

PART III – FINDINGS

[Revised Findings #1-5, 7, 8 Approved; 9-0-0]

F-1. Commercial “Best Practices” Generally

Finding: “Best practices” by commercial buyers of services include a clear definition of requirements, reliance on competition for pricing and innovative solutions, and use of fixed-price contracts.

F-2. Defining Requirements

Finding: Commercial organizations invest the time and resources necessary to understand and define their requirements. They use multidisciplinary teams to plan their procurements, conduct competitions for award, and monitor contract performance. They rely on well-defined requirements and competitive awards to reduce prices and to obtain innovative, high quality goods and services. Procurements with clear requirements are far more likely to meet customer needs and be successful in execution.

F-3. Competition in the Commercial Marketplace

Finding: Commercial buyers rely extensively on competition when acquiring goods and services. Commercial buyers further facilitate competition by defining their requirements in a manner that allow services to be acquired on a fixed-price basis in most instances.

F-4. Contract Terms and Conditions Used in Commercial Contracts

Finding: Large commercial buyers generally require sellers to use the buyers’ contracts which includes the buyers’ standard terms and conditions. This allows all offerors to compete on a common basis. The use of standard terms and conditions streamlines the acquisition process, making it easier to compare competing offers, eliminating the need to negotiate individual contract terms with each offeror, and facilitating contract management.

F-5. Pricing of Commercial Contracts by Commercial Buyers

Finding: Commercial buyers rely on competition for the pricing of commercial goods and services. They achieve competition by carefully defining their requirements in a manner that facilitates competitive offers and fixed-price bids. In the absence of competition, commercial buyers rely on market research, benchmarking, and in some cases, cost-related data provided by the seller, to determine a price range.

F-6. “Commercial Practices” Adopted by the Government

(a) Findings: The government has implemented a number of different approaches to acquiring commercial items and services. Each approach has distinct strengths and weaknesses. The extent to which each of these approaches achieves competition, openness, and transparency varies. ~~None of these approaches replicates the commercial marketplace.~~ Competition for government contracts differs in significant respects from commercial practice, even where the government has attempted to adopt commercial approaches.

(b) Findings: ~~The current structure of the GSA Schedules was established for acquiring commercial commodities based on unit prices.~~ The Panel believes that multiple award contracts have a number of

common issues. For clarity, we have divided the contracts into two categories, multiple award contracts and the Federal Supply Schedules.

~~(c) Findings: Federal Supply Schedules are used in some instances, for large services procurements but without the discipline and rigor of full and open competition.~~

~~(d) Findings: Competition based on well-defined requirements is the most effective method of establishing fair and reasonable prices for services using the Federal Supply Schedule.~~

Multiple Award Contracts

~~(e b) Findings: Solicitations for task and delivery order contracts often include an extremely broad scope of work that fails to produce meaningful competition.~~

~~(fb) Findings: Orders placed under task and delivery order contracts frequently indicate insufficient attention to requirements development.~~

~~(gd) Findings: The ordering process under task and delivery order contracts often does not result, in some instances, without rigorous acquisition planning, adequate source selection, and meaningful competition at the task order level.~~

~~(he) Findings: Agencies frequently make significant purchases of complex services using task and delivery orders.~~

~~(if) Findings: Although task and delivery order contracts are supposed to be streamlined buying mechanisms, agencies use best value type competitions when placing large orders – but without any standards for such competitions.~~

GSA Federal Schedule Contracts

(g) Findings: The structure, including pricing, of the GSA Schedules was established for acquiring commercial commodities based on unit prices. The structure has evolved to address the acquisition of services. However, unit prices are not a particularly useful indicator of the true price for acquisition of complex professional services.

(h) Findings: Federal Supply Schedules are often used for large services procurements but, in some instances, without rigorous acquisition planning, adequate source selection, and meaningful competition.

(i) Findings: Competition based on well-defined requirements is the most effective method of establishing fair and reasonable prices for services using the Federal Supply Schedule.

F-7. Time & Materials Contracts

~~Finding: Commercial buyers use time and materials contracts minimally, preferring the use of fixed price contracts whenever practicable.~~

Finding: Commercial buyers have a strong preference for the use of fixed price contracts and avoid using Time and Materials contracts whenever practicable. Although difficult to quantify precisely due to limited data, the government makes extensive use of time and materials contracts.

F-8. Statutory and Regulatory Definitions of Commercial Services

Finding: The current regulatory ~~definitions~~ treatment of commercial items and services ~~allow~~ allows goods and services not sold in substantial quantities in the commercial market place to be classified nonetheless as “commercial” and acquired using the streamlined procedures of FAR Part 12.- [Move next sentence to

discussion: This can put the government at a significant disadvantage- with respect to pricing when there is limited or no competition.

The definition of stand-alone “commercial services” in 41 U.S.C. § 403(12)(F) is:

Services 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.

This definition for commercial services is adopted in FAR 2.101 as follows:¹

(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 under standard commercial terms and conditions. This does not include services that are sold based on hourly rates without an established catalog or market price for a specific service performed. 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 through competition or from sources independent of the offerors. (emphasis added).

F-9. Price as an Evaluation Factor [tabled 7/21/06]

Finding: The use of non-price related and “responsibility” type evaluation factors may result in too much emphasis being placed non-price considerations that exceed the government’s minimum requirements and also result in price being a minimal consideration in source selection. This can result in the government paying too much for criteria that do not really add value.

¹ FAR 2.101 also provides the following definition for commercial services directly related to a commercial item:

(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.

PART IV – RECOMMENDATIONS

R-1. Definition of Commercial Services

Recommendation: The definition of stand-alone commercial services in FAR 2.101 should be amended to delete the phrase “of a type” in the first sentence of the definition. Only those services that are actually sold in substantial quantities in the commercial marketplace should be deemed “commercial.” The government should acquire all other services under traditional contracting methods, e.g., FAR Part 15.

R-2. Improving the Requirements Process

Recommendation: Current policies mandating acquisition planning should be better enforced. Agencies must place greater emphasis on defining requirements, structuring solicitations to facilitate competition and fixed-price bidding, and monitoring contract performance. Agencies should support requirements development by establishing centers of expertise in requirements analysis and development. Agencies should then ensure that no acquisition of complex services (e.g., information technology or management) occurs without express advance approval of the statement of requirements by the program manager or user and the contracting officer, regardless of which type of acquisition vehicle is used.

R-3. Improving Competition

(a) Recommendation: The requirements of Section 803 of the FY 2002 Defense Authorization Act regarding orders for services over \$100,000 placed against multiple award contracts, including Federal Supply Service schedules, should apply uniformly government-wide to all orders valued over the Simplified Acquisition Threshold. For Schedule orders over \$5 million, notice would be required to all applicable Schedule holders. Further, the requirements of Section 803 should apply to all orders, not just orders for services.

(b) Recommendation: The Panel recommends that for orders over \$5 million under any multiple award contract, in addition to Section 803, the following competition requirements should be mandatory: (1) a clear statement of the agency’s requirements; (2) notice to all Federal Supply Schedule contractors or all holders of task and delivery order contracts; (3) a response period of at least 10 working days; (4) a clear statement of the significant factors and subfactors that the agency expects to consider in evaluating proposals, including the quality of the product or services to be provided (technical capability, management capability, prior experience, and past performance of the offeror); (5) cost or price to the government shall be a significant evaluation factor that must be considered; (6) a statement of the relative weight of the evaluation factors, including whether all evaluation factors other than cost or price are more important than, equal to, or less important than cost or price; and (7) where award is made on a best value basis, a written statement documenting the basis for award and the trade-off of quality versus cost or price. The requirements of FAR 15.3 shall not apply. There is no requirement to synopsize the requirement or solicit or accept proposals from vendors other than those holding contracts.

R-4. New Competitive Services Schedule

Recommendation: Create a new services Schedule under the GSA Schedules that relies on competition, not posted rates, to establish order prices.

R-5. Improving Transparency and Openness

(a) Recommendation: Adopt the following synopsis requirements.

Amend the FAR to establish a requirement to publish, for information purposes only, at FedBizOpps all sole source orders (task or delivery) in excess of the simplified acquisition threshold (SAT) placed against multiple award contracts.²

Amend the FAR to establish a requirement to publish, for information purposes only, at FedBizOpps all sole source orders (task or delivery) in excess of the Simplified Acquisition Threshold (SAT) placed against multiple award Blanket Purchase Agreements (BPAs).

(b) Recommendation: For any order under a multiple award contract over the simplified acquisition threshold where a statement of work and evaluation criteria were used in making the selection, the agency whose requirement is being filled should provide a post-award debriefing consistent with the requirements of FAR 15.506.

R-6. Time & Materials Contracts

Recommendations: The Panel makes the following recommendations with respect to time & materials contracts. (1) Current policies limiting the use of time & materials contracts should be enforced. (2) Whenever practicable, work currently being done on a time & materials basis should be converted to a performance-based effort. (3) The government should not award a time & materials contract unless the overall scope of the effort, including the objectives, has been sufficiently described to allow efficient use of the time & materials resources and to provide for effective government oversight of the effort. (4) Time & materials contracts should be awarded competitively whenever practicable. (5) Current policies regarding contractor conflicts of interest (personal and organizational), inherently government activities, and personal services contracts should be reviewed and revised to address the wide-spread use of time & materials contracts throughout the government.

R-7. Protest of Task & Delivery Orders

Recommendation: The statutory limitation on protests of task and delivery orders under multiple award contracts should be limited to acquisitions in which the total value of the anticipated award is less than \$5 million.

R-8. Pricing When No or Limited Competition Exists

Recommendation: For commercial items, provide for a more commercial-like approach to determine price reasonableness. Revise the current FAR provisions that permit the government to require "other than cost or pricing data" to conform to commercial practices by emphasizing that price reasonableness should be determined by competition, market research, and analysis of prices for similar commercial sales. Move the provisions for determining price reasonableness for commercial items to FAR Part 12 and de-link it from FAR Part 15.

Establish in Far Part 12 a clear preference for market-based price analysis but, where the contracting officer cannot make a determination on that basis (e.g., when no offers are solicited, or the items or services are not sold in substantial quantities in the commercial marketplace), allow the contracting officer to request additional limited information in the following order: (i) prices paid for the same or similar commercial items by government and commercial customers during a relevant period; or, if necessary (ii) available information regarding price or limited cost related information to support the price offered such as wages, subcontracts or material costs. The contracting officer shall not require detailed cost

² Multiple award contracts has the same meaning here as in Section 803 of the National Defense Authorization Act for 2002 (P.L. 107-107),

breakdowns or profit, and shall rely on price analysis. The contracting officer may not require certification of this information, nor may it be the subject of a post award audit.

R-9. Standardized Terms

Recommendation: Revise FAR Parts 12 and 52.212 to include standardized contract terms for the purchase of commercial items and services. Deviate from these standard terms only when in the government's best interest. Further, revise the FAR to encourage agencies and contracting activities to draft, publish, and use industry or commodity specific terms for recurring requirements.

R-10. Market Research

Recommendation: GSA should establish market research monitor services acquisitions by government and commercial buyers, and maintain a database of information regarding transactions.

40.R-11. Price as Evaluation Factor

Recommendation: The Panel recommends that the statutes addressing price as an evaluation factor, 41 U.S.C. §253a (P.L. 103-355 §1061(b)) and 10 U.S.C. §2305 (P.L. 103-355 §1011(b)), be amended to provide that non-price factors ~~may never~~should rarely be "significantly more important" than price. Evaluation criteria could specify that non-price factors are equal to or more important than price. This approach means that price will still be a significant factor in the evaluation.

Appendix A

Proposed Changes to FAR Parts 12 and 15 to Implement Recommendation #8 Pricing When No or Limited Competition Exists

12.209 Determination of price reasonableness.

(a) While the contracting officer must establish price reasonableness in accordance with 13.106-3, 14.408-2, or Subpart 15.4, as applicable for any commercial item (which includes commercial services), as discussed below, the contracting officer should be aware of customary commercial business terms and conditions when pricing commercial items. Commercial item prices are affected by factors that include, but are not limited to, speed of delivery, length and extent of warranty, limitations of seller's liability, quantities ordered, length of the performance period, and specific performance requirements. The contracting officer must ensure that contract terms, conditions, and prices are commensurate with the Government's need.

(b) Competition, market research, and comparisons to prior prices that have been determined to be reasonable typically should enable the contracting officer to determine that an offered price for a commercial item is fair and reasonable without further information from the offeror. If the contracting officer is unable to make such a determination on that basis (e.g., no offers are solicited), the contracting officer may request the information in (i) or (ii) below from the offeror in the following order of preference, provided that the contracting officer should not request more information than is necessary to determine that an offered price is reasonable:

(i) Prices paid for the same or similar commercial items under comparable terms and conditions by both government and commercial customers. The contracting officer must limit requests for sales data relating to such items during a relevant time period. (10 U.S.C. 2306a(d)(2) and 41 U.S.C. 254b(d)).

(ii) Available information regarding price or cost that may support the price offered, such as wages, subcontracts, or material costs. The contracting officer must, to the maximum extent practicable, limit the scope of the request to information that is in the form regularly maintained by the offeror as part of its commercial operations. (10 U.S.C. 2306a(d)(2) and 41 U.S.C. 254b(d)). The contracting officer shall not require the offeror to provide information regarding all cost elements, detailed cost breakdowns, or profit, but instead shall rely on price analysis (see 15.404-1(b)).

(c) A determination of price reasonableness shall be based on the information referenced in paragraph (b) of this section. The contracting officer shall not request that any information provided by the offeror pursuant to paragraph (b) be certified as accurate, complete, or current, nor shall such information be the subject of any postaward audit with regard to price reasonableness.

(d) The Government must not disclose outside the Government information 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)). (10 U.S.C. 2306a(d)(2) and 41 U.S.C. 254b(d)).

15.402 Pricing policy.

Contracting officers must—

(a) Purchase supplies and services from responsible sources at fair and reasonable prices. In establishing the reasonableness of the offered prices, the contracting officer must not obtain more

information than is necessary. To the extent that cost or pricing data are not required by 15.403-4, the contracting officer must generally use the following order of preference in determining the type of information required:

(1) No additional information from the offeror, if the price is based on adequate price competition, except as provided by 15.403-3(b).

(2) Information other than cost or pricing data:

(i) Information related to prices (e.g., established catalog or market prices, sales, or previous contract prices), relying first on information available within the Government; second, on information obtained from sources other than the offeror; and, if necessary, on information obtained from the offeror. When obtaining information from the offeror is necessary, unless an exception under 15.403-1(b)(1) or (2) applies, such information submitted by the offeror shall include, at a minimum, appropriate information on the prices at which the same or similar items have been sold previously, adequate for evaluating the reasonableness of the price.

(ii) Cost information, ~~that does not meet the definition of~~ but in no event shall the offeror be requested to provide cost or pricing data as that term is defined in ~~at~~ 2.101 or to certify any such information.

(3) *Cost or pricing data.* The contracting officer should use every means available to ascertain whether a fair and reasonable price can be determined before requesting cost or pricing data. Contracting officers must not require unnecessarily the submission of cost or pricing data, because it leads to increased proposal preparation costs, generally extends acquisition lead time, and consumes additional contractor and Government resources.

(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.

15.403-3 Requiring information other than cost or pricing data.

(a) General.

(1) The contracting officer is responsible for obtaining information that is adequate for evaluating the reasonableness of the price or determining cost realism, but the contracting officer should not obtain more information than is necessary (see 15.402(a)). If the contracting officer cannot obtain adequate information from sources other than the offeror, the contracting officer must require submission of information other than cost or pricing data from the offeror that is adequate to determine a fair and reasonable price (10 U.S.C. 2306a(d)(1) and 41 U.S.C. 254b(d)(1)). Unless an exception under 15.403-1(b)(1) or (2) applies, the contracting officer ~~must~~ may require that the information submitted by the offeror include, ~~at a minimum,~~ appropriate information on the prices at which the same item or similar items have previously been sold, adequate for determining the reasonableness of the price. To determine the information an offeror should be required to submit, the contracting officer should consider the

guidance in Section 3.3, Chapter 3, Volume I, of the Contract Pricing Reference Guide cited at 15.404-1(a)(7).

(2) The contractor's format for submitting the information should be used (see 15.403-5(b)(2)).

(3) The contracting officer must ensure that information used to support price negotiations is sufficiently current to permit negotiation of a fair and reasonable price. ~~Requests for updated offeror information should be limited to information that affects the adequacy of the proposal for negotiations, such as changes in price lists.~~

(4) As specified in Section 808 of Public Law 105-261, an offeror who does not comply with a requirement to submit information 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 information is necessary to determine the reasonableness of price. However, if there are unusual circumstances where it is concluded that additional information is necessary to determine the reasonableness of price, the contracting officer shall, to the maximum extent practicable, obtain the additional information from sources other than the offeror. In addition, the contracting officer may request information to determine the cost realism of competing offers or to evaluate competing approaches.

(c) Commercial items.

(1) ~~At a minimum, t~~The contracting officer ~~must should~~ 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)12.209~~). ~~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 information from sources other than the offeror, then the contracting officer must require the offeror to submit information other than cost or pricing data to support further analysis (see 15.404-1).~~

~~(2) Limitations relating to commercial items (10 U.S.C. 2306a(d)(2) and 41 U.S.C. 254b(d)).~~

~~(i) The contracting officer must 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 must, to the maximum extent practicable, limit the scope of the request for information relating to commercial items to include only information that is in the form regularly maintained by the offeror as part of its commercial operations.~~

~~(iii) The Government must not disclose outside the Government information 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)).~~

Appendix B

Proposed Changes to 41 U.S.C. § 253a and 10 U.S.C. § 2305(a) to Implement Recommendation #9 Price as an Evaluation Factor

41 U.S.C. § 253a

(c) Evaluation factors

(1) In prescribing the evaluation factors to be included in each solicitation for competitive proposals, an executive agency—

(A) shall clearly establish the relative importance assigned to the evaluation factors and subfactors, including the quality of the product or services to be provided (including technical capability, management capability, prior experience, and past performance of the offeror);

(B) shall include cost or price to the Federal Government as an evaluation factor that must be considered in the evaluation of proposals; and

(C) shall disclose to offerors whether all evaluation factors other than cost or price, when combined, are—

- (i) significantly more important than cost or price;
- (ii) approximately equal in importance to cost or price; or
- (iii) significantly less important than cost or price.

(2) The regulations implementing subparagraph (C) of paragraph (1) may not define the terms “significantly more important” and “significantly less important” as specific numeric weights that would be applied uniformly to all solicitations or a class of solicitations.

10 U.S.C. § 2305(a)

(3) (A) In prescribing the evaluation factors to be included in each solicitation for competitive proposals, the head of an agency—

(i) shall clearly establish the relative importance assigned to the evaluation factors and subfactors, including the quality of the product or services to be provided (including technical capability, management capability, prior experience, and past performance of the offeror);

(ii) shall include cost or price to the Federal Government as an evaluation factor that must be considered in the evaluation of proposals; and

(iii) shall disclose to offerors whether all evaluation factors other than cost or price, when combined, are—

- (I) significantly more important than cost or price;
- (II) approximately equal in importance to cost or price; or
- (III) significantly less important than cost or price.

(B) The regulations implementing clause (iii) of subparagraph (A) may not define the terms “~~significantly~~ more important” and “~~significantly~~ less important” as specific numeric weights that would be applied uniformly to all solicitations or a class of solicitations.