracting officer shall, to the maximum extent practicable, obtain the additional data from sources other than the offeror. In addition, the contracting officer should request data to determine the cost realism of competing offers or to evaluate competing approaches.

(c) Commercial items. (1) At a minimum, the contracting officer must use price analysis to determine whether the price is fair and reasonable whenever the contracting officer acquires a commercial item (see 15.404-1(b)). The fact that a price is included in a catalog does not, in and of itself, make it fair and reasonable. If the contracting officer cannot determine whether an offered price is fair and reasonable, even after obtaining additional data from sources other than the offeror, then the contracting officer shall require the offeror to submit data other than certified cost or pricing data to support further analysis (see 15.404-1). This data may include history of sales to non-governmental and governmental entities, cost data, or any other information the contracting officer requires to determine the price is fair and reasonable. Unless an exception under 15.403-1(b)(1) or (2) applies, the contracting officer shall require that the data submitted by the offeror include, at a minimum, appropriate data on the prices at which the same item or similar items have previously been sold, adequate for determining the reasonableness of the price.

(2) Limitations relating to commercial items (10 U.S.C. 2306a(d)(2) and 41 U.S.C. 254b(d)(2)). (i) The contracting officer shall limit requests for sales data relating to commercial items to data for the same or similar items during a relevant time period.

(ii) The contracting officer shall, to the maximum extent practicable, limit the scope of the request for data relating to commercial items to include only data that are in the form regularly maintained by the offeror as part of its commercial operations.

(iii) The Government shall not disclose outside the Government data obtained relating to commercial items that is exempt from disclosure under 24.202(a) or the Freedom of Information Act (5 U.S.C. 552(b)).

(3) For services that are not offered and sold competitively in substantial quantities in the commercial marketplace, but are of a type offered and sold competitively in substantial quantities in the commercial marketplace, see 15.403-1(c)(3)(ii).

1. Price Reasonableness

When the agency has decided to use a fixed-price-type contract, the contracting

officer will have to have sufficient information to ensure that the contract price is reasonable. As indicated in the above FAR policy, when there is adequate price competition, the competitive prices submitted by the offerors will almost always provide sufficient information to determine that the price is reasonable. In such cases no pricing information need be obtained from the offerors. Indeed, when adequate price competition is present, 10 U.S.C. § 2306a and 41 U.S.C. § 254b, as implemented in FAR 15.403-1(b)(1), prohibit agencies from obtaining certified cost or pricing data.

Adequate price competition exists in a variety of circumstances. See FAR 15.403-1(c), which states:

> (1) *Adequate price competition*. A price is based on adequate price competition if —
>
> > (i) Two or more responsible offerors, competing independently, submit priced offers that satisfy the Government's expressed requirement and if —
> >
> > (A) Award will be made to the offeror whose proposal represents the best value (see 2.101) where price is a substantial factor in source selection; and
> >
> > (B) There is no finding that the price of the otherwise successful offeror is unreasonable. Any finding that the price is unreasonable must be supported by a statement of the facts and approved at a level above the contracting officer;
>
> (ii) There was a reasonable expectation, based on market research or other assessment, that two or more responsible offerors, competing independently, would submit priced offers in response to the solicitation's expressed requirement, even though only one offer is received from a responsible offeror and if —
>
> > (A) Based on the offer received, the contracting officer can reasonably conclude that the offer was submitted with the expectation of competition, e.g., circumstances indicate that —
> >
> > > (1) The offeror believed that at least one other offeror was capable of submitting a meaningful offer; and
> > >
> > > (2) The offeror had no reason to believe that other potential offerors did not intend to submit an offer; and
> >
> > (B) The determination that the proposed price is based on adequate price competition, is reasonable, and is approved at a level above the contracting officer; or
>
> (iii) Price analysis clearly demonstrates that the proposed price is reasonable in comparison with current or recent prices for the same or similar items, adjusted to reflect changes in market conditions, economic conditions, quantities, or terms and conditions under contracts that resulted from adequate price competition.

If the agency determines that adequate price competition does not exist, it may have to obtain pricing information from the offerors. However, in such circumstances it is still the policy to obtain the minimum amount of information necessary to ensure that the price is reasonable. If the procurement is for a commercial item, FAR 15.404-3(c) imposes limitations on the amount of information that should be obtained. If the

procurement is for a noncommercial item, FAR 15.403-1(c)(4) suggests limiting the amount of pricing data obtained by waiving the requirement for certified cost or pricing data, as follows:

> *Waivers*. The head of the contracting activity (HCA) may, without power of delegation, waive the requirement for submission of certified cost or pricing data in exceptional cases. The authorization for the waiver and the supporting rationale shall be in writing. The HCA may consider waiving the requirement if the price can be determined to be fair and reasonable without submission of certified cost or pricing data. For example, if certified cost or pricing data were furnished on previous production buys and the contracting officer determines such data are sufficient, when combined with updated data, a waiver may be granted. If the HCA has waived the requirement for submission of certified cost or pricing data, the contractor or higher-tier subcontractor to whom the waiver relates shall be considered as having been required to provide certified cost or pricing data. Consequently, award of any lower-tier subcontract expected to exceed the certified cost or pricing data threshold requires the submission of certified cost or pricing data unless — (i) An exception otherwise applies to the subcontract; or (ii) The waiver specifically includes the subcontract and the rationale supporting the waiver for that subcontract.

If the procurement is for a commercial item, the key issue is whether there is adequate price competition - in which case the above procedure applies. If there is no competition, agencies must follow the guidance in FAR 15.402(c) above. That will general entail making a decision as to whether commercial prices will be required to be submitted or whether, as a last alternative, data other than certified cost or pricing data will be required. The Department of Defense has issued detailed guidance on obtaining sufficient data to determine that commercial item prices are fair and reasonable - particularly when there is little or no competition or the item has not yet been sold to commercial customers. DFARS PGI 215.403-1(c)(3)(A)(2) directs contracting officers to obtain "prior non-government sales data" on the precise item or the predecessor item if the item being procured has not yet been sold commercially but has evolved from a commercial item. DFARS PGI 215.403-3(1) states:

> Sales data must be comparable to the quantities, capabilities, specifications, etc. of the product or service proposed. Sufficient steps must be taken to verify the integrity of the sales data, to include assistance from the Defense Contract Management Agency, the Defense Contract Audit Agency, and/or other agencies if required.

DFARS PGI 215.404-1(b)(i) points out that sometimes this type of sales data can be obtained through market research that finds data on commercial sales or in published catalogs or prices.

DFARS PGI 215.404-1(b)(ii) calls for obtaining "cost information" when sales data are not sufficient to demonstrate that the price is fair and reasonable:

> In some cases, commercial sales are not available and there is no other market information for determining fair and reasonable prices. This is especially true when buying supplies or services that have been determined to be commercial but have only been "offered for sale" or purchased on a sole source basis with

no prior commercial sales upon which to rely. In such cases, the contracting must require the offeror to submit whatever cost information is needed to determine price reasonableness.

The DOD guidance then makes it clear at DFARS PGI 215.404-1(c)(iii) that such "cost information" need not be submitted in accordance with the instructions in Table 15-2 of FAR 15.408 dealing with the submission of certified cost or pricing data but can be submitted in the contractor's format. See, however, the definition of "data other than certified cost or pricing data" in FAR 2.101 permitting agencies to require such data in accordance with Table 15-2 (without certification).

DFARS PGI 215.403-3(4) also contains a warning about relying on prior prices paid by the government:

Before relying on a prior price paid by the Government, the contracting officer must verify and document that sufficient analysis was performed to determine that the prior price was fair and reasonable. Sometimes, due to exigent situations, supplies and services are purchased even though an adequate price or cost analysis could not be performed. The problem is exacerbated when other contracting officers assume these prices were adequately analyzed and determined to be fair and reasonable. The contracting officer also must verify that the prices previously paid were for quantities consistent with the current solicitation. Not verifying that a previous price analysis was performed, or the consistencies in quantity, has been a recurring issue on sole source commercial items reported by oversight organizations. Sole source commercial items require extra attention to verify that previous prices paid on Government contracts were sufficiently analyzed and determined to be fair and reasonable. At a minimum, a contracting officer reviewing price history shall discuss the basis of previous prices paid with the contracting organization that previously bought the item. These discussions shall be documented in the contract file.

2. Cost Realism

When the agency determines that a cost-reimbursement-type contract will be used or if it decides that price realism will be assessed in fixed-price-type contracts, it will have to obtain data to make this analysis. FAR 15.404-1 provides the following guidance on when cost realism analysis should be performed:

(d) *Cost realism analysis*. (1) Cost realism analysis is the process of independently reviewing and evaluating specific elements of each offeror's proposed cost estimate to determine whether the estimated proposed cost elements are realistic for the work to be performed; reflect a clear understanding of the requirements; and are consistent with the unique methods of performance and materials described in the offeror's technical proposal.

(2) Cost realism analyses shall be performed on cost-reimbursement contracts to determine the probable cost of performance for each offeror.

(i) The probable cost may differ from the proposed cost and should reflect the Government's best estimate of the cost of any contract that is most likely to result from the offeror's proposal. The probable cost shall be used for purposes of evaluation to determine the best value.

> (ii) The probable cost is determined by adjusting each offeror's proposed cost, and fee when appropriate, to reflect any additions or reductions in cost elements to realistic levels based on the results of the cost realism analysis.
>
> (3) Cost realism analyses may also be used on competitive fixed-price incentive contracts or, in exceptional cases, on other competitive fixed-price-type contracts when new requirements may not be fully understood by competing offerors, there are quality concerns, or past experience indicates that contractors proposed costs have resulted in quality or service shortfalls. Results of the analysis may be used in performance risk assessments and responsibility determinations. However, proposals shall be evaluated using the criteria in the solicitation, and the offered prices shall not be adjusted as a result of the analysis.

The data that is necessary to make a cost realism analysis to determine probable cost in a cost-reimbursement-type contract is generally cost element breakdowns for major contract line items. In large contracts cost element breakdowns for subelements of the major contract line items may be called for. Such cost element breakdowns identify the essential cost information — purchased materials and subcontracts, labor hours, labor rates and indirect cost rates — that is necessary to assess the realism of the estimated costs. In many cases the agency can assess these estimates without obtaining cost or pricing data — with the assistance of government audit agencies or with pricing information available within the agency. If such information is not available, it may be necessary to obtain cost or pricing data. However, obtaining certified cost or pricing data is *prohibited* if adequate price competition has been obtained and the GAO has ruled that there is adequate price competition on cost-reimbursement contracts when cost is a substantial evaluation factor, *Dynalectron Corp.*, 52 Comp. Gen. 346 (B-176217) (1972) (cost to the government found to be a substantial factor in a cost-plus-award-fee contract even though it was 20% of the total evaluation); *U.S. Nuclear, Inc.*, 57 Comp. Gen. 185 (B-187716), 77-2 CPD ¶ 511 (adequate price competition found on a cost-plus-fixed-fee contract).

If a price realism analysis is going to be made on a fixed-price-type contract to assess the offerors' understanding of the work, even less data may be needed. In that circumstance the agency may need to assess only the labor hours proposed for major elements of the work, including labor hours to be incurred by subcontractors. Only labor hour estimates are needed to make such assessment. If the agency believes that the labor rates and indirect cost rates must also be assessed, cost element breakdowns can be obtained.

B. Technical Information Supporting Offers

Agencies have frequently required the submission of technical proposals as a

major element of the information required for evaluation without making it clear whether the information in the proposal was to be used to evaluate offers or the capability of the offeror. However, it is good practice to distinguish these two types of technical proposals. The use of these proposals as a means of obtaining information to evaluate offeror capability will be discussed below. This section discusses the use of the technical proposal as a means of obtaining information to support the validity of technical offers.

When the agency solicits technical offers in addition to the price or cost offers, it must determine whether the offers will be understandable without explanation or whether they will need to be explained. For example, if the technical offers are merely to state what commercial products will be supplied to meet the contract requirements, the agency may need no information to assess the value of the offered products (if their characteristics are well known). Alternatively, available product literature may be all that is required. See FAR 12.205, which states:

> (a) Where technical information is necessary for evaluation of offers, agencies should, as part of market research, review existing product literature generally available in the industry to determine its adequacy for purposes of evaluation. If adequate, contracting officers shall request existing product literature from offerors of commercial items in lieu of unique technical proposals.

In contrast, if the technical offer is the design of a weapon system or a building, the agency may need technical information to assess the technical offer. In such cases the agency should call for a technical proposal providing all technical information necessary for the agency technical personnel to evaluate the risks that the offered product or building entails.

C. Capability Information

In almost all procurements the agency will assess the capability of the offerors as one of the evaluation factors. The information necessary to make this assessment will depend on the evaluation factors used and will be tailored to that factor. The major issues are found in obtaining information on past performance and experience and in demonstrating an understanding of the work.

1. Past Performance and Experience

Past performance information is obtained from two sources — agency data banks and references of agencies and companies for whom the offeror has previously worked.

FAR 42.1502(a) requires agencies to compile data evaluating the contractor's performance on all contracts over $1 million, but this requirement has not been fully implemented. FAR 42.1503(e) limits the retention and use of the information to three years after the completion of contract performance. Under this regulation, contractors are given a minimum of 30 days to submit comments, rebut statements, or provide additional information. The completed evaluated information cannot be released to other than government personnel and the contractor whose performance is being evaluated during the period the information is being used for source selection purposes. It is generally believed that information that has been carefully reviewed by the contractor is more reliable than less formally developed information.

The earliest system of collecting performance information on contractors is the current system applicable to all construction contracts over $650,000, FAR 42.1502(e), and all architect-engineer contracts over $30,000, FAR 42.1502(f). These systems were all incorporated into the FAR in 1984. The Air Force adopted a system in 1988 called the Contractor Performance Assessment Reporting System (CPARS) to assess performance risk on current systems acquisitions greater than $5 million, AFSC Regulation 800-53, Aug. 11, 1988. CPARS is now used by most military services and is available on-line www.defenselink.mil/dbt/cse_cpars.html. It is now implemented by the DOD Contractor Performance Assessment Reporting System (CPARS) Policy Guide, February 2009 (http://www.cpars.csd.disa.mil/cparsfiles/pdfs/DoD-CPARS-Guide.pdf). It rates contractor performance in one of the following categories:

Rating	Definition	Note
Dark Blue/Exceptional	Performance meets contractual requirements and exceeds many to the Government's benefit. The contractual performance of the element or sub-element being assessed was accomplished with few minor problems for which corrective actions taken by the contractor was highly effective.	To justify an Exceptional rating, identify multiple significant events and state how they were of benefit to the Government. A singular benefit, however, could be of such magnitude that it alone constitutes an Exceptional rating. Also, there should have been NO significant weaknesses identified.
Purple/Very Good	Performance meets contractual requirements and exceeds some to the Government's benefit. The contractual performance of the element or sub-element being assessed was accomplished with some minor problems for which corrective actions taken by the contractor was effective.	To justify a Very Good rating, identify a significant event and state how it was a benefit to the Government. There should have been no significant weaknesses identified.

Rating	Definition	Note
Green/Satisfactory	Performance meets contractual requirements. The contractual performance of the element or sub-element contains some minor problems for which corrective actions taken by the contractor appear or were satisfactory.	To justify a Satisfactory rating, there should have been only minor problems, or major problems the contractor recovered from without impact to the contract. There should have been NO significant weaknesses identified. Per DOD policy, a fundamental principle of assigning ratings is that contractors will not be assessed a rating lower than Satisfactory solely for not performing beyond the requirements of the contract.
Yellow/Marginal	Performance does not meet some contractual requirements. The contractual performance of the element or sub-element being assessed reflects a serious problem for which the contractor has not yet identified corrective actions. The contractor's proposed actions appear only marginally effective or were not fully implemented.	To justify Marginal performance, identify a significant event in each category that the contractor had trouble overcoming and state how it impacted the Government. A Marginal rating should be supported by referencing the management tool that notified the contractor of the contractual deficiency (e.g., management, quality, safety, or environmental deficiency report or letter).
Red/Unsatisfactory	Performance does not meet most contractual requirements and recovery is not likely in a timely manner. The contractual performance of the element or sub-element contains a serious problem(s) for which the contractor's corrective actions appear or were ineffective.	To justify an Unsatisfactory rating, identify multiple significant events in each category that the contractor had trouble overcoming and state how it impacted the Government. A singular problem, however, could be of such serious magnitude that it alone constitutes an unsatisfactory rating. An Unsatisfactory rating should be supported by referencing the management tools used to notify the contractor of the contractual deficiencies (e.g., management, quality, safety, or environmental deficiency reports, or letters).

The data collected are submitted to the contractor for review and comment before being entered into the system. Thereafter, evaluators use the data in accordance with their relevance to each specific procurement. The GAO has upheld the use of this system, *Rockwell Int'l Corp*., Comp. Gen. Dec. B-261953.2, 96-1 CPD ¶ 34; *Questech, Inc*., Comp. Gen. Dec. B-236028, 89-2 CPD ¶ 407; *Pan Am World Servs., Inc*., Comp. Gen. Dec. B-235976, 89-1 CPD ¶ 283.

Because of the incomplete nature of agency data banks, data on past performance will have to be obtained from each offeror in most procurements. This will normally entail the obtaining of information on a specified number of recent contracts where the offeror has performed similar types of work. Generally, agencies request the names of key people that can be called as references and data as to the work done on the contract and problems encountered in its performance. See FAR 15.305(a)(2)(ii), stating:

> The solicitation shall describe the approach for evaluating past performance, including evaluating offerors with no relevant performance history, and shall provide offerors an opportunity to identify past or current contracts (including Federal, State, and local government and private) for efforts similar to the Government requirement. The solicitation shall also authorize offerors to provide information on problems encountered on the identified contracts and the offeror corrective actions..

Experience data can be obtained in the same manner as past performance information. Such information will focus on obtaining a sufficient description of the work performed on prior contracts to permit the agency to evaluate the degree of similarity of that work to the work called for by the instant procurement.

2. Understanding the Work

When an agency has decided to assess the capability of the offerors by assessing their understanding of the work, there are two ways to obtain the information — by calling for a written technical proposal or by scheduling oral presentations.

a. Technical and/or Management Proposals

As discussed earlier, agencies have commonly decided that each offeror should submit a "technical proposal" and/or a "management proposal" stating how it will perform each element of the work. This essay is then scored by technical evaluators to assess the offeror's understanding of the work. The reading and scoring of these proposals has added to the time required to conduct the competitive source selection, yet there is little indication that the scores achieved in this assessment are a very

accurate indication of the offeror's capability to perform the contract. One reason for this imprecision is that these technical proposals can be written by professional proposal writers rather than by the personnel that will actually perform the work. Another problem is that the evaluation of these proposals is highly judgmental and may depend on the offeror's use of key terms or key concepts that are favored by the evaluators. As a result of these deficiencies, a number of agencies have decided that obtaining such technical proposals is not a valid means of assessing capability.

When such proposals are required, the RFP should contain very clear guidance on the information to be included and the format of the proposals. Minimal guidance is contained in FAR 15.204-5(b) as follows:

> Prospective offerors or respondents may be instructed to submit proposals or information in a specific format or severable parts to facilitate evaluation. The instructions may specify further organization of proposal or response parts, such as -
>
> (1) Administrative;
>
> (2) Management;
>
> (3) Technical;
>
> (4) Past performance; …

b. Oral Presentations

An alternative, and superior, way to assess understanding of the work is to schedule an oral presentation where the agency evaluators can discuss the performance of the contract with the key members of the offeror's staff that will be responsible for successful performance. Agencies began using oral presentations in lieu of technical proposals in the early 1990s and guidance on these presentations was included in the FAR Part 15 rewrite. See FAR 15.102, providing the following guidance on this technique:

> (a) Oral presentations by offerors as requested by the Government may substitute for, or augment, written information. Use of oral presentations as a substitute for portions of a proposal can be effective in streamlining the source selection process. Oral presentations may occur at any time in the acquisition process, and are subject to the same restrictions as written information, regarding timing (see 15.208) and content (see 15.306). Oral presentations provide an opportunity for dialogue among the parties. Pre-recorded videotaped presentations that lack real-time interactive dialogue are not considered oral presentations for the purposes of this section, although they may be included in offeror submissions, when appropriate.
>
> (b) The solicitation may require each offeror to submit part of its proposal through oral presentations. However, certifications, representations, and a signed offer sheet (including any exceptions to the

Government's terms and conditions) shall be submitted in writing.

(c) Information pertaining to areas such as an offeror's capability, past performance, work plans or approaches, staffing resources, transition plans, or sample tasks (or other types of tests) may be suitable for oral presentations. In deciding what information to obtain through an oral presentation, consider the following:

(1) The Government's ability to adequately evaluate the information;

(2) The need to incorporate any information into the resultant contract;

(3) The impact on the efficiency of the acquisition; and

(4) The impact (including cost) on small businesses. In considering the costs of oral presentations, contracting officers should also consider alternatives to on-site oral presentations (e.g., teleconferencing, video teleconferencing).

When an agency decides to assess understanding of the work through an oral presentation in lieu of a technical proposal, it must decide on the time and format of the presentation.

FAR 15.102 provides detailed guidance on obtaining information, but not offers, through this process. This regulatory provision for obtaining information through the presentation process is consistent with prior practice. See *Intermagnetics Gen. Corp.*, Comp. Gen. Dec. B-255741.2, 94-1 CPD ¶ 302, holding that while an agency may limit its evaluation to information contained in written submissions, it also may decide to use other information, including that obtained in oral presentations:

> An agency may properly limit its evaluation to information contained in the four corners of a proposal, and [the protester] cites decisions in which we have denied protests alleging that the contracting agency should have used information from other sources, such as a pre-award survey, as a substitute for information that the solicitation directed offerors to include in their proposal. *See*, *e.g.*, *Numax Elecs. Inc.*, B-210266, May 3, 1983, 83-1 CPD ¶ 470. [The protester] is also correct in noting that we have denied protests where the protester complained that the agency erred in not considering orally discussed changes to the protester's proposal, where the protester did not confirm the changes by incorporating them in its BAFO. *See*, *e.g.*, *Recon Optical, Inc.*, B-232125, Dec. 1, 1988, 88-2 CPD ¶ 544.
>
> These decisions are not inconsistent with our denial of [the protester's] protest; they stand for the proposition that offerors act at their peril when they fail to include within the four corners of their proposals information required by the solicitation or requested by the agency during discussions, and that such proposals may properly be rejected. *See Abacus Enters.*, B-248969, Oct. 13, 1992, 92-2 CPD ¶ 242. However, we have also consistently held that, in evaluating proposals, contracting agencies may consider any evidence, even if that evidence is entirely outside the proposal (and, indeed, even if it contradicts statements in the proposal), so long as the use of the extrinsic evidence is consistent with established procurement practice. *See*, *e.g.*, *Western Medical Personnel, Inc.*, 66 Comp. Gen. 699 (1987), 87-2 CPD ¶ 310; *AAA Eng'g & Drafting, Inc.*, B-250323, Jan. 26, 1993, 93-1 CPD ¶ 287.

See also *NW Ayer, Inc.*, Comp. Gen. Dec. B-248654, 92-2 CPD ¶ 154; and *Palmer*

Brown Cos., 70 Comp. Gen. 667 (B-243544), 91-2 CPD ¶ 134. In *Labat-Anderson, Inc.*, 71 Comp. Gen. 252 (B-246071), 92-1 CPD ¶ 193, the oral presentation resulted in a determination that the offeror lacked capability as it also did in *ARTEL, Inc.*, Comp. Gen. Dec. B-248478, 92-2 CPD ¶ 120, where the agency concluded from an oral presentation that there were serious doubts as to the quality and availability of the offeror's key personnel.

The most important part of an oral presentation is the dialog that occurs between the government technical personnel and the contractor's personnel that will be performing the contract. The present regulations make it clear that agency officials may ask questions and seek further detail during the oral presentation and this is consistent with prior decisions, *NAHB Research Found., Inc.*, Comp. Gen. Dec. B-219344, 85-2 CPD ¶ 248 (aggressive questioning permissible). However, both the Court of Federal Claims and the GAO have rejected protests that the agency did not use the oral presentation to obtain full information on the capability of an offeror. See *Bean Stuyvesant, L.L.C. v. United States*, 48 Fed. Cl. 303 (2000) (offeror properly downgraded for not discussing an issue - with no agency effort to raise the issue in the dialog); *Oceaneering Int'l, Inc.*, Comp. Gen. Dec. B-287325, 2001 CPD ¶ 95 (agency didn't raise omitted issue with offeror). Agencies that conduct oral presentations in this manner lose the full benefit of the technique.

Agencies may adopt reasonable rules governing the nature of the presentations, including limitations on the length and nature of the presentations, *American Sys. Corp.*, 68 Comp. Gen. 475 (B-234449), 89-1 CPD ¶ 537. They may also require that offerors meet mandatory requirements in an RFP before being eligible to make an oral presentation, *Inte-Great Corp.*, Comp. Gen. Dec. B-272780, 96-2 CPD ¶ 159. Some agencies have followed the questionable practice of requiring offerors to submit the slides that they will use in the oral presentation at the time the proposal is submitted. See *KSEND v. United States*, 69 Fed. Cl. 103 (2005), agreeing that an offeror that did not meet this requirement was properly dropped from the procurement. Compare *RGII Techs., Inc.*, Comp. Gen. Dec. B-278352.3, 98-1 CPD ¶ 130, where the GAO held that the slides were not subject to the late proposal rule when an offeror had submitted the slides late but copies had come with the written proposal.

Agencies may either preclude or permit discussions during the oral presentation, FAR 15.102(d)(6). However, if discussions occur, the agency must comply with the rules governing negotiations with all offerors in the competitive range, FAR 15.102(g). The GAO has not yet ruled that discussions occurred during an oral presentation. See *General Physics Federal Sys., Inc.*, Comp. Gen. Dec. B-275934, 97-1 CPD ¶ 171,

where no ruling on this issue was made because there was no prejudice to the protester when the agency sought information on the commitment of proposed key personnel from all the offerors during the oral presentations. See also *Telestar Corp.*, Comp. Gen. Dec. B-275855, 97-1 CPD ¶ 150, finding that no discussions had occurred during an oral presentation; and *Development Alternatives, Inc.*, Comp. Gen. Dec. B-279920, 98-2 CPD ¶ 54, holding that requesting additional details concerning information in a proposal during an oral presentation did not constitute discussions. Compare *Global Analytic Information Tech. Servs., Inc.*, Comp. Gen. Dec. B-298840.2, 2007 CPD ¶ 57, holding that allowing an offeror to submit revised pricing *after* an oral presentation was a discussion. In *Sierra Military Health Servs., Inc.*, Comp. Gen. Dec. B-292780, 2004 CPD ¶ 55, GAO stated the rule as follows:

> The FAR generally anticipates "dialogue among the parties" in the course of an oral presentation, FAR § 15.102(a), and we see nothing improper in agency personnel expressing their view about vendors' quotations or proposals, in addition to listening to the vendors' presentations, during those sessions. Once the agency personnel begin speaking, rather than merely listening, in those sessions, however, that dialogue may constitute discussions. As we have long held, the acid test for deciding whether an agency has engaged in discussions is whether the agency has provided an opportunity for quotations or proposals to be revised or modified. *See, e.g., TDS, Inc.*, B-292674, Nov. 12, 2003, 2003 CPD ¶ 204 at 6; *Priority One Servs., Inc.*, B-288836, B-288836.2, Dec. 17, 2001, 2002 CPD ¶ 79 at 5. Accordingly, where agency personnel comment on, or raise substantive questions or concerns about, vendors' quotations or proposals in the course of an oral presentation, and either simultaneously or subsequently afford the vendors an opportunity to make revisions in light of the agency personnel's comments and concerns, discussions have occurred. *TDS, Inc., supra*, at 6; see FAR § 15.102(g).

D. Organizational Conflicts of Interest

FAR 9.504 requires that contracting officers identify potential organizational conflicts of interest (OCIs) before issuing an RFP, as follows:

> (a) Using the general rules, procedures, and examples in this subpart, contracting officers shall analyze planned acquisitions in order to —
>
> (1) Identify and evaluate potential organizational conflicts of interest as early in the acquisition process as possible; and
>
> (2) Avoid, neutralize, or mitigate significant potential conflicts before contract award.
>
> (b) Contracting officers should obtain the advice of counsel and the assistance of appropriate technical specialists in evaluating potential conflicts and in developing any necessary solicitation provisions and contract clauses (see 9.506).
>
> (c) Before issuing a solicitation for a contract that may involve a significant potential conflict, the contracting officer shall recommend to the head of the contracting activity a course of action for resolving the conflict (see 9.506).

In addition, FAR 9.507-1 requires the inclusion of a solicitation provision in RFPs when the contracting officer determines that there is the possibility of an OCI: As indicated in the general rules in 9.505, significant potential organizational conflicts of interest are normally resolved by imposing some restraint, appropriate to the nature of the conflict, upon the contractor's eligibility for future contracts or subcontracts. Therefore, affected solicitations shall contain a provision that —

> (a) Invites offerors' attention to this subpart;
>
> (b) States the nature of the potential conflict as seen by the contracting officer;
>
> (c) States the nature of the proposed restraint upon future contractor activities; and
>
> (d) Depending on the nature of the acquisition, states whether or not the terms of any proposed clause and the application of this subpart to the contract are subject to negotiation.

There is no standard solicitation provision in the FAR for this purpose.

If the contracting officer determines that a potential OCI can be avoided by the imposition of a restraint on the future conduct of the contractor, FAR 9.507-2 requires the use of both a solicitation provision and a contract clause:

> (a) If, as a condition of award, the contractor's eligibility for future prime contract or subcontract awards will be restricted or the contractor must agree to some other restraint, the solicitation shall contain a proposed clause that specifies both the nature and duration of the proposed restraint. The contracting officer shall include the clause in the contract, first negotiating the clause's final terms with the successful offeror, if it is appropriate to do so (see 9.508-1(d) of this subsection).
>
> (b) The restraint imposed by a clause shall be limited to a fixed term of reasonable duration, sufficient to avoid the circumstance of unfair competitive advantage or potential bias. This period varies. It might end, for example, when the first production contract using the contractor's specifications or work statement is awarded, or it might extend through the entire life of a system for which the contractor has performed systems engineering and technical direction. In every case, the restriction shall specify termination by a specific date or upon the occurrence of an identifiable event.

The FAR contains no solicitation provisions or clauses for this purpose. See, however, DEAR 952.209-72, containing the following required clause for contracts for advisory and assistance services:

Organizational Conflicts of Interest (June 1997)

> (a) *Purpose*. The purpose of this clause is to ensure that the contractor (1) is not biased because of its financial, contractual, organizational, or other interests which relate to the work under this contract, and (2) does not obtain any unfair competitive advantage over other parties by virtue of its performance of this contract.
>
> (b) *Scope*. The restrictions described herein shall apply to performance or participation by the contractor

and any of its affiliates or their successors in interest (hereinafter collectively referred to as "contractor") in the activities covered by this clause as a prime contractor, subcontractor, cosponsor, joint venturer, consultant, or in any similar capacity. For the purpose of this clause, affiliation occurs when a business concern is controlled by or has the power to control another or when a third party has the power to control both.

(1) Use of Contractor's Work Product. (i) The contractor shall be ineligible to participate in any capacity in Department contracts, subcontracts, or proposals therefor (solicited and unsolicited) which stem directly from the contractor's performance of work under this contract for a period of (Contracting Officer see DEAR 9.507-2 and enter specific term) years after the completion of this contract. Furthermore, unless so directed in writing by the contracting officer, the Contractor shall not perform any advisory and assistance services work under this contract on any of its products or services or the products or services of another firm if the contractor is or has been substantially involved in their development or marketing. Nothing in this subparagraph shall preclude the contractor from competing for follow-on contracts for advisory and assistance services.

(ii) If, under this contract, the contractor prepares a complete or essentially complete statement of work or specifications to be used in competitive acquisitions, the contractor shall be ineligible to perform or participate in any capacity in any contractual effort which is based on such statement of work or specifications. The contractor shall not incorporate its products or services in such statement of work or specifications unless so directed in writing by the contracting officer, in which case the restriction in this subparagraph shall not apply.

(iii) Nothing in this paragraph shall preclude the contractor from offering or selling its standard and commercial items to the Government.

(2) Access to and use of information. (i) If the contractor, in the performance of this contract, obtains access to information, such as Department plans, policies, reports, studies, financial plans, internal data protected by the Privacy Act of 1974 (5 U.S.C. 552a), or data which has not been released or otherwise made available to the public, the contractor agrees that without prior written approval of the contracting officer it shall not:

(A) use such information for any private purpose unless the information has been released or otherwise made available to the public;

(B) compete for work for the Department based on such information for a period of six (6) months after either the completion of this contract or until such information is released or otherwise made available to the public, whichever is first;

(C) submit an unsolicited proposal to the Government which is based on such information until one year after such information is released or otherwise made available to the public; and

(D) release such information unless such information has previously been released or otherwise made available to the public by the Department.

(ii) In addition, the contractor agrees that to the extent it receives or is given access to proprietary data, data protected by the Privacy Act of 1974 (5 U.S.C. 552a), or other confidential or privileged technical, business, or financial information under this contract, it shall treat such information in accordance with any restrictions imposed on such information.

(iii) The contractor may use technical data it first produces under this contract for its private purposes consistent with paragraphs (b)(2)(i) (A) and (D) of this clause and the patent, rights in data, and security provisions of this contract.

(c) *Disclosure after award*. (1) The contractor agrees that, if changes, including additions, to the facts disclosed by it prior to award of this contract, occur during the performance of this contract, it shall make an immediate and full disclosure of such changes in writing to the contracting officer. Such disclosure may include a description of any action which the contractor has taken or proposes to take to avoid, neutralize, or mitigate any resulting conflict of interest. The Department may, however, terminate the contract for convenience if it deems such termination to be in the best interest of the Government.

(2) In the event that the contractor was aware of facts required to be disclosed or the existence of an actual or potential organizational conflict of interest and did not disclose such facts or such conflict of interest to the contracting officer, DOE may terminate this contract for default.

(d) *Remedies*. For breach of any of the above restrictions or for nondisclosure or misrepresentation of any facts required to be disclosed concerning this contract, including the existence of an actual or potential organizational conflict of interest at the time of or after award, the Government may terminate the contract for default, disqualify the contractor from subsequent related contractual efforts, and pursue such other remedies as may be permitted by law or this contract.

(e) *Waiver*. Requests for waiver under this clause shall be directed in writing to the contracting officer and shall include a full description of the requested waiver and the reasons in support thereof. If it is determined to be in the best interests of the Government, the contracting officer may grant such a waiver in writing.

See Chapter 4 for a complete discussion of the types of OCI and the restraints that have been found to be effective in mitigating the effects of OCIs.