

Additional Findings and Recommendations

Definition of Competition

Finding: There is no current statutory or regulatory definition of competition. The absence of a definition provides uncertainty in terms of evaluating whether a particular acquisition process is competitive.

Discussion:

Competition is universally agreed to as the best way to obtain value in the marketplace. Both from the testimony received and from discussions among the Panel it is clear that what constitutes competition varies depending on who you speak to and where they sit in the market. Many from the private marketplace talked about getting rigorous competition but when queried about how they measured rigorous competition there were different descriptions and all the descriptions circled around the process – none offered a definition of competition was, although some had methods for measuring whether competition was achieved.

Similarly, what constitutes competition in the Federal government seems to be defined by a process followed as opposed to the outcome achieved. The absence of a definition of the outcome and thus the ability to measure the outcome provides for continual disagreements on whether competition was achieved and the public interest served. With the end of the War Powers Act following World War II Congress passed the Armed Services Procurement Act of 1947 (ASPA) and the Federal Property and Administrative Services Act (FPASA), now codified in titles 10 and 41 of the United States Code, respectively. Neither statute defined competition nor established outcome measures to determine whether competition was achieved. Rather, they focused on processes to be used in contracting on behalf of the government that presumably would result in competition. The subsequent regulatory implementations of ASPA and FPASA, the Armed Services Procurement Regulation (ASPR) and the Federal Procurement Regulations (FPR) respectively, subsequently combined in the current Federal Acquisition Regulation (FAR), also failed to define competition, focusing instead on identifying processes to be used to obtain competition. Over the course of the intervening years there was a gradual evolution from “sealed bidding” to negotiated procurement, as markets matured and understanding on what competition should achieve also evolved. The authors of both subsequent statutory and regulatory guidance presumed that their directions on how to conduct a procurement would result in competition when the government entered the market place.

Apparently competition was not achieved to the satisfaction of Congress and Congress, passed the Competition in Contracting Act in 1984. Once again the Congress and the FAR Council in implementing the statutory guidance, failed to define the outcome desired. Rather, further process guidance was promulgated. The result is, today, there is still frequent disagreement internally within the government, between the

operational and oversight functions of government and between the government and the private sector on whether competition was achieved in a particular government acquisition. Often without measuring the outcome of the acquisition, but focusing on a particular process aberration, an acquisition is determined to be competitive or non-competitive. In an environment where there is a bi-partisan emphasis on achieving results and value on behalf of the taxpayers, it is inexcusable that the government lacks a definition of competition and measures that allow all to know whether that outcome was achieved.

Recommendation: The FAR Council should establish a team and conduct public meetings to define competition and measures by which competition can be measured. The FAR Council should amend the FAR to include a definition for competition, the definition to include specific measures for determining whether competition has been achieved.

Discussion:

The absence of a definition of competition in either statute or regulation provides unnecessary uncertainty in the government's acquisition process. Creating a statutory definition will require a lengthy process and in the end will lack sufficient flexibility to provide for adjustments as experience in implementing the definition and changes in the marketplace occur. The creation of a definition in the FAR will provide for more interaction with the public on establishing the definition and should provide for greater flexibility in adjusting the definition as experience and changes in the marketplace occur.