

U.S. GENERAL SERVICES ADMINISTRATION

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MEETING OF THE MULTIPLE AWARD SCHEDULE

ADVISORY PANEL

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MONDAY, FEBRUARY 2, 2009

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The panel convened at 9:00 a.m. in Room L-1301 of the offices of the U.S. General Services Administration, 2200 Crystal Drive, Arlington, Virginia, Elliott Branch, Chairman, presiding.

PANEL MEMBERS PRESENT:

ELLIOTT BRANCH, Chairman, Naval Sea Systems
Command

LARRY ALLEN, Coalition for Government
Procurement

DAVID DRABKIN, U.S. General Services
Administration

JAN FRYE, Department of Veterans Affairs

JACQUELINE JONES, U.S. General Services
Administration

JUDITH NELSON, U.S. General Services
Administration

GLENN PERRY, Department of Education

LESA SCOTT, U.S. General Services

Administration

THOMAS A. SHARPE, JR., Department of the
Treasury

DEBRA SONDERMAN, Department of the Interior

THEDLUS THOMPSON, U.S. General Services
Administration

DESIGNATED FEDERAL OFFICIAL:

PAT BROOKS, General Services Administration

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

2 9:20 a.m.

3 CHAIRMAN BRANCH: On the record.

4 Good morning. I'd like to take things in this
5 order. Since I think the heart of our report
6 is really the Recommendations section, I'd
7 like to start with David's section this
8 morning.

9 Pat has up on the board and I
10 think you have a hard copy of the outline. So
11 we'll defer that until later. I think it
12 reflects the substance of our discussions on
13 Friday, but I'd simply ask you to take a look
14 at that and later on this morning we'll just
15 confirm that that is the case.

16 So if we can move to Dave's
17 Recommendation section. And I guess I'd like
18 to ask first. I understand Jackie sent David
19 one comment over the weekend. Does anybody
20 have any other suggested changes for David
21 before we go through the text that he provided
22 us on Friday?

1 MR. ALLEN: I just had one
2 comment, but I had mentioned to David on
3 Friday. I think we got it cranked in there.
4 But the end of the first one, the --

5 MR. DRABKIN: It's missing it.

6 MR. ALLEN: Right.

7 MR. DRABKIN: It's missing some
8 words and we'll fix at that.

9 MR. ALLEN: Right.

10 MR. DRABKIN: And I did not
11 reformat this over the weekend. I was so
12 excited anticipating the game and then --
13 Thank you. Pittsburgh now has six Super Bowl
14 rings, the best team in all of professional
15 football.

16 (Laughter.)

17 MS. SCOTT: Ho hum.

18 (Off the record comments.)

19 CHAIRMAN BRANCH: All right. So
20 why don't we just -- As we did with the
21 outline, why don't we just start at the top
22 and work our way down.

1 MS. THOMPSON: I do have one just
2 overall.

3 CHAIRMAN BRANCH: Yes, Thedlus.

4 MS. THOMPSON: I didn't see
5 anywhere where we had a definition of
6 Solutions. Did I miss something? I guess I'm
7 looking for a particular since we don't define
8 it in the FAR or the GSAM. Do we actually
9 have a definition?

10 CHAIRMAN BRANCH: You know we had
11 a fairly extension discussion around that.
12 Okay. And Debra Sonderman is pointing out to
13 me that Glenn's Finding and Issues we appear
14 to have a definition I think that reflects the
15 discussion we had at the bottom of his first
16 page.

17 MS. THOMPSON: Okay. Just an
18 overall comment that we might want to pull
19 that out and I don't know if we're going to
20 have any other issues that we might need to
21 define different of words we're using, but I
22 think that would be appropriate to do so so

1 that everyone is --

2 CHAIRMAN BRANCH: Agreed.

3 MS. THOMPSON: Okay.

4 MR. DRABKIN: While I agree that
5 it may help the reader, I also think we need
6 to be careful since it's not defined in the
7 FAR statute. Perhaps we should make it clear
8 that this is the definition for purposes of
9 our discussions.

10 MS. THOMPSON: Absolutely. And
11 that's --

12 MR. DRABKIN: But I do anticipate
13 that the FAR will eventually address Solutions
14 by definition in Part 2 or somewhere else.

15 MS. THOMPSON: Right. I agree,
16 but I think for the purposes of the panel's
17 recommendations we have to have a working
18 definition of what we're talking about.

19 MR. DRABKIN: I am reminded of
20 Justice Whizzer White who was also a former
21 Steeler in reference to another matter which
22 required definitions saying, "I can't tell you

1 what it is, but I know it when I see it." And
2 I think Solutions kind of fall into that
3 definitional area as well.

4 MS. SONDERMAN: On the other hand,
5 Glenn's paper simply refers to it as "the
6 combined purchase of supplies and services"
7 which is the way, the context, in which we
8 discussed it.

9 MR. DRABKIN: So do you want to
10 move that somewhere into the Recommendations
11 section then?

12 MS. THOMPSON: Not necessarily. I
13 kind of thought that we would have a separate
14 section with definitions just to let the
15 reader know as we go on like any basis of
16 award or MFC or whatever. I mean I think it
17 might be helpful.

18 MR. DRABKIN: Do you mean an
19 appendices perhaps?

20 MS. THOMPSON: However. However
21 you want to do it.

22 CHAIRMAN BRANCH: I think probably

1 the thing to do on clean-up is to maybe
2 identify those terms of art we believe need to
3 be defined either in an appendices or
4 somewhere in the report.

5 MS. THOMPSON: Right. As long as
6 it's there somewhere.

7 CHAIRMAN BRANCH: So let's start
8 with Solutions as our first term of art that
9 needs defining, but I agree. Probably basis
10 of award, most favored customer, would also
11 need to be defined because as we've discussed
12 this those seem to be the two terms around
13 which we've had the most confusion.

14 MS. SCOTT: I had one comment I
15 wanted to ask on David's under paragraph four
16 at the very end. The last paragraph, it says,
17 "The majority of panel also believe this
18 recommendation should not lead to the
19 standardization of labor categories." And I
20 was going to ask is that because it's not a
21 standard commercial practice.

22 MR. DRABKIN: I don't recall why

1 we did it. I recall that in our discussion
2 and in the Recommendation section that as
3 published on the web, that language appears.

4 MS. SCOTT: Yes. Okay.

5 MR. DRABKIN: I think as you may
6 recall I don't agree with that position.

7 CHAIRMAN BRANCH: Right. But if
8 memory serves me, we had a lot of discussion
9 around the idea of a rate card and coming up
10 with a set of common definitions for labor
11 categories. I believe there was a motion on
12 the table to do that and the motion either
13 failed or for lack of a second was voted down.
14 I don't recall which.

15 MR. DRABKIN: I don't believe Tom
16 was there that day to second it.

17 MS. NELSON: We can check the
18 transcripts, but I don't think the motion was
19 seconded.

20 MR. DRABKIN: That's correct. I
21 believe that's the case.

22 CHAIRMAN BRANCH: Okay. All

1 right. So why don't we just start at the top
2 of the Recommendations section and work our
3 way down the way we did through the outline.

4 MS. THOMPSON: I have a comment
5 about the A.1.b on the first page, Section
6 803, Competition Requirements. Since
7 basically this has been superseded by Section
8 863 of the National Defense Authorization Act
9 of 2009, do we really need to include this
10 anymore? We have a requirement to apply
11 basically 803 requirements to the schedule.
12 So isn't that sort of being redundant now in
13 terms of recommendations or? Because at the
14 end of it you say, "The panel is aware of that
15 section of the National Defense Authorization
16 Act."

17 MR. DRABKIN: Right.

18 MS. THOMPSON: So I mean you're
19 alluding to it.

20 MR. DRABKIN: At the time we made
21 the recommendations, the National Defense
22 Authorization Act hadn't passed. Subsequent

1 to our making the recommendations, that
2 provision did pass.

3 MS. THOMPSON: Right.

4 MR. DRABKIN: I felt -- I'm not
5 being defensive of language. I'm not
6 objecting to what you had to say except to say
7 that what I have done is put here all the
8 recommendations that were approved. If you
9 think that this would be better addressed in
10 a parenthetical or in a footnote that for
11 instance says "The panel did approve a
12 recommendation but it was overcome by events,"
13 I'm not opposed to doing that. I just -- It's
14 here for us to decide what you want to do.

15 MS. THOMPSON: Okay.

16 MS. SONDERMAN: I think the
17 discussion that's in the body of that text
18 about the experience that DoD has had is
19 actually useful in terms of educating people
20 who haven't been using the procedures what the
21 effect. I mean this is one of those things
22 that could raise alarm in the community

1 whether it's a rule or not, just that "Oh my
2 goodness, we're going to be terribly
3 overburdened with this and get hundreds of
4 quotes for everything we put out." And so I
5 think it's worthwhile both for showing that
6 the panel was thoughtful about making this
7 recommendation, but that as we in the civilian
8 agencies proceed to implement the new
9 requirements we don't need to -- we shouldn't
10 feel like we have to panic about it.

11 I guess, David, the one thing that
12 I would -- where you say "received an average
13 of three quotes" I think --

14 MR. DRABKIN: I believe that
15 number should be five.

16 MS. SONDERMAN: Right.

17 MR. DRABKIN: And I do believe,
18 Debra, in response to your comments that at
19 least one of our colleagues on the panel when
20 we had this discussion was concerned and
21 expressed concern that this would create an
22 onerous burden on the use of schedules and

1 might detract his or her agency from using the
2 schedules. So I think your point is correct.

3 CHAIRMAN BRANCH: You know what I
4 would suggest is that we leave the language as
5 is and that we footnote it and simply say
6 subsequent to the panel recommendation, much
7 as Davis has said, "subsequent to the panel
8 recommendation the Congress passed Section 863
9 of the National Defense Authorization Act for
10 FY 2009 and levied this requirement on
11 civilian agencies."

12 But I think it's important to
13 reflect this as part of the panel's
14 deliberation. I mean we spent a fair amount
15 of time on this and I think it would be useful
16 to the Administrator to understand that we
17 believe that this is really critical given
18 that we're going to remove the price reduction
19 clause to drive the competition at the task
20 order level.

21 MS. NELSON: This may be crazy,
22 just nitpicking. I know we referenced the

1 NDAA and a section of the NDAA. But should we
2 also be referencing the subsequent public law?

3 MR. DRABKIN: I believe the last
4 sentence where I left a blank because I
5 couldn't remember what the section number is
6 does exactly that. That is the law and I will
7 fill in the blank with the right section
8 number. I just can't remember it.

9 MS. SCOTT: It's 863.

10 MR. DRABKIN: You can remember it.

11 MS. SONDERMAN: And I think you
12 just need to finish that. "The panel is aware
13 that Section 863 blah, blah extends the 803
14 procedures to civilian agencies" or wording to
15 that so that you complete your thought.

16 MR. DRABKIN: Yes, that was my
17 intention.

18 CHAIRMAN BRANCH: So do we have a
19 consensus around that approach? We'll leave
20 it there and we'll simply footnote it to
21 discuss the subsequent history of this
22 recommendation. Okay. Very good.

1 MR. DRABKIN: Okay. Shall we move
2 on? Subparagraph 2.

3 MS. NELSON: I have a question and
4 I don't remember and I didn't check with the
5 transcripts over the weekend. I agree totally
6 with the recommendation in paragraph two. I
7 just can't remember if we made a
8 recommendation on how this transactional data
9 would be collected or made available.

10 CHAIRMAN BRANCH: As I recall the
11 discussion on this issue we decided to not get
12 into how to solve the problem. I think we did
13 not go to try to figure out the mechanism by
14 which we collect that data.

15 MR. DRABKIN: I think as a matter
16 of fact in that discussion we thought it best
17 to make the recommendation and let GSA figure
18 out the best way to solve the problem or to
19 accomplish this recommendation.

20 CHAIRMAN BRANCH: Any further
21 comments on the text or Recommendation No. 2
22 and its rationale? Okay. Hearing none, let's

1 move to three.

2 MS. SCOTT: Are we looking for an
3 example at the end?

4 MR. DRABKIN: Yes, and I was going
5 to get one out of the transcripts. I just
6 didn't do it.

7 (Off the record comment.)

8 MR. DRABKIN: I don't remember. I
9 didn't read it on my Blackberry. I'm sorry,
10 Jackie.

11 MS. JONES: Oh okay. I think I
12 did.

13 MR. DRABKIN: Then I'll take your
14 --

15 MS. JONES: -- see the Boss over
16 that one.

17 MR. DRABKIN: He's coming to
18 Washington May 16th I think. Bruce
19 Springsteen concert.

20 MS. SONDERMAN: Tickets go on sale
21 at 10:00 a.m.

22 (Laughter.)

1 MR. DRABKIN: But I don't have an
2 internet connection. So I guess I won't get
3 them.

4 MS. SONDERMAN: Darn.

5 MS. NELSON: We can go upstairs.
6 I'll let you on mine.

7 CHAIRMAN BRANCH: Any comments on
8 the accompanying narrative for Recommendation
9 3?

10 MS. NELSON: I do. I think and
11 again I don't have the transcripts in front of
12 me. I liked to make if this is what we agreed
13 upon more clear. I know that there was
14 substantial discussion and I don't know how we
15 fell out on it at the end. I do agree that
16 with the recommendation and that's what we
17 agreed upon.

18 But I believe that we had
19 discussion that the basis of award first of
20 all be privy only to government in one fashion
21 or another. And second of all that it not be
22 the specific basis of award, but in some

1 fashion only somehow the class of customer or
2 the size of customer. But I would have to see
3 the transcript. In one way, we weren't saying
4 that it was IBM or that it was John Doe and
5 Co. But was this a small company? Was this
6 a large company? Was this all commercial
7 customers? Was this based on a government
8 class of customer? But not the specific
9 company.

10 CHAIRMAN BRANCH: Judith, do you
11 remember which meeting we had that discussion
12 or thereabouts because I do have the
13 transcripts available?

14 MS. NELSON: You know I'd have to
15 look. I can look during a break or --

16 CHAIRMAN BRANCH: Okay.

17 MS. SCOTT: I think it was
18 September.

19 CHAIRMAN BRANCH: September
20 meeting we think.

21 MR. DRABKIN: But I do recall
22 because I did review the transcripts that in

1 our discussion although we didn't frame it in
2 a recommendation it was clearly the intention
3 that this only be disclosed to the ordering
4 officers using the schedule. This would not
5 be made public information and as I recall we
6 talked about the specifics because in that
7 discussion what we were talking was the
8 ability of the ordering contracting officer to
9 use the contract and the negotiated deal
10 intelligently and, without knowing the
11 specifics as to the basis of award customers,
12 it made it kind of hard in a world where we
13 took away the price reduction clause and we
14 were relying on competitive information to
15 decide whether or not the price was in keeping
16 with both that negotiated by the schedule
17 contract and that which is competitive in the
18 marketplace. That's my recollection when I
19 read through it.

20 But clearly in our discussions the
21 intention was not to make this information
22 publicly available. We will treat it as

1 source selection, sensitive information and
2 provide it to the ordering contracting
3 officer.

4 And I believe in the discussion
5 here, Judith, in the second sentence we say,
6 "In discussions among the panel and the" blah,
7 blah, blah, "believe that if GSA made
8 available to ordering contracting officers."
9 I didn't put the word "only" or "restricted to
10 ordering contracting officers" and perhaps
11 that would help clarify it for you.

12 CHAIRMAN BRANCH: Yes, actually,
13 Judith, your memory is to be commended. I'm
14 looking at the transcripts from the September
15 19th meeting and these were my words in a
16 colloquy you and I had. "So the alternative
17 I would suggest the basis of award customer be
18 disclosed to ordering activities in some way
19 not to compromise any proprietary information
20 with respect to who that customer is that you
21 disclose the size of the customer, the
22 industry segment of that customer and what

1 that sales forecast was for the customer" and
2 then you go on to say, "I can support that in
3 part absolutely, positively, that we are
4 talking about your second recommendation which
5 is it would only be defined in terms of what
6 type of customer it was." So we did have that
7 discussion and I guess is it the sense of the
8 panel that we need to make that part of the
9 underpinning narrative for this particular
10 recommendation?

11 MS. SONDERMAN: I think it would
12 be a good idea in the world of creating
13 expectations or managing expectations.
14 Because, for example, we use -- we've
15 addressed what we want to do for orders above
16 the simplified acquisition threshold. But I
17 know in my agency there are an enormous number
18 of orders below the simplified acquisition
19 threshold and so I would want my contracting,
20 you know, if they're placing an order they
21 estimate to be at \$75,000 do they need to go
22 ahead and do the 803 procedures? What's the

1 best way to get the best deal for the
2 department? So I think that's relevant.

3 MS. SCOTT: I was going to suggest
4 we annotate it with a footnote that said
5 something to the effect of "subject to source
6 selection sensitive rules or regulations" or
7 something like that.

8 CHAIRMAN BRANCH: Okay.

9 MS. NELSON: I think addressing
10 Debra it is critical and we had the discussion
11 that an agency whether or not it be Interior
12 or Education or any other agency know whether
13 or not the basis of award customer was a
14 customer that was anticipated to sell or was
15 a customer that was the basis of award was for
16 generally sold in \$100,000 range. But to
17 disclose whether or not that specific customer
18 was, like I said, John Doe is not necessary.

19 MS. THOMPSON: I agree with Judy.
20 I don't think it's on a need-to-know basis and
21 as she said it's the information itself, not
22 who is.

1 CHAIRMAN BRANCH: Right.

2 MS. THOMPSON: Not the vendor and
3 I'm concerned about disseminating too much
4 information out of the hands of NS contracting
5 officer. Once that information is out there,
6 the potential for competitive harm to the
7 vendor, I think I'm just a little concerned.

8 MR. DRABKIN: You know, I
9 understand your concern and I share it to an
10 extent. But when we mark something "source
11 selection sensitive" we are used in our
12 profession dealing with that information,
13 protecting it properly and the good news is it
14 rarely gets compromised and I'm not sure that
15 there is that kind of risk associated here and
16 even if there were some risk I think the
17 objective of providing the ordering
18 contracting officer with sufficient
19 information to understand the basis of award
20 and the competitive pressures that set the
21 initial price at least until we get a bank of
22 competitive information as we've proposed

1 elsewhere, I think that outweighs the risk
2 that the source selection information might be
3 compromised. I mean it's a risk analysis
4 here.

5 MS. THOMPSON: But you don't need
6 to know the name of the party. I mean that's
7 the crux of it.

8 CHAIRMAN BRANCH: No, but I think
9 the transcript reflects a consensus that we
10 agree on that. So I guess what I'd like to
11 do is if, David, you would take an action.

12 MR. DRABKIN: I'm writing now.

13 CHAIRMAN BRANCH: Okay. To do
14 that and if you need a reference it's the
15 September 19th's transcript. The discussion
16 starts at page 119.

17 MR. DRABKIN: Got it.

18 CHAIRMAN BRANCH: Okay. Do we
19 have any other comments on the underpinning
20 language for Recommendation 3? Jackie?

21 MS. JONES: Yes, I have a comment.
22 David, your mike is on. Thank you.

1 What would be -- I'm thinking. I
2 have my CO hat on and I'm thinking about this
3 discussion. So what would be the expectation
4 of the CO? If we were gathering pricing
5 information from customer agencies to see what
6 our contractors are actually out there
7 charging in a competitive situation and then
8 we're establishing a basis of award customer
9 which right now is a commercial customer
10 category, what would be the expectation as the
11 CO as they gather this information and how
12 often would the basis of award customer need
13 to be renegotiate? I mean, what's the
14 expectation of the CO to act on this
15 information that we're recommending they
16 gather?

17 CHAIRMAN BRANCH: Well, yes, I can
18 only speak for myself. So I'll speak for
19 myself as a member of the panel. Today you
20 don't have any visibility into what we do as
21 ordering agencies. So you cannot use that
22 information to set price and I think where

1 we're starting is given that we don't have
2 that, then it would be helpful for ordering
3 activities COs to know what the basis, know a
4 general profile of the basis of award customer
5 so that CO can determine how aggressively he
6 negotiates for a discount off the schedule
7 prices and rates.

8 Now that having been said, and
9 again I want to make it clear that I'm
10 speaking for myself as a member of the panel
11 and not the chair, it would seem to me that in
12 five years if you had built a system which
13 collected ordering activity data and we had a
14 way of mining that data to have real
15 intelligence into the prices that are vendor
16 base was charging us that you would actually
17 have two paths to negotiate rates. So to the
18 extent that you had a vendor who had been
19 doing business on the schedules with the
20 Government over a long period of time, you
21 would actually use the ordering activity data
22 obtained in competition to reset the rates.

1 On the other hand, if you were to have a new
2 vendor who had never done business with the
3 Government, you would likely go down the more
4 traditional path of selling. You know, here's
5 a commercial customer. I'm going to set that
6 as the basis of award. I'm going to track him
7 until such time as I get sufficient data from
8 ordering activities to do a more meaningful
9 negotiation of the rate. That's just kind of
10 my personal reflection on it.

11 MS. JONES: Thank you.

12 MS. SCOTT: I would say another
13 concrete example is that from my personal
14 experience discovered that some vendors treat
15 different portions of the Government
16 differently and so that history would allow us
17 to know when we have a vendor that for
18 whatever reason gives better price breaks
19 above a certain dollar threshold than below
20 and we could end up re-negotiating the
21 schedule that we award to reflect some of
22 those volume discounts. So there's a lot of

1 things we could do with that data.

2 MS. JONES: Right. So, with that
3 said, in the price reductions clause that
4 we're recommending to eliminate, there is a
5 paragraph in the price reductions clause that
6 says that there will be no price reduction for
7 sales to federal agencies and that's a
8 specific paragraph in there. So I suggest
9 that we also recommend some type of -- that
10 GSA develop some type of clause to let the
11 vendors know that we are going to be looking
12 at their transactional information as they
13 sell to other government agencies.

14 Because right now the way that
15 things are and the way that the clause is
16 established, there's no expectation that
17 they'll have to reduce their prices on
18 contract as a result of sales to Federal
19 agencies. So I suggest that we recommend some
20 guidance or some provision be developed so
21 that they will know that in their contract.
22 Because right now, they don't have that

1 expectation.

2 MR. DRABKIN: That's true, but
3 we've recommended the elimination of the price
4 reduction clause altogether which would then
5 take that language out and furthermore in the
6 product section, I believe, be addressed in
7 the recommendations that we expect these
8 prices to be periodically re-negotiated by the
9 schedule contracting officer based upon the
10 information that GSA obtains from the ordering
11 processes and from market surveys so that they
12 are continually keeping the schedule contract
13 price relevant which as you may recall on
14 Friday was a concern that generated a lot of
15 discussion here. Why have them at all we said
16 because they rapidly become irrelevant and may
17 even be irrelevant from the very beginning.

18 So I think your concern is
19 addressed by the fact that we've eliminated
20 the price reduction clause. So therefore that
21 language that says your prices won't be
22 reduced by sales to other Federal Government

1 bodies no longer is in the contract and, in
2 fact, our practice will be that those prices
3 will be periodically reviewed and taken into
4 consideration as the schedule price gets re-
5 negotiated by the GSA schedule contracting
6 officer based upon our customer's experience
7 at point of order or point of sale of the
8 order.

9 MS. JONES: And my point is that
10 we need to let the contractor community know
11 that in our contracts' provisions because
12 they're not going to know and then when the
13 option period comes up and we go to look at
14 transactional information as we go to re-
15 negotiate option prices they're going to be
16 very surprised.

17 MR. DRABKIN: Actually, I don't
18 think that the first time -- Assume
19 momentarily they'll be surprised. It better
20 not be at the option re-negotiation. It ought
21 to be in the first year or two. Depending on
22 market fluctuations, it's going to be within

1 some period of time before the option is
2 renewed unless it's a very stale market where
3 prices don't change at all.

4 MS. SCOTT: We actually get
5 transactional data now within the audit
6 reports and also KOs we'll call ordering
7 activities and ask them for copies of things
8 they've awarded and look through FPDS and pull
9 some of that data out of there and then
10 contact people on an individual basis to
11 figure out how they got the prices they got.

12 MS. NELSON: If we just go to how
13 it would be implemented and put that aside
14 because I think that was the intention that we
15 go to the recommendations at this point and
16 let GSA make a determination once the
17 recommendations go forward. It would be my
18 assumption that if these recommendations or if
19 this recommendation, the price reduction
20 clause elimination, went forward that clauses
21 and notifications would be incorporated into
22 the contracts and solicitations so that the

1 contractors would be fully aware of their
2 responsibilities as well as the contracting
3 officer's responsibilities and what GSA and
4 Government customers as well as state and
5 local authorized users would be looking for
6 and how that would be done and none of that
7 would be implemented until it was understood
8 how that would be accomplished.

9 CHAIRMAN BRANCH: I guess should
10 we add the thought to that recommendation that
11 implementation would be determined by the
12 Administrator and make it clear that we leave
13 it to GSA to decide the how as opposed to the
14 what that comes out of the recommendation?

15 MR. DRABKIN: Rather than amend, I
16 don't know, Mr. Chairman, what you want to do
17 in terms of reopening recommendations and
18 having you vote. I'd recommend rather than
19 reopening the recommendation that in our
20 discussion we make it clear that our intent
21 was that --

22 CHAIRMAN BRANCH: Yes, I'm not

1 suggesting that we reopen the recommendation.

2 MR. DRABKIN: Right.

3 CHAIRMAN BRANCH: But the
4 narrative, the accompanying narrative, we'd
5 simply say that it's the consensus of the
6 panel because I think it always was. I
7 remember having this discussion that we not
8 try to invent the solution, that we simply
9 leave it to the Administrator as to how to
10 implement the recommendation.

11 MS. SCOTT: I just think it needs
12 to be at the high level as opposed to at the
13 individual level.

14 MS. NELSON: I think that was the
15 intent of the panel and the intent of seating
16 the panel in the first place that the panel
17 provide recommendations for improving or
18 reviewing the Schedules program in the first
19 place, provide those to the Administrator and
20 allow the Administrator to determine which and
21 how of those recommendations to move forward
22 on to improve the Schedules program for the

1 agency customers.

2 MR. DRABKIN: And I just quickly
3 drafted a sentence that I think captures this
4 thought and that is "The panel intends that
5 the Administrator will determine how best to
6 implement this recommendation and will
7 establish the appropriate processes for doing
8 so" or words to that effect so that it's
9 clearly not telling him how to do. We're
10 leaving it up to them to do it and if that
11 works, if those general words work for you,
12 you'll see the more specific words in a week
13 or so and then you can play with them.

14 CHAIRMAN BRANCH: Let me make a
15 suggestion that we take that particular
16 language and we move that to the Introductory
17 section of your Recommendations so that we
18 make that very clear that for none of these
19 recommendations did the panel attempt to solve
20 the problem, you know, the implementation of
21 it and I think that then covers them all. We
22 don't have to worry about that recommendation

1 by recommendation.

2 MR. DRABKIN: Done.

3 CHAIRMAN BRANCH: Is the panel
4 good with that?

5 Okay. Any other suggested changes
6 on Recommendation 3?

7 (No verbal response.)

8 Hearing none, let's move onto
9 Recommendation No. 4.

10 MS. SCOTT: It occurs to me in
11 that last paragraph we've got, it sounds
12 silly, but a double negative so that the panel
13 says don't recommend this and the panel was
14 opposed to it. So am I reading it too -- "A
15 majority of the panel believes the
16 recommendation should not lead to
17 standardization" and then the follow-on says,
18 A majority of the panel opposes..." So were
19 they opposed to the standardization or were
20 they opposed to the not standardization?

21 MR. DRABKIN: Excellent point.
22 I'll separate the thoughts.

1 MS. SCOTT: Despite your personal
2 preference, right?

3 MR. DRABKIN: Right. I'm a big
4 person and if you don't believe me you should
5 have seen the scale this morning.

6 (Laughter.)

7 CHAIRMAN BRANCH: Are there any
8 other comments on the accompanying narrative
9 for Recommendation 4? Are we good with that?
10 Okay.

11 Let's move onto Recommendation No.
12 5.

13 MS. THOMPSON: Just one comment
14 and question at the end of five where it says
15 ensure, "Take a greater effort in ensuring
16 coordination of the SPEs of customer
17 agencies." To what end? What information was
18 anticipated to be given? I just want to
19 amplify on that recommendation because I'm not
20 quite sure what is expected of GSA in terms of
21 this coordination with the SPEs.

22 MS. SONDERMAN: I think it goes

1 back to what's in the recommendation,
2 evaluating which schedules. Are there things
3 that need to be added or are there things that
4 need to be removed because they're no longer
5 relevant?

6 Okay. So perhaps a survey of what
7 SINS you use, those you don't use. I'm just
8 trying to hone in on it because that will make
9 it easier in terms of reviewing the
10 recommendation.

11 MR. DRABKIN: Right. When I went
12 back and reviewed the transcripts, it seemed
13 to me that what I read and what I recall
14 hearing from a number of colleagues was that
15 we weren't getting their input, the input of
16 people like Tom and Glenn and Debra, even
17 though GSA and Jan and Shea because even
18 though we had these customer councils it may
19 be that, and while they were valuable, we
20 weren't getting the input from the folks who
21 strategically were responsible for what was
22 going on in their agency and that's where this

1 sentence comes from, that kind of -- You won't
2 find it stated in the transcript clearly, but
3 if you read the transcript, I got that flavor
4 and that's my recollection of the
5 conversation.

6 So that's what I was trying to get
7 at that we needed two levels of discussion.
8 The customer council should continue, but that
9 the folks around our table who are responsible
10 for the day-to-day operations within their own
11 departments also needed to be consulted with
12 because they may have a different picture or
13 a bigger picture or a more inclusive picture
14 or they may just have some personal druthers
15 that didn't seem to be taken into account.

16 So I'm all in favor of whatever
17 rewrites you want of the last sentence that
18 kind of gets to that point so that we're
19 talking to people like Tom and Jan and Debra
20 and Glenn and Elliott and others who even
21 though they had representatives, even though
22 those representatives should be communicated

1 up to them, we all know how government works
2 and my sense was there was a communications
3 breakdown. That was the point I was trying to
4 make. And it could be that they would say, "I
5 don't want that SIN."

6 CHAIRMAN BRANCH: Yes, I would
7 echo David's comments and I do that from the
8 perspective of having been the Navy's Senior
9 Procurement Executive as well as an
10 operational activity head. What I would want
11 to do as a Director of Contracts in the NAVSEA
12 I may not have wanted to do as the Executive
13 Director for Acquisition of Logistics
14 Management.

15 So I think it's very, very
16 important especially since GSA has an
17 entrepreneurial orientation. Its desire to
18 satisfy customers at the operational level may
19 work across purposes to the strategic bent of
20 the SPEs. So the SPEs I think have to buy
21 into what their folks to do and I think that
22 was David's intent as reflected in that last

1 sentence.

2 MS. THOMPSON: That's fine. I
3 just didn't quite know where you were going.
4 But that makes sense. You want to make sure
5 that SPEs have input.

6 MS. SCOTT: We need more customer
7 input is what we mean.

8 MS. THOMPSON: That's fine.

9 MR. DRABKIN: But is there
10 something we should do to it, I mean, because
11 we know that your office will be getting this
12 report. Even though your signing it just as
13 my office will get this report, is there some
14 other language that needs to be added? Is
15 there a footnote that we should add or
16 something to do that will make it easier for
17 you as we explain to both Jim and to whoever
18 our administrator is the point here?

19 MS. THOMPSON: Right. If I could
20 just kind of look at it for a while and get
21 back to you on that.

22 MS. SCOTT: I've got a word change

1 I'll recommend to you. Maybe change it from
2 "ensure coordination" to "solicit more." I'm
3 trying to figure out the rest of the part but
4 change it to "solicit" more input from them.

5 MS. SONDERMAN: Maybe what you
6 say, "The panel was aware that GSA operates
7 multiple customer councils but believes that
8 a greater effort should be made to coordinate
9 with the senior procurement executives of
10 customer agencies to understand their
11 strategic acquisition direction" or something
12 like that.

13 MS. NELSON: "Strategic
14 acquisition requirements" or?

15 MS. SONDERMAN: "Needs."

16 MS. NELSON: "Needs."

17 MS. SONDERMAN: Yes.

18 MS. NELSON: "Vision."

19 MR. DRABKIN: I think I captured
20 that thought and I will put it in the redraft.

21 CHAIRMAN BRANCH: Any other
22 comments on Recommendation 5?

1 (No verbal response.)

2 Okay. Hearing none, let's move
3 onto Recommendation No. 6.

4 MS. SCOTT: I need a refresh on
5 the thinking here. I was trying to remember
6 what transcript had this discussion about the
7 pricing on the T&M portion. Does anybody
8 recall?

9 CHAIRMAN BRANCH: No, I don't
10 recall when we had the discussion, but the
11 substance of it was our struggle with "lowest
12 overall cost to the Government" vs. "fair and
13 reasonable price" vs. "most favored customer
14 basis" vs. "the tracking of the basis of award
15 customer." And I think what we were saying is
16 that we needed to clarify the fact that the
17 objective is aside from all these other terms
18 of art is to obtain a fair and reasonable
19 price at the time of contract formation and
20 that would be to pursue the lowest overall
21 cost alternative with the statute.

22 I think this is one where our

1 esteemed counsel weighed in and said, "Hey,
2 you know you need to understand what the
3 statute tells the Administrator the objective
4 of the Schedules program is." So as memory
5 serves me that was the discussion and I think
6 that was a summer discussion as well.

7 MS. SCOTT: I would like to say
8 July. This is the one where we were having --
9 The statute says "lowest overall cost" and we
10 were saying what do we do.

11 MS. NELSON: I think also if I
12 remember correctly part of this discussion had
13 to do with the customer, well, I shouldn't say
14 customer, with the stakeholder confusion over
15 what "most favored customer" and "basis of
16 award" is and that is part of our findings
17 that there is confusion among the multiple
18 stakeholders among "basis of award" and "most
19 favored customer." I'm not sure if that's
20 one, but I know that one of the
21 recommendations, and this is the only place
22 where I find it, came out with that and that

1 we recommended that the Administrator try and
2 clean up the language so that that confusion
3 among the stakeholders was less.

4 MR. DRABKIN: But I also recall in
5 that discussion a number of other things. For
6 example, I think we talked about the fact that
7 a senior systems engineer in one company was
8 priced one way and a senior systems engineer
9 in another company was priced another way and
10 that there was very little ability to
11 reconcile the difference between the pricings
12 in those example categories which by the way
13 I think was led or contributed to our
14 discussion of the standardization idea and I
15 think my recollection was is that we wanted to
16 give more information to the ordering
17 contracting officer and we wanted the schedule
18 contracting officer to do a better job of
19 making it clear of what was priced and how you
20 should view that pricing on T&M. Because in
21 services, that's all you really do price. I
22 mean that's how you price services on the

1 schedule contract.

2 There was even some discussion
3 about the recommendation of the panel to have
4 no pricing. In that same day that we talked
5 about that issue, we didn't go there. I'm not
6 sure what else I can add to that though as
7 witnessed by just the couple of sentences that
8 follow it.

9 MS. SCOTT: So in essence what
10 we're saying in here though is that the
11 statute says "lowest overall cost
12 alternative." When we start talking about T&M
13 services, it can't really be applied at that
14 overall level and we're telling him to expand
15 that guidance and make it more clear. Am I
16 reading that correctly?

17 MR. DRABKIN: Well, I think it
18 doesn't seem apparent to the outside observer
19 that the lowest overall cost objective is the
20 goal. Then why do we have on our services
21 schedules categories with great variance in
22 price using the same nomenclature?

1 Now the contracting officer -- In
2 that discussion we heard explanations for why
3 that's the case. But it didn't appear to
4 someone other than the schedule contracting
5 officer. It might not appear why there was
6 such a variance and how that could be if your
7 goal was the lowest overall cost objective.

8 MS. SCOTT: This is one paragraph
9 where I'm thinking it might be beneficial to
10 add a sample or an example to clarify what it
11 is we're trying to say here.

12 MS. NELSON: To be honest, I'd
13 really like to have the opportunity to review
14 the transcripts because I'm not 100 percent
15 sure that that is the discussion that led to
16 this recommendation. I know we had the
17 discussion, but I'm not sure that's the
18 context of the recommendation.

19 CHAIRMAN BRANCH: Does anyone
20 recall which meeting we had that discussion
21 at? What time frame?

22 MS. SCOTT: Well, if it was the

1 lowest overall cost, I'm thinking it was July.

2 CHAIRMAN BRANCH: Okay.

3 MS. SCOTT: Related to the
4 standardization of labor categories, I don't
5 recall.

6 CHAIRMAN BRANCH: Okay. I guess
7 we'll have to look at the -- I can't find that
8 very quickly. I'm looking in the July
9 transcript.

10 MS. BROOKS: It may be later
11 because this says this was for services --
12 Remember we looked at products first and we
13 looked at services. So it's probably the
14 September transcript.

15 MR. DRABKIN: Well, at any rate,
16 it appears that we can't dispose of
17 Recommendation No. 6 here until we do some
18 more homework.

19 MS. SCOTT: I was going to suggest
20 we table it temporarily and move onto seven
21 while we look for the transcript information.

22 CHAIRMAN BRANCH: Okay. Then

1 let's do that. Move onto seven. Comments on
2 the accompanying narrative for Recommendation
3 No. 7?

4 MS. THOMPSON: I have a concern in
5 the first sentence there in terms of "ordering
6 agencies in order to ensure that orders are
7 placed in a manner that is consistent with the
8 schedule contract." I really think that
9 should say "in scope," "within scope of."

10 MS. SONDERMAN: That wasn't a
11 scope issue.

12 MS. THOMPSON: Okay. So what is
13 the --

14 MS. SONDERMAN: The issue was that
15 there are changes in terms and conditions.
16 Ordering agencies don't have access to the
17 terms and conditions.

18 CHAIRMAN BRANCH: Right.

19 MS. SONDERMAN: And therefore we
20 get ourselves into contract situations where
21 we've placed an order that we think we are
22 administering based on some general term and

1 condition and then we find out that a change
2 was made by that vendor and their schedule
3 contracting officer to one of the more
4 standard terms that we wouldn't know about and
5 it affects our ability to administer our
6 order.

7 MS. THOMPSON: Okay. So how is
8 that not within scope of the schedule
9 contract?

10 MS. SONDERMAN: Well, I guess when
11 I think of scope I think what kinds of
12 products or services are you authorized to
13 provide through that schedule contract.

14 MS. THOMPSON: Okay.

15 MR. DRABKIN: To be more specific,
16 I think I mentioned, if we didn't I certainly
17 meant to mention, some of the changes, for
18 instance, on Schedule 70 that affected things
19 like limitation of liability which our
20 standard terms and conditions don't include
21 any limitations to liability. But we
22 discovered ourselves that we had negotiated

1 some limitations to liability in some of those
2 contracts and our customers didn't know it and
3 when they did have a dispute were surprised by
4 it.

5 So I'm not sure that that's really
6 a scope question. I really do -- As scope is
7 normally discussed and thought of, we were
8 well within the scope of the contract. We had
9 a term and condition that the customer wasn't
10 aware of because it was a change to the
11 standard clauses that the customer didn't get
12 to see either because we never published them.
13 But now we are.

14 I mean I think that's the point
15 here is that if we make a change to a standard
16 term and condition with a particular customer
17 which we can do that that change be made and
18 brought to the attention of the ordering
19 contracting officer so that they understand
20 what the rules are for that particular
21 contract and the fact that they may be
22 different than they are for any other person

1 on that particular schedule or other schedule.

2 MS. SCOTT: It was specifically
3 around when we made changes to standard terms
4 and conditions.

5 MR. DRABKIN: Right.

6 MS. SCOTT: Then we make everybody
7 aware. It was very much that conversation.

8 MR. DRABKIN: Right.

9 MS. NELSON: There are two sets of
10 changes I think. A lot of times a customer is
11 going to see a solicitation that came out,
12 say, a specific refresh that had a set of
13 terms and conditions and then those terms and
14 conditions may become updated across the
15 entire contract, say, Schedule 70 if we're
16 there, and there is a change to those based on
17 whatever and those may impact the entire base
18 of contractors and then as David mentioned
19 there may be a specific pre-negotiated change
20 to terms and conditions which as he said may
21 have been part of a specific negotiation and
22 clearly that has been an issue for our

1 customers. So it's really the transparency
2 has been a significant issue.

3 So that -- I agree. It's not a
4 scope issue of whether or not something's in
5 scope. It's the negotiated terms and
6 conditions and the visibility to the customer.

7 MS. THOMPSON: Well, if we could
8 be a little bit more detailed on that because
9 I see it consistent with and in scope of
10 because certain provisions in our contract do
11 allow ordering activities to make deviations.

12 CHAIRMAN BRANCH: But I think the
13 chief problem is most ordering activities do
14 not have a copy of the schedule contract. So
15 we have no idea what terms and conditions were
16 in that schedule contract when they were
17 awarded. We use the schedule contract as a
18 vehicle to buy things and we use them in a way
19 in which we believe we control the entire set
20 of terms and conditions in the contract and
21 that's very dangerous because we will put
22 provisions in which may well be in conflict

1 with the provisions of the contract.

2 (Off the record comment.)

3 Well, no, it's not a scope issue.

4 I mean we talk about scope in terms of that
5 which the parties contemplated would be the
6 exchange of value at the time of contract
7 formation. If we have scope issues, shame on
8 us in the ordering agencies because the scope
9 I think is fairly clear. Presumably we know
10 how to read and we just did it anyway.

11 But when we're talking about the
12 Ts & Cs are the necessary conditions under
13 which the presently bargained-for exchanges is
14 prosecuted, we sometimes write things in there
15 that are counter to what was in the original
16 award. But we have no idea what those are
17 because we don't see the original awards. I
18 really think that was the sense of our
19 thinking when we came up with that.

20 MR. DRABKIN: And it is also
21 important to keep in mind and I think we
22 reminded you during this discussion that an

1 ordering activity cannot change the Ts & Cs.
2 They can include in their requirement some
3 additional terms and conditions that without
4 modifying the underlying which are part of
5 their scope of work, not the scope of the
6 contract.

7 But the real problem was is that
8 despite what they thought were standard terms
9 and conditions in the government contracts
10 some of our customers reported they learned
11 that that which they thought were standard in
12 this particular contract was not. It may have
13 been standard but had been changed for that
14 particular contract and what we're doing in
15 the GSAM as I think I reported was we're
16 publishing the general terms and conditions
17 which weren't previously published. But we
18 weren't publishing any specific negotiated
19 changes to those terms and conditions that
20 might occur on a contract-by-contract basis
21 and the issue was how do you make sure that
22 those changes to a specific contract that

1 occurred in the negotiation at the schedule
2 contract level get communicated to the
3 ordering contract officers so that they can
4 make a decision.

5 For example, an ordering
6 contracting officer may not want to order from
7 a company who has a limitation of liability
8 clause in their contract because they may want
9 to hold that contractor liable without
10 limitation for default. And, by the way,
11 that's the standard clause in FAR is that
12 there is no limitation of liability on
13 default. There's a definition of what those
14 default damages may include, but there's no
15 limitation on that. Whereas, we know that
16 particularly in the IT world there has been a
17 concerted effort to reduce potential liability
18 through IT contracts and the Safety Act itself
19 talks about certain limitations of liabilities
20 under certain circumstances.

21 So our point I think here, I think
22 what we all agreed to, was that they place the

1 order consistent with the schedule contract
2 but that they understand what that particular
3 schedule contract might have if it differs
4 from the general terms and conditions which
5 we've already published and made available for
6 them to review.

7 So again, scope, this has a very
8 specific meaning and term of art and it
9 doesn't go to the terms and conditions. It
10 goes to that which you're buying under the
11 contract, not the terms and conditions that
12 the rules of the road, if you will, for that
13 particular contract.

14 CHAIRMAN BRANCH: Do we need to
15 clarify what we mean in this recommendation or
16 are you comfortable with the discussion?

17 MS. SCOTT: I have some language
18 I'd volunteered to David. Do you want me to
19 read it?

20 MR. DRABKIN: Well, before you do,
21 I just want to get back to Thedlus' comment is
22 to the recommendation itself, the word

1 "consistent" in the recommendation, not in my
2 discussion of it. So do we want to reopen the
3 -- Are you asking us to reopen the
4 recommendation to change the word "consistent"
5 or would you like for us to better explain it
6 in the discussion of what we mean by
7 "consistent"?

8 MS. THOMPSON: I don't think that
9 sentence captures the information that all of
10 you have really stated especially you, David,
11 in terms of -- The intent apparently is to
12 ensure that the ordering activity has
13 information on any deviations that have been
14 made at the contract level and that's not what
15 this says.

16 MR. DRABKIN: Right, and so then
17 if you read the explanation, I think we get
18 into the fact that beginning I believe with
19 the second sentence. I mean I'm open to
20 rewording.

21 MS. THOMPSON: All right.

22 MR. DRABKIN: But if you read

1 beginning with the second sentence.

2 MS. THOMPSON: Okay. Sorry. I
3 didn't read further. Sorry.

4 MS. SCOTT: I'll just give it to
5 you and everybody can see it in the final
6 draft.

7 CHAIRMAN BRANCH: Okay. Do we
8 have any other comments on Recommendation 7?

9 (No verbal response.)

10 Okay. Hearing none, let's move
11 onto No. 8.

12 MR. DRABKIN: Just a reminder that
13 this recommendation was actually added at the
14 end, the very end, of our discussion of
15 Solutions and we moved it from that area up to
16 Services. We did not discuss this
17 recommendation contemporaneously with the
18 first seven that we approved. It was during
19 the Solutions discussion if you're looking for
20 the transcript or where it appeared
21 chronologically in the course of the panel.

22 MS. JONES: Well, I now would like

1 to add something to No. 7 and I think I put
2 this in my comments dated that GSA improve if
3 we want to say the manner or but also the
4 timeliness in which the contract Ts and Cs are
5 made available because a lot of information is
6 on GSA Advantage. But the timeliness in which
7 that information becomes available to the
8 customer may be up to a six-month period.

9 MR. DRABKIN: I'll add a sentence
10 on timeliness to the discussion in
11 Recommendation No. 7.

12 And so we're back to No. 8.

13 CHAIRMAN BRANCH: Yes, we're back
14 to No. 8. Yes, No. 8, your comment, "in a
15 cost type contract implies some development
16 rather than commercial products and services,"
17 did we -- I don't recall that as being part of
18 the discussion.

19 MR. DRABKIN: Actually, I lifted
20 that directly from the recommendations paper
21 that Pat provided us from the meeting.

22 CHAIRMAN BRANCH: Okay. I must be

1 suffering from half --

2 MR. DRABKIN: It may not be what
3 we want to say now, but I wanted to make sure
4 I didn't fail to capture that which we did
5 discuss.

6 CHAIRMAN BRANCH: Okay.

7 MS. SONDERMAN: Is there something
8 that you would suggest instead of the word
9 "development" keeping in mind David's reminder
10 that this came up in our discussion of
11 Solutions and I think we were speaking
12 specifically of information technology
13 development work where there may be either
14 progressive elaboration or some ambiguity in
15 our initial statement of work.

16 CHAIRMAN BRANCH: You know, I
17 guess the term "development" to me kind of
18 triggers this idea that we are creating
19 something and as I remember the Solutions
20 discussion it wasn't that we were creating
21 something that could stand on its own. It was
22 that we were taking products and services and

1 integrating them to create something new. So
2 I guess to that extent it's development. But
3 it's not as if we're going out and we're
4 developing e-Verify from scratch or we're
5 building a littoral combat ship or the hadron
6 collider and I guess the word "development"
7 kind of infers to me a broader undertaking
8 than the intent of our discussion.

9 MR. DRABKIN: So would you object
10 then, Mr. Chairman, to inserting a footnote
11 here that by "development" we mean the
12 integration of existing services and products
13 to provide a solution to an existing problem
14 as opposed to research and development where
15 we would create something that has never been
16 created before or words to that effort?

17 CHAIRMAN BRANCH: Right. I mean
18 that works for me. I think we just need to
19 clarify that we're not using development in
20 that kind of very broad sense of the word.

21 MS. NELSON: Pat, rather than
22 "problem" can we say "requirement"? David

1 suggested an existing footnote that
2 "development" is integrating existing products
3 and Solutions rather than -- That "development
4 is the integration of existing products and
5 services" or he's writing in his -- Right?

6 MR. DRABKIN: Right.

7 MS. NELSON: I just -- Rather than
8 saying "problem" I would say "requirement"
9 because that's generally what the customer
10 has.

11 CHAIRMAN BRANCH: Right. Any
12 other comments on the accompanying narrative
13 for Recommendation No. 8?

14 MS. NELSON: David, when we say or
15 you wrote in 8B, can you jog my memory whether
16 the Government has adequate audit resources?
17 Are we talking about a CO who is evaluating at
18 the task order level to place an order? Is
19 that -- I can't remember.

20 MR. DRABKIN: I seem to recall in
21 our discussion we talked about the fact that
22 at least on the civilian agency side we lacked

1 the same audit resources generally that our
2 colleagues in the military side of the house
3 have through DCAA in that cost-type contracts
4 do involve more work and in particular audit
5 work and that in reviewing this decision that
6 GSA shouldn't, I think what we said was you
7 shouldn't add a cost-type SIN unless you had
8 the resources available to provide assist to
9 your customers through that audit process and
10 I think we even talked about how the IG audit
11 function was not sufficient or it had a
12 different view on the world than the audit
13 function that the contracting officer would
14 need to manage cost-type contracts.

15 I think we even made reference to
16 a comparison to Sarbanes-Oxley and the fact
17 that in the private sector companies have an
18 internal audit function to assist management
19 to do their job and that we lack a similar
20 internal audit capability generally speaking
21 on the civilian side. I think that captured
22 our conversation about our concerns because

1 cost-type contracts are work. They're more
2 work actually than I think we agreed a fix
3 price type contract, but they are in some
4 cases the most appropriate way for the
5 Government to get best value. Cost-type
6 contracts are not a bad thing as some other
7 folks made them out to be.

8 I think we had that kind of
9 general discussion that day. Now it didn't
10 get captured in that one parenthetical and if
11 you think it needs to be expanded out, that's
12 fine. I didn't expand out what Pat had typed
13 that day and I'll be more than happy to add
14 some additional words to capture that thought.

15 MS. NELSON: No, I was trying to
16 job my memory when we say "Government" because
17 the Government is a broad topic and I do
18 remember now that you say it was civilian.

19 I have an odd thought. I agree --
20 Thinking back over this, I do remember all of
21 the points that you've brought out here. It's
22 an interesting thing because it seems to me

1 that in eight here we've done something that
2 we haven't done in any of the other
3 recommendations which is we've put forward
4 implementation suggestions and maybe I'm
5 wrong. I mean if we put forward and just
6 don't -- I mean I'm not tied to this. Perhaps
7 what we've put forward here is the panel's
8 concerns or thoughts about how of doing cost-
9 type in the schedules and expertise around
10 doing that which is fine. I'm just making the
11 observation.

12 CHAIRMAN BRANCH: Yes. Well, I
13 think it's a little more nuance than that. I
14 don't think we're really talking about
15 implementation as much as we're talking about
16 the policy issues that adding cost-type SINS
17 would imply. But if you go do that, then
18 remember here are these things that we're
19 going to have to grapple with.

20 I don't know that we have similar
21 sorts of issues with the other
22 recommendations.

1 MS. SCOTT: Each recognition, this
2 is a pretty complex topic in that we are not
3 without care and thought in making this
4 recommendation to the reality of it.

5 MS. NELSON: In that case, may I
6 ask that, David, in 8B can we just clarify
7 whether the Government, just clarify the
8 reference to Government, that it's the
9 civilian agencies?

10 MR. DRABKIN: I'll put a
11 parenthetical in there to capture that. But
12 I'd also like to add that I think in our
13 discussion we also recognized that schedule
14 contracting officers are not familiar with the
15 use of cost-type contracting or what would be
16 involved in creating that kind of program at
17 the schedule contract level. And so I thought
18 that in crafting our recommendation and these
19 specific notes I think we were trying to
20 remind the Administrator that should they
21 adopt this recommendation there are some
22 things based on the experience of those

1 present that the Administrator should take in
2 mind. I mean the Administrator may look at
3 all these things and say, "Too hard" and
4 decide not to do it.

5 MS. SONDERMAN: And maybe one way
6 is to actually look at your sentence that
7 precedes these five things and say something
8 along the lines of "The panel considered the
9 following," you changed it, sorry, "issues
10 associated with creating a cost-type vehicle
11 for services within the MAS program which
12 raised concerns about the ability to implement
13 this recommendation" or something.

14 MS. SCOTT: This is an actual
15 motion. So don't we have to then vote on it?

16 MS. SONDERMAN: We did.

17 MR. DRABKIN: The eight.

18 MS. SCOTT: I mean to change the
19 wording.

20 MS. SONDERMAN: Turn your mike on,
21 David.

22 MR. DRABKIN: The first sentence

1 in eight was the recommendation. The rest of
2 this were notes that Pat had captured of our
3 discussion. So, no, this does not represent
4 something we voted -- Eight, the first
5 sentence recommends -- It represents something
6 we voted on. All this other stuff are notes
7 that Pat had captured from our discussion and
8 shared with us but weren't voted on.

9 MS. SCOTT: All right. Because I
10 was looking at the motion summary and it's in
11 here word for word. So that's what had me
12 concerned.

13 MR. DRABKIN: Right. Yes, it's
14 below the actual motion itself, right?

15 MS. SCOTT: This particular
16 handout.

17 MR. DRABKIN: Right.

18 MS. SCOTT: And then motion six it
19 says -- It's just a point of order to make
20 sure we stay in.

21 MR. DRABKIN: My recollection was
22 we voted on the sentence and then Pat typed in

1 the rest of that conversation. She did in
2 some other places, too.

3 MS. BROOKS: Yes, David. That's
4 correct. The motion is the first sentence and
5 when I could pick up some key points for each
6 motion where I could I did put that under the
7 motions.

8 MS. SCOTT: I'm relieved.

9 CHAIRMAN BRANCH: Okay. Any other
10 discussion?

11 (No verbal response.)

12 Okay. It's 10:37 a.m. by Pat's
13 computer clock. So why don't we take a ten
14 minute break, come back at 10:50 a.m. and see
15 if we can maybe finish this up before lunch.
16 Off the record.

17 (Whereupon, the above-entitled
18 matter went off the record at 10:37 a.m. and
19 resumed at 10:51 a.m.)

20 CHAIRMAN BRANCH: On the record.
21 Before we move onto No. 9, I do have a
22 question. I didn't catch the last topic under

1 eight which is the appropriateness of cost-
2 type contracts on I guess the next page.
3 Dave, could you elaborate a little bit on the
4 thoughts you're trying to capture there
5 because that's a very broad thought?

6 MR. DRABKIN: Actually, I believe
7 first of all it was a thought we tried to
8 capture and I didn't elaborate on our words.
9 But I believe that was a result of our
10 discussion about the nature of schedule
11 contracts. Right now, the schedule contracts
12 are described as commercial contracts and
13 commercial contracts as they're defined in
14 FASA, not in FAR Part 12, but in FASA would to
15 the maximum extent practicable not be cost-
16 type contracts.

17 FASA, when we implemented FASA and
18 FAR Part 12, we decided to be more strict than
19 the FASA language and you may remember. You
20 were part with the people in the organization
21 of the team to help us write that. We said
22 that you will not use cost-type contracts and

1 then you have -- So you have that guidance or
2 statutory language on the one hand.

3 On the other hand, under the
4 Administrator's authority under for FASA the
5 Administrator is not bound by the FAR. But he
6 or she is bound, of course, by statute. And
7 so that sentence I believe was designed to
8 capture that whole discussion. That perhaps
9 needs some elaboration to talk about the fact
10 that this would be a new wrinkle, if you will,
11 for schedule contracts and it would require,
12 I think, some explanation so as not to confuse
13 folks who may not be as steeped in the history
14 of commercial contracting, who may not be as
15 familiar with the language of the statute, but
16 are familiar with the language in FAR Part 12.

17 CHAIRMAN BRANCH: Thank you. Yes,
18 I think it might be helpful to relate that
19 back to the intent of the statute just so we
20 know that we're talking about a very narrow
21 issue with respect to appropriateness.
22 Because I think that to some degree all five

1 of these points talk to the appropriateness of
2 cost-type contracts for very different
3 reasons.

4 MR. DRABKIN: I will draft some
5 additional language for the panel's
6 consideration.

7 CHAIRMAN BRANCH: Okay. Thank
8 you.

9 Okay. Any discussion on nine?
10 Nine is really simply a recitation of the
11 things that we did not approve.

12 MS. NELSON: The first thing is I
13 would like -- My recommendation would be that
14 nine be divided between those motions that
15 were proffered and did not get a second vote
16 and those that were proffered, got a second
17 and were voted on.

18 MR. DRABKIN: I have no objection
19 to adding an indication of which ones weren't
20 seconded and which ones were seconded and were
21 voted no. The only purpose I had for putting
22 in that which didn't pass is I believe the

1 Administrator is entitled to be informed about
2 all the ideas we discussed, whether we thought
3 they were good idea or bad ideas.

4 CHAIRMAN BRANCH: Yes, I think it
5 would be helpful if you classified them only
6 because things that we voted down we at least
7 discussed as motions. Those things that
8 failed for the lack of a second didn't even
9 get discussed. So I think that would be
10 helpful.

11 Any last thoughts on Services?

12 (No verbal response.)

13 Okay. Hearing none, why don't we
14 move onto topic B which is Products.

15 MR. DRABKIN: Any comments on
16 Motion No. 1 which is the same I think
17 language as Motion No. 1 under Services except
18 change to read Products?

19 CHAIRMAN BRANCH: This one is a
20 little bit different. I'm not sure we
21 recommended that we remove the price reduction
22 clause for services in phases. So there is a

1 little bit of a wrinkle in that one I think.

2 MR. DRABKIN: You are correct, Mr.
3 Chairman, as always.

4 I believe our discussion about the
5 phases dealt with the availability of
6 information to assist the ordering contract
7 officer and I believe that was our discussion.

8 CHAIRMAN BRANCH: Yes, I think it
9 was and I think the discussion that's around
10 Services is that we came to a consensus
11 because you do most services against a
12 statement of work that the price reduction
13 clause really had no effect because it was an
14 issue of the skill mix, the labor mix and
15 different by service vendors. But where you
16 had products you really needed to have that
17 data to make sure that the pricing was fair
18 and reasonable. So I would recommend that we
19 leave this one as is.

20 MS. SONDERMAN: So do we need some
21 elaboration about why we recommend phases in
22 the discussion?

1 CHAIRMAN BRANCH: Anybody have any
2 thoughts on that?

3 MR. DRABKIN: Well, I do think
4 that someone who hasn't read the transcripts
5 or have been to all of our meetings might not
6 appreciate why we recommended phasing here and
7 no phasing in service contracts and to that
8 extent if you will allow me I will prepare
9 another subparagraph on the phasing issue. It
10 may only be a few sentences but to try to
11 capture that which our Chairman laid out just
12 a few moments ago.

13 MS. SONDERMAN: I think that's a
14 great idea.

15 CHAIRMAN BRANCH: Are we good with
16 that as a group?

17 (No verbal response.)

18 All right. Okay. So any other
19 comments on the first recommendation?

20 (No verbal response.)

21 Let's move onto Recommendation No.
22 2.

1 MS. THOMPSON: Are you open to any
2 editing recommendations?

3 MR. DRABKIN: Of course. Anything
4 from my counsel I'm open to?

5 (Laughter.)

6 MS. THOMPSON: No comment.

7 MS. NELSON: He says now.

8 (Laughter.)

9 MR. DRABKIN: I'm open to many
10 things. That which I may be open to I may
11 simply ignore otherwise.

12 MS. THOMPSON: Yes. Exactly.

13 MR. DRABKIN: But I'm open to it.

14 MS. THOMPSON: These are my
15 suggestion edits. "Under GSA Schedules for
16 Products, the price objective is to obtain and
17 fair and reasonable prices at the time of the
18 contract formation at the schedule contract
19 level. The price must be reasonable as it
20 relates to the basis of a work customer as
21 well as from a commercial marketplace
22 standpoint."

1 MR. DRABKIN: I'm sorry. I don't
2 recognize where you are.

3 MS. SONDERMAN: She's on the
4 actual motion.

5 MS. THOMPSON: I'm on the Motion
6 No. 2. Do you want me to repeat?

7 CHAIRMAN BRANCH: Well, I guess
8 the question there is do we want to reopen the
9 wording of that motion for discussion?

10 MR. ALLEN: Mr. Chairman, that's
11 kind of my concern as well. We do have a
12 majority here. I don't know that we had
13 contemplated reopening discussion on
14 recommendations. I think that while this
15 particular recommendation is well intended it
16 starts us on a slippery slope of reopening
17 discussions on all recommendations and I'm not
18 sure that this is the place that we want to go
19 and I think that if we were going to do some
20 voting on recommendations that other panel
21 members who are absent might want a chance to
22 be here.

1 MS. THOMPSON: I think your
2 interpretation is incorrect. I'm not
3 intending to change the intent at all.

4 MR. ALLEN: No, I know you're not.

5 MS. THOMPSON: It was editing.

6 MR. ALLEN: I know. It's not an
7 intent to change the -- Your wording is
8 substantively similar to what we have here.

9 MS. THOMPSON: Sure.

10 MR. ALLEN: My concern is the
11 precedent rather that it establishes that we
12 could then reopen discussion on every
13 recommendation in which case we'd never have
14 a report and we would be taking votes when
15 other panel members who aren't here didn't
16 realize we would be taking votes.

17 MS. THOMPSON: But again the
18 intent is not to change the intent of the
19 language. It's strictly to edit to make it a
20 more user-friendly document and to clarify.
21 If you have a concern about that, we can
22 definitely discuss that. But I thought that

1 was the purpose of this which was to ensure
2 that we all agreed on the language.

3 MS. SCOTT: I'm much more in favor
4 of elaborating in the discussion than I am in
5 actually changing the wording of the motion
6 because several of these motions came down to
7 a specific word or words for our voting.

8 MS. SONDERMAN: I agree, Lesa.

9 MS. NELSON: I agree with that.
10 We deliberated long over words and semantics.
11 So I would be very hesitant to change the
12 wording.

13 CHAIRMAN BRANCH: Yes, I think we
14 need to be careful. You know we'll get on the
15 slope of the Executive's use of signing
16 statements here.

17 (Laughter.)

18 And I don't know that we want to
19 go there.

20 MS. THOMPSON: I hear what you're
21 saying. Then I must have misunderstood the
22 intent of providing us with a copy of the

1 motions. I guess I assumed that that was open
2 for review and editing. So my apology.

3 CHAIRMAN BRANCH: Well, but to the
4 extent that you think we're missing a thought,
5 is there language we could put in the
6 accompanying narrative to clarify what you
7 believe perhaps is not clear in the wording of
8 the motion itself? I'm open to that. You
9 know, I think sense of the panel in having
10 worked with you now for almost a year I'm sure
11 you will spit the words out if I don't capture
12 it right is that when we made motions,
13 specific wording, we often literally fledged
14 to that wording through discussion and
15 consideration of alternatives.

16 On the other hand, if the words
17 aren't clear, I think we have an opportunity
18 in the accompanying narrative to clarify what
19 the motion means. So I would certainly be
20 open to that if the rest of the panel is.

21 MS. SONDERMAN: I'm fine with more
22 elaboration in the commentary beneath the

1 motion.

2 CHAIRMAN BRANCH: Do we want to
3 come back to this one as we will in No. 6
4 under Services and give Theddie an opportunity
5 to think about that?

6 MR. DRABKIN: I have no objection
7 to coming back to this.

8 CHAIRMAN BRANCH: Okay. So we
9 will come back to the accompanying narrative
10 to make sure we'll comfortable that it
11 expresses the sense of the motion.

12 So moving onto No. 3.

13 MS. JONES: Oh wait. I have a
14 question --

15 CHAIRMAN BRANCH: Sorry, Jackie.

16 MS. JONES: -- on number two. On
17 page seven, "The panel heard testimony to the
18 effect that MAS contracting officer only
19 considered at time of award the basis of
20 award. Customer price did not evaluate the
21 basis of award price against market prices for
22 the same or similar items." Is that in a

1 transcript? Was that testimony from the COs
2 who were here?

3 MR. DRABKIN: Yes, I believe is
4 you look at the questions we asked the
5 contracting officers their answers to those
6 questions were that they only considered the
7 pricing vertically by the company and not the
8 prices horizontally, i.e., competitive prices
9 for the same item. This was in the Products
10 conversations.

11 MS. SCOTT: I was thinking it
12 would be a case of the contracting officer may
13 only consider. I know that they don't always
14 do it, but it's not that they don't ever do
15 the other. Does that make sense?

16 MR. DRABKIN: I'm more than
17 willing to modify this to reflect what your
18 understanding was, but I thought it was pretty
19 clear and one of the reasons why we have this
20 recommendation is that the price wasn't good,
21 not that the price wasn't good, that it didn't
22 appear that as a regular matter we determined

1 whether the price was competitive marketplace
2 wide. So if you have some ideas about how to
3 fix that language I'm more than willing to
4 amend it, of course.

5 CHAIRMAN BRANCH: Let me offer a
6 suggestion. So after the word "effect" put a
7 comma and add "that typically." So it would
8 read "The panel heard testimony to the effect,
9 that typically the MAS contracting officer
10 only considered a time of contract award, the
11 basis of award. Customer pricing did not
12 evaluate the basis of award customer pricing
13 against market prices for same or similar
14 items." I think that probably reflects what
15 most schedule contracting officers do.

16 Jackie is shaking her head no.

17 MS. JONES: That's what I was
18 asking. Did this come from the transcript?
19 Okay.

20 MR. DRABKIN: Again, Jackie,
21 remember that we hear testimony from three as
22 I recall different mass contracting officers

1 and clearly in the Services arena they weren't
2 as clear on this as they were in the Products
3 arena. When we asked them, "Did you check the
4 price for that copier, for example, against
5 another competitor's price for copier before
6 you determined that that price was fair and
7 reasonable" and the answer was generally no,
8 they didn't do that.

9 CHAIRMAN BRANCH: Yes, and I'll
10 just add an observation that in the Services
11 discussion when we talked about how else they
12 did that it was generally on the basis of a
13 cost breakdown and not on the basis of looking
14 at competitor pricing from other schedule
15 holders and I think really that's the thought
16 that David is trying to capture.

17 MS. JONES: Well, that hasn't been
18 my experience in even working with some of the
19 other SINS on Services. So maybe in the
20 Products arena that may be true. But it's a
21 broad statement and I was just wondering where
22 it came from.

1 MR. DRABKIN: So I'm not clear.
2 Is the Chairman's modification assuage your
3 concerns or is there further modification that
4 would help you be more comfortable with this
5 explanation?

6 MS. JONES: Well, if that's what
7 typically happens on the private side of the
8 house and that's the testimony that we got,
9 that's why I was asking did it come from the
10 transcripts, then I'm okay with it.

11 MR. DRABKIN: Okay.

12 MS. SCOTT: I'd probably offer you
13 up a rewrite suggestion because I feel like
14 the second sentence is the most important
15 thing and I would like to see that brought up
16 higher, that we do have significant price
17 variances for the same and like items and I
18 feel like that's more important than the first
19 sentence is. So I may offer you up a rewrite
20 for it.

21 MR. DRABKIN: Always amenable.

22 MS. JONES: I guess another

1 concern I have with the absolute statement
2 that they did not evaluate or they do not is
3 that that's not consistent with our guidance.

4 MS. NELSON: I would make the
5 statement that there is a substantial
6 difference between guidance and the
7 implementation of that guidance. So while
8 there is guidance at GSA, I think we heard
9 testimony that that guidance is not always
10 followed and that is what the panel found
11 based on the testimony.

12 So while we'll look at P&Ms that
13 show in some cases, there is lack of
14 consistency and it is market research across
15 the horizontal and vertical. Both are in the
16 toolbox. What we found is there is a
17 substantial lack of consistency in what goes
18 into the P&M.

19 MR. DRABKIN: I even think someone
20 mentioned that they looked at the GSA
21 Advantage for a particular product and found
22 a wide price variance in GSA Advantage and the

1 question was how can that be if the price is
2 fair and reasonable and have such a wide price
3 variance in GSA Advantage which as you know is
4 principally for products.

5 MS. NELSON: I believe Mr. Drabkin
6 himself did those.

7 MR. DRABKIN: Yes, I believe it
8 was my television example. Yes. By the way,
9 the picture stinks because the cable is not
10 very good in the building.

11 Any other comments about the
12 discussion in No. 2?

13 (No verbal response.)

14 There being none, Mr. Chairman,
15 may I suggest we move to No. 3?

16 CHAIRMAN BRANCH: Absolutely.
17 Let's move to No. 3.

18 MR. ALLEN: This one looks like it
19 may very well be similar to that that we had
20 for Services and we had a rather substantive
21 discussion on that. So maybe our discussion
22 here or focus here can be on anything that

1 would be different from what we've already
2 gone through in the Services arena.

3 MR. DRABKIN: I would only like to
4 point out, Larry, that in the Services arena
5 we did not have the last sentence in the
6 motion here I don't believe. And I believe
7 that covers a lot of the discussion that we
8 had previously. This sentence makes it clear
9 that proprietary pricing information doesn't
10 get released.

11 MS. NELSON: So again just to
12 amend it to say that as we talked about in
13 three that it be not specific to the company
14 but more to the nature.

15 MR. DRABKIN: I'll add that
16 additional language. Absolutely.

17 CHAIRMAN BRANCH: Okay. Any other
18 comments on Recommendation No. 3?

19 (No verbal response.)

20 Okay. Hearing none, let's move
21 onto Recommendation No. 4.

22 MR. ALLEN: Is that also not the

1 case for four?

2 MR. DRABKIN: Right. The
3 discussion should be very similar to the
4 discussion under Services.

5 CHAIRMAN BRANCH: Right, and I
6 guess a reference to the footnote that talks
7 of subsequent legislative events.

8 MR. DRABKIN: Right.

9 CHAIRMAN BRANCH: Okay. Any other
10 comments on Recommendation No. 4?

11 (No verbal response.)

12 All right. Why don't we move to
13 No. 5.

14 MR. DRABKIN: I believe, Judith,
15 this goes to the discussion we had about
16 implementation and although we've added a
17 general statement at the beginning I believe
18 here we were giving -- As I mentioned earlier
19 that we were just giving general guidance to
20 develop it not telling them how to develop it.

21 CHAIRMAN BRANCH: Any further
22 comments on Recommendation No. 5?

1 MR. DRABKIN: Mr. Chairman, I
2 would ask the panel members to look at this
3 again either today or when they leave here.
4 One of the things I thought was important that
5 I added and I may not have done as good a job
6 as I would have liked was making sure that
7 while we were emphasizing price here that we
8 didn't lose sight of the fact that our goal is
9 best value which may or may not be the lowest
10 price in a particular buy and I want to make
11 sure -- I think it represents the panel's view
12 that pricing is important, but best value is
13 more important and we don't want to be trapped
14 or taken back to the days of low price is the
15 only way we decide what we buy.

16 So if you would look at this and
17 make sure that I've captured it. If you have
18 any other ideas about how to make sure we
19 communicate not only to the Administrator but
20 to any who might read this report and want to
21 give us help that while getting the pricing
22 information right is important for the

1 competition the lowest price may not be the
2 right answer.

3 CHAIRMAN BRANCH: Dave, I'm going
4 to suggest that this may be one of those terms
5 we want to define separately and I make that
6 suggestion because I guess philosophically I
7 believe that low price is subsumed by best
8 value. Best value is highly contextual.
9 Sometimes when I'm dealing with a commodity,
10 low price is sufficient if a commodity is
11 technically acceptable and that could be in
12 goods or services. Whereas, other times best
13 value extends to factors other than price.

14 MR. DRABKIN: In that respect
15 then, perhaps we should simply refer to the
16 definition of best value in FAR Part 15 which
17 captures I believe begins with a description
18 of best value being a spectrum from lowest
19 price to technically acceptable and then goes
20 on to a discussion and we should probably use
21 the meaning it has under FAR Part 15 here
22 unless someone intends a different meaning.

1 CHAIRMAN BRANCH: I would agree
2 with that. You know I think generally the
3 less you write and the more you refer to other
4 things the less trouble you tend to get into.
5 So that's acceptable to me that we say that.
6 As a matter of fact instead of defining it
7 separately you could just add the phrase
8 "within the meaning of the FAR."

9 MR. DRABKIN: If the Chairman
10 doesn't object what I think I would do is I
11 will footnote the term "best value" and
12 depending on the length of the definition from
13 the FAR either cite the FAR or put the
14 definition in the footnote.

15 CHAIRMAN BRANCH: It's acceptable
16 to me. Is that acceptable to the remainder of
17 the panel? Okay. I see heads nodding up and
18 down and so we're going to take that as a
19 consensus.

20 Other comments on the accompanying
21 narrative for Recommendation No. 5?

22 (No verbal response.)

1 Okay. Hearing none, let's move
2 onto No. 6.

3 MR. DRABKIN: Mr. Chairman,
4 recalling an earlier discussion about
5 refreshing the schedule prices I think,
6 Jackie, you had these. Someone had this
7 question about what we meant or how frequently
8 we would refresh those prices in the schedule
9 contracts in our Services discussion and
10 here's where that recommendation is in the
11 Product section. And I think as you read the
12 recommendation, it's clear that we anticipate
13 that being driven by the market as opposed to
14 a standard period of time and in some markets
15 prices may stay fairly stale and others they
16 may fluctuate greatly and that it would be the
17 Administrator's goal to try to make sure that
18 the schedule pricing is changed to reflect the
19 realities of the marketplace.

20 CHAIRMAN BRANCH: Just so the
21 record -- I'm assuming when you said prices
22 may remain fairly stale you meant fairly

1 stable in some markets.

2 MR. DRABKIN: Yes, I used the
3 wrong word and I'm not terribly embarrassed.

4 (Laughter.)

5 MS. NELSON: As we all are for
6 you.

7 (Laughter.)

8 MR. DRABKIN: Well, thank you,
9 Judith.

10 CHAIRMAN BRANCH: Well, we just
11 want the record to reflect our intent since
12 this report is likely to get GSA and many of
13 others of us a certain amount of help and we
14 want to just make it clear that there are some
15 markets in which pricing is fairly stable and
16 there are others where it's more dynamic and
17 we don't need nearly as much help where the
18 pricing is fairly stable.

19 MR. DRABKIN: Or stale, sir.
20 That's a term perhaps more aptly used with
21 regard to bread.

22 Are there any serious comments

1 with regard to --

2 MS. JONES: I have a comment
3 concerning the definition of "market prices."
4 Typically, the way the MAS program is set up
5 now when we say "market prices" we're
6 referring the commercial marketplace and in
7 here since we're going to also be looking at
8 pricing based on sales to government agency
9 customers that we'd better define what we mean
10 by "market" in here.

11 MR. DRABKIN: I think that's an
12 excellent point, although I'm not sure I would
13 -- I think that's an excellent point and I
14 will add some language about what I think we
15 mean by "market prices" for you to review.

16 CHAIRMAN BRANCH: Well, let me
17 push back on that a little bit. I guess I'm
18 comfortable with the language "relevant market
19 prices" because I think it does two things.
20 One, it would allow a GSA schedule contracting
21 officer to look at the commercial activity
22 against the tracking customer and say, "Have

1 you something in the commercial marketplace
2 that is significant enough to reflect my
3 pricing?" On the other hand, I also believe
4 it would allow a schedule contracting officer
5 to look horizontally and say, "Your market
6 prices are not in movement with your fellow
7 competitors" and it would also allow a GSA
8 contracting officer to say, "The schedule
9 price is here, but you clearly undersell that
10 by say" and I'll pick a number "an average of
11 24 percent to other government agencies." So
12 I think the word "relevant market" perhaps
13 clarifies that.

14 MR. DRABKIN: Mr. Chairman, I
15 think you're right by what was meant. I would
16 add that what we lack in the discussion of
17 horizontal market is good data about what the
18 commercial marketplace, not the vendor, but
19 the commercial marketplace itself is setting
20 the price for a particular item or similar
21 item. But I do think that defining what we
22 mean by "relevant markets" to include both the

1 vertical and the horizontal and where it's
2 available to us the private commercial, well
3 without the qualification private, but the
4 commercial non-government pricing where that's
5 available for us to consider.

6 CHAIRMAN BRANCH: I don't have any
7 strongly held theological beliefs around this.
8 So I would certainly entertain a modification
9 to those words.

10 Other comments on the accompanying
11 narrative to Recommendation No. 6?

12 (No verbal response.)

13 Okay. Hearing none, why don't we
14 move onto Recommendation No. 7.

15 The only comment that I have if
16 you look five lines down, I'm not sure I
17 understand what you mean by the phrase
18 "pricing hinges."

19 MR. DRABKIN: I have no idea how I
20 wrote that word there. I clearly wasn't
21 having a glass of wine at the time. So I
22 can't blame it on alcohol. I don't know. I

1 think it has to --

2 MS. SONDERMAN: I think your
3 sentence is clear without the word "hinges."
4 "Pricing and terms and conditions change
5 frequently."

6 MR. DRABKIN: I delete the word
7 "hinges" willingly.

8 MS. NELSON: The only comment that
9 I have and while I do agree that it is
10 inconceivable I might soften it somewhat to
11 say "In today's marketplace it is unlikely
12 that a contract..."

13 MR. DRABKIN: I was expressing my
14 own personal feelings. I will remove the word
15 "inconceivable."

16 CHAIRMAN BRANCH: Well, I kind of
17 like "inconceivable" myself.

18 MS. NELSON: I don't disagree with
19 the word. But if the panel wants to go with
20 "inconceivable" that's fine. I just think it
21 is extraordinary strong language.

22 CHAIRMAN BRANCH: I cannot imagine

1 an economic situation in which anybody could
2 be good enough to predict pricing over a 20
3 year period and if they are, they should be
4 working for Secretary Geithner.

5 MS. SCOTT: They're in the
6 insurance business and they're not doing MAS.

7 MR. DRABKIN: Actually, they
8 should be Secretary Geithner. It's not only
9 the pricing though. The terms and conditions
10 themselves in the market have changed
11 substantially. Earlier we talked about the
12 limitation of liability. Well, limitation of
13 liability wasn't a reality of the marketplace
14 until IT became a huge issue and thus we had
15 a Safety Act.

16 But the word "inconceivable" could
17 be offensive to some of my colleagues and I
18 should have thought of that and used a less
19 offensive term.

20 CHAIRMAN BRANCH: Well, while the
21 word --

22 MR. DRABKIN: Like unimaginable.

1 CHAIRMAN BRANCH: The word might
2 be strong. I think it's important to send a
3 clear message that we believe the probability
4 that pricing could be stable over 20 years is
5 very close to zero.

6 MS. SCOTT: "Improbable" is
7 probably the better choice. It's somewhere
8 between unlikely and inconceivable.

9 CHAIRMAN BRANCH: Right, and I
10 would say so. I'm just not sure "unlikely" is
11 strong enough. So if we could find some
12 middle ground between "unlikely" and
13 "inconceivable" I'd certainly --

14 MS. NELSON: I suggested to Mr.
15 Drabkin "ridiculous" but --

16 (Laughter.)

17 MS. SONDERMAN: Well, I like
18 Thedlus' suggestion of "improbable."

19 MR. DRABKIN: And I typed in the
20 word and deleted "inconceivable." You won't
21 see my typing on the screen though.

22 CHAIRMAN BRANCH: I think

1 "improbable" is probably a good choice of
2 words, but I think it's very important to send
3 a strong message that 20 years might be a
4 little long to go with pricing terms and
5 conditions and if you just look back 20 years
6 at cell phones and cell phone pricing today or
7 that marketplace.

8 MR. DRABKIN: Twenty years ago
9 cell phones were bricks.

10 CHAIRMAN BRANCH: Well, that's
11 true.

12 MS. NELSON: And it even goes
13 beyond that. I mean you're looking at
14 ownership of companies and size standards of
15 companies. The companies, we now have
16 companies on schedule that are in fiscal year
17 '09 entering their 19th year and I'm sure that
18 I looked at those how many of those are still
19 owned or in the same size standards by the
20 same company. There are so many issues.

21 MS. SONDERMAN: And some of us who
22 are on the panel spend a lot of time looking

1 at the Federal Procurement Data System and
2 concerns about accuracy of that data and some
3 of the underlying issues related to that and
4 for agencies like mine that awards 40 percent
5 of its contract dollars through the schedules
6 the business size status of a schedule vendor
7 becomes material to the accuracy or the
8 perceived accuracy of our reporting.

9 So I think that's really, really
10 important thought and I guess, David, I would
11 suggest that some further elaboration not just
12 about price and terms and conditions, but that
13 the marketplace itself changes so much in that
14 period of time and, you know, if you ask
15 someone from the Small Business Administration
16 they will tell that the average small business
17 doesn't last five years. So the business
18 turnover cycle is significant and since we are
19 trying to make sure that schedules are
20 available to small businesses, it becomes
21 relevant.

22 MR. DRABKIN: And we appreciate

1 your agency's 40 percent share of schedule
2 contracts. We would like to know why it's not
3 50 percent and I have gathered your thoughts.

4 MS. JONES: I just have a comment
5 concerning that whole sentence. It's my
6 opinion that it is an opinion and it could be
7 taken out because these contracts don't stay
8 in place as current for over a 20 year period.
9 They're constantly modified. We're constantly
10 re-negotiating pricing as a result of economic
11 price adjustments. The price doesn't stay the
12 same for a 20 year period.

13 That's why our contract
14 administration workload is so heavy because we
15 are administering these contracts to keep them
16 current and we have a process in place now
17 called MAS Mods and we have the Solicitation
18 Writing System where now a lot of the updates
19 to the clauses and changes are done through
20 automation. So they're not in place for 20
21 years without maintenance.

22 MR. ALLEN: Well, that was kind of

1 my thought and I'm glad that you brought it
2 up. I think the inference here is that you
3 have a static contract. Jackie, your
4 experience is going to be much more
5 operational than is mine. But it's been my
6 distinct impression that many, if not most, of
7 these contracts are fundamentally redone every
8 five years so that you take -- You know, it's
9 almost like except for the contract number
10 just about everything else has gone through at
11 the five year mark.

12 MS. JONES: Well, even before then
13 as changes come about, as FAR clauses change,
14 DSIM clauses change, the contractor's pricing
15 changes. Yes, every five years we look at
16 whether or not it's in the Government's best
17 interest to exercise an option, but even
18 within that five year period or each five year
19 increment we're constantly maintaining these
20 contracts.

21 MR. DRABKIN: Yes, but I think
22 that that actually points out part of our

1 initial discussion. I mean going back to
2 basic government contracting without regard to
3 even the common law contracting. You know, a
4 contract is a document that's an agreement
5 between two parties. It's the meeting of the
6 minds and it's negotiated based upon some
7 objective initially.

8 When the contract changes so
9 dramatically, I believe our colleague talked
10 about scope earlier. I mean, the product
11 lines change in some of our IT contracts two
12 or three times during the five year base
13 period and the resulting option contract which
14 extends the contract for five more years but
15 really doesn't give us the opportunity to have
16 a --

17 We do have a vigorous negotiation.
18 I know I've witnessed some when I was
19 temporarily over at the IT Center, but it's
20 the same kind of competitive pressures as when
21 they have to apply for a new contract and, in
22 fact, there's pressure on us, GSA, to -- When

1 I say "pressure," I don't mean pressure from
2 somebody upstairs telling us to do something.
3 I mean there's a pressure on us. It's easier
4 for us to do an option than it is to do a --
5 Lesa is shaking her head no, but for some
6 reason people must think it's easier.
7 Otherwise we go out and re-negotiate a whole
8 new contract instead of trying to put enough
9 bandaids on the base period so we can exercise
10 an option and I think that's the point.

11 Now there may be some of our
12 markets where the market is stable enough, the
13 offerings are stable enough, that a five year
14 base contract and you renew an option and
15 there's not any dramatic changes, terms and
16 conditions don't change significantly and it
17 may make sense to exercise an option.

18 Although I can conceive of any market where 20
19 years, why I used the word "inconceivable" I
20 can't conceive where that continues to be the
21 case.

22 So I think what we're recommending

1 here to the Administrator is that he review
2 this process to make sure that it makes sense.
3 I know why Bill Gormley pushed Evergreen
4 Contracting and in the 1990s it made a lot of
5 sense to do that. But there are all kinds of
6 issues we're facing, the contract file and
7 it's validity, the availability of contracting
8 officers 20 years from now to talk about the
9 contract that they awarded and why they did
10 this or that or the other.

11 So I think all and all even though
12 this wasn't my recommendation this is an
13 important recommendation towards the
14 maintenance of the whole program.

15 MS. JONES: All I'm saying is that
16 -- I'm not disputing the recommendation, but
17 the way the sentence is structure to say that
18 it's inconceivable that a contract can remain
19 current and viable for a total of 20 years
20 implies that we're leaving contracts in place
21 unkept for a 20 year period. That's the
22 implication and what I'm saying is when we

1 imply that it conveys a certain amount of
2 ignorance in terms of us not being aware that
3 our contracts are not in place for a 20 year
4 period and that we have systems in place now
5 that expedites that or that is automated that
6 expedites that process to maintain them and
7 keep them current through e-mods. So I'm just
8 saying that it implies that we don't know
9 what's really going on.

10 CHAIRMAN BRANCH: Well, let me
11 talk. I'm going to insert myself into this
12 discussion. Yes, and I think back to my roots
13 in ship-building and for those of you who are
14 interested in naval history we used to have a
15 fossil fuel carrier, the Midway. And we built
16 the Midway in the World War II time frame and
17 through the genius of naval architecture we
18 kept that ship viable for 40 years.

19 The thing that finally got it
20 decommissioned was they figured if they made
21 one more modification to it it would sink and
22 I think we're really talking philosophically

1 about the same issue. Yes, you can keep a
2 contract alive for 20 years. Yes, you can
3 modify it. Yes, you can refresh it. But at
4 some point it becomes so administratively
5 cumbersome that you are better off going out
6 and issuing a new solicitation and putting a
7 contract in place that reflects not only the
8 terms and conditions under which the
9 Government will do business but also the
10 realities of the marketplace as they are today
11 and I really think that was the basis of the
12 recommendation.

13 No one is impugning GSA's ability
14 to keep the contract alive. But what I think
15 the sense of the panel was that perhaps 20
16 year contracts that we depend on the
17 modification process to keep alive and viable
18 is not particularly efficient nor is it
19 particularly effective. So if we want to
20 reshape the thought in the accompanying
21 narrative, but I fully believe that the idea
22 was at some point you're just better off

1 starting over.

2 MR. DRABKIN: And perhaps it would
3 help -- I think I understand now your point,
4 Jackie, and I wasn't listening and I
5 apologize. But perhaps if we add the sentence
6 preceding "in today's marketplace" something
7 like "We are aware that GSA regularly updates
8 the MAS program. However, in today's
9 marketplace..." and then go on.

10 MS. SCOTT: I was going to just
11 suggest we'll just turn the sentence around.
12 As it stands now conceivably we could have a
13 contract that is unchanged for 20 years and
14 that's unrealistic theoretically.

15 MR. DRABKIN: Something like that
16 then.

17 MS. SCOTT: Yes, we'll just
18 rearrange the sentence.

19 MR. DRABKIN: "Recognizing that
20 GSA does maintain the contracts..." but also
21 recognizing the point that Elliott makes is
22 that sometimes you modify a contract to the

1 point where it bears no resemblance to the
2 initial meeting of the minds that we had with
3 the contractor and that's not what we teach
4 government contracting people to do.

5 MS. JONES: But typically you
6 don't leave a solicitation open indefinitely
7 either. So we could do away with Evergreen
8 and like you said, Elliott, modify them to the
9 point where you have a new contract. But
10 they're just going to come back in because --

11 MR. DRABKIN: But we're not saying
12 doing away with it. We're saying look at it
13 and see where it makes sense. Even Larry in
14 his discussion just a few moments ago said,
15 "The contract in some cases bears no
16 resemblance by the end of some relatively
17 short period of time," short by virtue of
18 measuring it by 20 years bears no resemblance
19 to the initial deal. It may not have the same
20 products on it anymore if it's a products
21 contract because the product lines have all
22 changed and they've gone or become obsolete or

1 out. So all we're saying to the Administrator
2 in this recommendation is look at it and
3 figure out what makes sense, but one-size-
4 fits-all doesn't make sense and 20 years
5 doesn't seem to make sense and besides that
6 even though we didn't say it in here it's just
7 not good contracting. It's not what we teach
8 you in Con 101.

9 MS. SONDERMAN: And I guess my
10 observation again following up on Larry's
11 comment is that if the contract is essentially
12 being rewritten every five years through
13 modification, then rewrite the contract and
14 let's have a current and up-to-date contract
15 on a five year basis instead of a longer
16 period.

17 CHAIRMAN BRANCH: Yes, and I think
18 this is important essentially in the context
19 of recommendations we made about disclosure to
20 ordering activities. Because if you continue
21 to send the average ordering activity and
22 modification to the contract and our contract

1 file starts to the parallel the size of your
2 contract file, we're going to encourage
3 ordering activities not to use the data we're
4 asking GSA to give them to strike better
5 deals. So I think it's important in some
6 marketplaces.

7 And I think one of the most stable
8 ones, for example, would be office furniture.
9 I mean that's a fairly -- You know, desks are
10 desks. Chairs are chairs. The terms and
11 conditions probably aren't going to change a
12 great deal. The product offerings are going
13 to change a fair amount.

14 But on the IT side of the house
15 the entire set of terms of references changes
16 as people develop new business models. So I
17 think you have to look at groups of products
18 or services and periodically decide is this
19 one I can keep alive for 20 years because I
20 have a fairly stable and mature market and the
21 dissemination of that information to my
22 ordering agencies is not overly burdensome

1 because I'm simply refreshing product
2 offerings as opposed to contracts where
3 markets change.

4 And I think telecommunications
5 although not necessarily the major focus of
6 schedules contracting is a really good
7 example. You know if you think back 20 years
8 ago we were still paying for long distance by
9 the mile because the infrastructure was highly
10 variable. It was copper. Once we started to
11 make significant infrastructure developments
12 in fiber optics companies said, "It doesn't
13 really matter how long the call is. I need
14 the stuff up and going and utilized all the
15 time." So now you start to pay by minutes as
16 opposed to by the mile.

17 And that's a great example where
18 once you start to modify that contract to
19 reflect different business models you have in
20 some sense moved away from the original intent
21 of the parties when they formed the contract.

22 MS. JONES: And I totally agree

1 with you. I was only talking about the
2 implications of the way this sentence was
3 worded. That's all.

4 MR. DRABKIN: And I'm going to try
5 to reword it to give credit to the current
6 maintenance problems and recognition to the
7 panel's concern that maintenance
8 notwithstanding at some point a contract needs
9 to be terminated and a new contract needs to
10 be begun and I'll try to add more words to
11 address both concerns, neither of which would
12 change the recommendation.

13 MR. ALLEN: Right.

14 MS. SCOTT: Just like you get
15 creep, you get T & C creep. Twenty years is
16 a long period of time because we're facing
17 that now upstairs.

18 CHAIRMAN BRANCH: Okay. Any
19 issues with eight? Eight simply is a
20 statement of those motions.

21 MR. DRABKIN: And I will take note
22 of Judith's request in the previous last in

1 the Services section to distinguish between
2 those which failed for lack of a second and
3 those which failed because the majority of the
4 panel did not approve the recommendation.

5 MR. ALLEN: I think we just need
6 to strike the last s.

7 MR. DRABKIN: Thank you.

8 MR. ALLEN: Any time.

9 CHAIRMAN BRANCH: All right.

10 MS. NELSON: Elliott.

11 CHAIRMAN BRANCH: We've finished
12 Products and Services. It's now 11:45 a.m.
13 I would suggest this is probably a good time
14 to break.

15 MR. DRABKIN: Mr. Chairman, if I
16 may. Solutions is relatively short. The
17 issues I think are pretty much the same. We
18 might be able to knock this out if we could go
19 another half hour.

20 CHAIRMAN BRANCH: Okay. Is the
21 panel okay with that? Just work right through
22 Solutions?

1 (No verbal response.)

2 Okay. Then let's continue.

3 MS. NELSON: Can I just ask one
4 thing? As we're bucketing the -- I think we
5 had a decision on Friday that we bucket
6 things. As we got through the Products, it
7 occurred to me that the recommendations under
8 Services there were two of them. One was No.
9 4 which talked about a review of the SINS and
10 even though it makes mention of labor
11 categories and then No. 5 had evaluate the
12 schedules essentially vis ... vis the
13 marketplace and agency requirements that in
14 some way those were not specific to Services
15 but overall recommendations for the program
16 and I don't know that they should fall
17 specifically under Services but maybe overall
18 Recommendations just as the Options one
19 wouldn't be specific to Products but overall
20 because Options don't have to do with just a
21 product or a service. But they have to do
22 with the very underpinning of the Schedules

1 program, the Evergreen clause, which is not
2 specific service contracts or product
3 contracts.

4 CHAIRMAN BRANCH: Yes. I guess my
5 only concern is that concern I expressed
6 earlier today that we stay faithful to the
7 recommendations. But I guess we will probably
8 need to review the transcripts.

9 MS. NELSON: I'm not asking to
10 change the language of the recommendation, but
11 we did talk on Friday about bucketing them.

12 CHAIRMAN BRANCH: Right. But I
13 guess my concern is that we make sure against
14 the transcript that the recommendation really
15 reflects the scope. So, for example, I know
16 we talked generally about reviewing the length
17 of MAS schedule contracts and one could infer
18 from that that we're talking about schedules
19 that dealt with supplies as well as services.
20 I guess the question I'm raising --

21 By the way, I agree with you. If
22 we're going to look at them for one group, we

1 probably ought to look at them for all groups.
2 But in order to ensure, if you will, the
3 integrity of what we've done, I think we need
4 to check against the transcripts to make sure
5 that that motion was offered in a more general
6 way as opposed to limited to the scope of
7 supplies here.

8 MS. NELSON: So I'd like to take a
9 look at the discussion around actually all
10 three of those, the review of the SINS, the
11 review of schedules in general so what comes
12 down to essentially Recommendations Nos. 4 and
13 5 under Services and Recommendation No. 7
14 under Products and just see whether or not
15 those were specific to services or products or
16 whether or not in general to the Schedules
17 program so that we're clear what we're
18 recommending.

19 CHAIRMAN BRANCH: I'm comfortable
20 with that and I think that's important from a
21 clarity standpoint and to the extent that we
22 weren't perhaps clear, you know, we didn't

1 make it explicit, I think it might be useful
2 for us to have a discussion as we wrap this up
3 on whether and how we want to expand the scope
4 of these more generic recommendations. So am
5 I hearing a volunteer? Are you going to look
6 at the transcripts?

7 MS. NELSON: I'm happy to look at
8 them. I'm just -- Because we're talking about
9 services here and all of the examples or a
10 large portion of the examples that we're
11 giving here are changes in the commercial
12 market largely vis ... vis products.

13 CHAIRMAN BRANCH: Products. Okay.
14 I think that's fair.

15 MS. SONDERMAN: Mr. Chairman, I
16 would suggest that perhaps after we come back
17 from lunch that we look at how you
18 recommended, the outline that you recommended,
19 and go through these in that context having
20 had this review of all the recommendations
21 fresh in our mind.

22 CHAIRMAN BRANCH: Okay.

1 MS. SONDERMAN: And that might
2 help us.

3 CHAIRMAN BRANCH: All right. Why
4 don't we do that? So we'll finish up
5 Solutions and then after lunch we'll take a
6 look at my buckets. I just want to again
7 reiterate my comment when I first put that on
8 the table. That was just a different
9 conceptual way of looking at our
10 recommendations and, if the panel is not
11 comfortable with that or would prefer to put
12 it in slightly different buckets, I'm okay
13 with that. It was merely an attempt on my
14 part to give a different kind of clarity to
15 things.

16 So let's look at that after lunch.
17 But for now why don't we go onto Solutions and
18 try to finish that up.

19 MR. DRABKIN: Okay. Moving onto
20 Solutions then, Recommendation No. 1. I'm
21 sorry that -- I mean, Judith left because she
22 needed to go and be back shortly. But in my

1 discussion, I just want to make sure that I'm
2 not being insensitive to my colleagues in the
3 various programs. So take a look at these.
4 I believe this is what we said in our
5 discussions in the transcripts, but I want to
6 be sensitive. I want to be in touch with my
7 other side whatever that is.

8 (Laughter.)

9 Are there any suggestions or
10 language changes that anyone sees in
11 Recommendation No. 1 and its explanation?

12 (No verbal response.)

13 CHAIRMAN BRANCH: I guess hearing
14 none why don't we move on with the
15 understanding that we'll give Judith an
16 opportunity to take a quick look at that and
17 revisit it if necessary.

18 MR. DRABKIN: Certainly.

19 MS. SONDERMAN: There is one term
20 that I am not exactly sure what you mean. The
21 second sentence of the explanation starts with
22 "Work-arounds." Can you describe what was in

1 your head when you came up with those words?

2 (Laughter.)

3 MR. DRABKIN: This is a public
4 record, right?

5 MS. SONDERMAN: Yes sir. I
6 understand.

7 MR. DRABKIN: Okay. Well, first
8 of all, I'm sure that the Chairman will help
9 me find the right word. But what I meant here
10 was people figured out how to glom together a
11 solution using either a single schedule or
12 teaming arrangements under a schedule or
13 multiple schedule vendors who came together to
14 form teams of their own to buy Solutions
15 because it would not be a true statement that
16 there aren't ordering officers today who are
17 buying Solutions using the Schedules. It's
18 just that to do that they have to jerry-rig
19 it. They have to put it together with baling
20 wire. I don't know what the colloquial
21 expression is, but "work-arounds" was to
22 define that colloquial expression I thought to

1 define the fact that they kind of force things
2 together.

3 In some cases, they may be
4 violating the rules of the Schedules program
5 in terms of the letter of the rule but are
6 achieving an acquisition outcome which they
7 need. That's what I was thinking about work-
8 arounds are used. If that's -- I'm open to
9 any other terminology or way to describe it.

10 CHAIRMAN BRANCH: I think work-
11 arounds is fine. But what you might want to
12 do before that sentence is set up a context
13 and say that the Schedules program is
14 primarily focused on the purchase of either
15 goods or services and then to go on to say "In
16 order to." I'd modify that sentence.

17 MS. SCOTT: Make it active voice
18 first and just say, "Ordering officers can try
19 to achieve Solutions by working around."

20 MS. SONDERMAN: I don't know that
21 it's necessarily ordering officers. Ordering
22 officers may put out a performance-based

1 statement of work and say, "Industry, you tell
2 us how to do this. You will have willing
3 partners." It's not just that --

4 MR. DRABKIN: Yes.

5 MS. SONDERMAN: -- we're coming up
6 with creative or skating on the edge or
7 whatever.

8 MR. DRABKIN: But you may have
9 noticed in all of my discussions I took care
10 not to take shots at industry.

11 MS. SONDERMAN: I'm not --

12 MR. DRABKIN: Top that one.

13 MS. SONDERMAN: Say no --

14 MR. DRABKIN: Seriously, I mean
15 industry responds in many cases to what we ask
16 for and there's no question that they bring us
17 solutions which work but may not conform to
18 the letter of the various rules, but it solves
19 an acquisition requirement and they find ways
20 to make it work.

21 MS. SONDERMAN: Right, and my goal
22 isn't to throw anybody under the bus. I don't

1 think this is intentional solicitation to do
2 bad things or an intentional response to do
3 bad things. It's we're trying to solve a
4 problem and industry comes forward with a
5 solution and they tell us use this piece from
6 this schedule and use this other piece from
7 this other schedule and we have this
8 contractor teaming away with this other
9 company who has their own schedule and put
10 that altogether and you know.

11 MR. DRABKIN: I think that thought
12 does need to be captured and I'll try to
13 capture that thought as well as the one that
14 the Chairman suggested.

15 MS. SONDERMAN: Without throwing
16 industry under the bus.

17 MR. DRABKIN: Well, I don't have
18 any problems throwing industry under the bus
19 when they deserve to be thrown under the bus.
20 But I generally blame, blame that's a hard
21 word, but if the rules aren't followed, I
22 think the first instance or responsibility as

1 the contracting officer that issues the order.

2 MS. SONDERMAN: Right.

3 MR. DRABKIN: Not the vendor who
4 brings me a solution. I don't have to accept
5 that solution.

6 MS. SCOTT: I have a rewrite for
7 you.

8 MR. DRABKIN: Okay.

9 CHAIRMAN BRANCH: But I want to
10 get this thought out here. I don't believe
11 the discussion was really around any of the
12 stakeholders from not complying the rules of
13 the schedule. I mean there are certain things
14 that are fairly clear and well settled. We
15 don't buy things that aren't on schedule, for
16 example, above the micro-purchase threshold.
17 GAO has told us that. I believe most
18 contracting officers are not doing that. I
19 believe most ordering officers are probably
20 not letting people have subcontractors who
21 don't have a schedule contract.

22 But I think what's important here,

1 I think the important thought to capture, is
2 however industry and ordering activities are
3 using various devices, you know, teaming
4 arrangements, ODCs and so forth, it creates an
5 extremely complex solution to what should be
6 a fairly straightforward problem that under a
7 performance-based statement of work I want to
8 buy a turnkey solution and I want to do that
9 on the schedule and then it really need not be
10 as complex as the current rules make it. I
11 think that was more the spirit of our
12 discussion.

13 MR. DRABKIN: I think you're
14 right, Mr. Chairman. I think the point was is
15 that the current Schedules program doesn't
16 facilitate and forces people to do lots of
17 other things to get to the same goal as
18 opposed to facilitating the purchase of
19 solution.

20 I think even in our discussions we
21 pointed out that that's why GSA has some GWACs
22 whose title is to buy Solutions as opposed to

1 things and services and integration of those
2 things. So let me work on rewording this and
3 I'll take Lesa's words and we'll get another
4 version to you shortly, not today.

5 CHAIRMAN BRANCH: Thank you. Then
6 moving onto No. 2 if we can.

7 Any comments on the accompanying
8 narrative to Recommendation No. 2? I guess
9 the only thing that I would offer up here is
10 I think it may be helpful to put a little more
11 context around this and the context addresses
12 given our contract type structures under
13 today's schedule.

14 And I think the discussion went
15 something like this. Given that we can only
16 write either time and material or fixed price
17 contracts under the Schedules for Solutions,
18 we think the only responsible way to do that
19 is to put it in a fixed price type contract
20 and I think this relates back to our earlier
21 recommendations in Services that the
22 Administrator consider cost reimbursement

1 contracts. So I think it's really important
2 to say we're driving in that direction because
3 we don't think T&M is the appropriate way to
4 buy Solutions. So I just offer that up as a
5 thought.

6 MR. DRABKIN: Yes. I went back
7 and reread our transcript about this because
8 this recommendation concerned me, although
9 even though I know I voted for it. And the
10 reason it concerned me is that outside of the
11 Schedules program you might buy Solutions it
12 might be the wisest thing for you to buy
13 Solutions on a cost-type basis. Cost plus
14 award fee managed properly would get you an
15 even better result in many cases than fixed
16 price.

17 But the panel was pretty clear on
18 this vote and I'm not suggesting we revisit
19 it. But I would suggest that someone reading
20 this might ask why we limited our
21 recommendation for cost-type contracts to
22 Services and did not offer up as a possibility

1 a cost-type contract for Solutions.

2 Having said that, I'm content
3 personally with what you've recommended. It
4 means that the Schedules won't be quite as
5 versatile as they could be and, by the way,
6 the fact that we haven't recommended it
7 doesn't mean that the Administrator can't
8 consider in reviewing this recommendation not
9 only to accept this recommendation but to also
10 add cost-type contracts.

11 But I think the point you just
12 made that no matter what the Administrator
13 does vis ... vis this recommendation we think
14 the use of time and material contract to buy
15 Solutions is not the right answer and that I
16 think I had that discussion because I agree
17 with that 100 percent. Time and materials
18 gets you no solution. It gets you time and
19 materials.

20 MS. SCOTT: I was thinking back
21 myself and my recollection when I read this
22 was that we did not link the cost

1 reimbursement with this and I was thinking
2 that it was because there are things out there
3 where it is probably more appropriate for
4 certain solutions to be acquired and that we
5 were saying if you're going to do it and
6 you're going to use Schedules then it should
7 be fixed price and it should be performance-
8 based and not necessarily sitting there trying
9 to make the Schedules everything to everybody.

10 MS. SONDERMAN: Right, and that's
11 my recollection as well, Lesa, that you can
12 use Part 15 to purchase Solutions and if you
13 need to do that on a cost reimbursement basis
14 that's perfectly acceptable under the Part 15.
15 And so go do that there. I agree don't try to
16 make the Schedules -- Make them as good as
17 they can be. Don't try to make them
18 everything for everyone.

19 CHAIRMAN BRANCH: I think it's so
20 important and I'm not sure we had this
21 discussion. Maybe some of the stuff was
22 explicit or implicit at the time we had it,

1 but my thinking was always that if the
2 Administrator accepted our recommendations to
3 add cost-type SINS that you could then buy a
4 solution using a combination of the fixed
5 price SINS for hardware components, if you
6 will, to a solution and the cost reimbursement
7 SINS for the integration piece of that which
8 is why I made my earlier comment.

9 I think our real thrust around
10 here around this particular recommendation was
11 that T&M just wasn't the way to go and given
12 the current state of play where the only
13 choice was T&M or firm, fixed price, then it
14 had to be T&M or rather it had to be firm,
15 fixed price. I'm sorry.

16 And it was for that reason that I
17 didn't raise under Solutions the idea that we
18 ask the Administrator to consider adding cost-
19 type SINS because we had already previously
20 done that. So in my head anyway there was an
21 implication that if the Administrator
22 proceeded down that road that you could mix

1 the cost and fixed price type SINS to get to
2 a solution. But that what we're really saying
3 is time and material is a bad way to go.

4 MR. DRABKIN: I've just capture
5 that thought in a note so that I will rewrite
6 our discussion to make it clear that what we
7 are saying here is don't use T&M to buy
8 Solutions.

9 MS. NELSON: Actually, Elliott, I
10 may be wrong, but I believe the CR discussion
11 came at the very tail end and we hadn't really
12 brought up to the panel the notion of
13 contemplating CR under the Schedules and so
14 the discussion around having Solutions under
15 the schedule was really limited to the fact
16 that we didn't feel that T&M was an adequate
17 way to go at the Solutions and that was let's
18 not do Solutions with T&M. It doesn't get you
19 a solution. And then later we talked about
20 what would be other ways, sort of thinking
21 outside the box, to increase the viability of
22 the Schedules to allow the agencies to procure

1 what they needed.

2 CHAIRMAN BRANCH: Yes, I don't
3 know that what I just laid out is reflected in
4 the transcript with respect to the cost
5 reimbursement. I was just laying out my own
6 thinking about that as we went through the
7 Solutions discussion. You know, my assumption
8 has always been that if the Administrator
9 adopted one then clearly you could then use
10 that and that you're absolutely right.

11 What we were really trying to say
12 here is T&M is a poor way to buy Solutions,
13 not suggesting that we insert that discussion
14 with respect to cost reimbursement anywhere in
15 the accompanying narrative because it's not a
16 discussion that we've had. But I guess it
17 would be my hope that if the Administrator
18 adopted the idea of considering adding cost
19 reimbursement line items that a policy would
20 then be, any policy for Solutions would then
21 be, conformed to allow us to use those.

22 MR. DRABKIN: Again, I think I can

1 capture this discussion in our explanation,
2 perhaps even go back and insert a footnote
3 under Services under cost reimbursement as
4 well that explains that we didn't discuss this
5 type of recommendation with regard to
6 Solutions and capture your sentiment and get
7 it back to you.

8 MS. SCOTT: Yes, the issue is to
9 make sure that it's clear we're talking
10 Solutions and then we're talking cost
11 reimbursement. We were not connecting them in
12 any way, shape or form because I would hate to
13 have it come across as though we are saying
14 that you either do -- you can't do Solutions
15 until you add cost reimbursement. That's what
16 I was worried about.

17 MR. DRABKIN: Okay. If there is
18 no other discussion on two, then trying to
19 keep you on a half hour schedule to get to
20 lunch, No. 3.

21 CHAIRMAN BRANCH: Any recommended
22 changes or additions to the accompanying

1 narrative for Recommendation No. 3?

2 (No verbal response.)

3 Okay. Hearing none, let's move
4 onto No. 4.

5 MS. SONDERMAN: My only concern
6 about this gets back to the statutory -- of
7 the explanatory language gets back to the
8 statutory or regulatory requirement that GSA
9 has to determine that a Schedules contract
10 prices are fair and reasonable and I'm just a
11 little concerned about that may be why we
12 don't really have Solutions defined at the
13 schedule contract level. And so I don't know
14 how to go through that, cut that Gordian knot,
15 but it does trouble me that they can't be --
16 I know they're not priced and it's not
17 realistic to price them. But does that by the
18 constraints of your statute mean then that
19 they can't happen under the Schedules program
20 because you are required to make a
21 determination that prices are fair and
22 reasonable?

1 MR. DRABKIN: I looked through the
2 transcript and I did not see us having a
3 discussion of this particular issue, although
4 --

5 (Off the record comment.)

6 MR. DRABKIN: That's entirely
7 possible and it's all her fault.

8 (Laughter.)

9 But non-feasance not mis-feasance
10 or malfeasance. But it does occur to me when
11 I read this that we all I know have had the
12 experience of awarding or maybe some haven't
13 but we have award in GSA a number of solutions
14 IDIQs and in making those awards we in some
15 cases in the source selection process provide
16 a sample task and have that task, that
17 solution, offered back to us and make our
18 evaluation on whether or not a contractor can
19 win the IDIQ contract, not an IDIQ schedule
20 but just a regular non-schedule IDIQ, based
21 upon the evaluation of their offer to this
22 hypothetical procurement problem requirement

1 and while we didn't have that discussion, it
2 seems to me that we can certainly rely on our
3 experiences and GSA Administrator who already
4 administers some programs where that is how an
5 award decision is made which complies with the
6 CICA rule that says you have to consider
7 price.

8 That's how this could work,
9 although we clearly did not have that
10 discussion and I didn't know how to put that
11 explanation here since we didn't have the
12 discussion. Although I was sure that -- I
13 mean you keep shaking your head, Debra, so I'm
14 assuming you're aware that we've had this
15 experience ourselves and I know the GSA
16 Administrator, his people, have this
17 experience. But I'm not sure what else we
18 could say.

19 MS. SCOTT: My recollection was
20 that what we really said was that if you're
21 going to do Solutions you have to do 803. You
22 have to do competition. I don't know where

1 that is in the transcript, but that's my -- It
2 was kind of one of these at that point you're
3 going to have to use competitive forces at the
4 task order level.

5 MR. DRABKIN: Right. That's in
6 No. 3 above and we say that right there.

7 CHAIRMAN BRANCH: Yes, as I recall
8 the logic behind this was Solutions are
9 comprised of products and services so that and
10 those configurations of those products and
11 services are combined to produce what the
12 systems thinker would call a set of emerging
13 properties and that emerging properties are
14 not on the schedule. So why would you try to
15 apply a clause to something that is not per se
16 on the schedule? In other words, I think that
17 was really the basis of our discussion.

18 MS. SONDERMAN: I agree that that
19 was the basis of our discussion. I think for
20 purposes of the paper it might be cleaner to
21 use simpler logic. "Solutions are
22 combinations of services and supplies that

1 exist on Schedule. We have recommended that
2 the price reduction clause should not apply to
3 Services nor should it apply to Products.
4 Therefore, it follows that the price reduction
5 clause should not apply to combinations of
6 services and Products" and then you can avoid
7 the tricky problem of what do you do with your
8 statutory requirement to determine if price is
9 fair and reasonable for a schedule contract.
10 I don't know.

11 MR. DRABKIN: I will attempt to
12 build the syllogism you've outlined and submit
13 it to you for your review to determine whether
14 or not I pass first semester Logic.

15 CHAIRMAN BRANCH: All right.

16 MS. SCOTT: We're hoping for
17 second semester, David.

18 MR. DRABKIN: Actually it was
19 Aristotle, but it's okay.

20 CHAIRMAN BRANCH: All right. Why
21 don't we try to wrap this up and move along to
22 Recommendation No. 5.

1 MR. DRABKIN: No. 5 is the last
2 one.

3 MS. SONDERMAN: David, in the last
4 sentence, I'm not sure which terms and
5 conditions you're referring to. Are those the
6 -- The sentence reads "The value offered by
7 having a MAS program contract is that all of
8 the other terms and conditions can be
9 negotiated at time of award as well as past
10 performance" blah, blah. Are you referring to
11 the terms and conditions that are in the
12 schedule or other terms and conditions?

13 MR. DRABKIN: I'm referring to the
14 terms and conditions. The value offered by
15 having a MAS program contract is that all of
16 the terms and conditions can be negotiated at
17 time of award as well as past performance.
18 The value is we pre-negotiate all this stuff
19 for the ordering contracting officer.

20 MS. SONDERMAN: Okay. Well, then
21 I guess the use of the word "other" is what
22 confused me.

1 MR. DRABKIN: Right and should
2 have. I succeeded.

3 MS. SCOTT: He's back to semester
4 one.

5 MR. DRABKIN: Yes.

6 CHAIRMAN BRANCH: I think you need
7 to be careful with this thought though because
8 this ties back to previous discussion we've
9 had today with respect to supplementing the
10 terms and conditions of the MAS contract and
11 I'm not sure that this language is consistent
12 with that discussion because what we're really
13 saying is that we believe the value of the MAS
14 program stems from the fact that the terms
15 negotiated by the MAS contracting officer are
16 sufficient to result in a binding contract.
17 Okay. The implication though with ordering
18 agency contracting officers adding certain
19 language would imply that not all the
20 necessary provisions for an agency contracting
21 officer are there.

22 And it may be a subtle point, but

1 I think it's an important one to reflect that
2 the value really is that if you have a fairly
3 vanilla requirement without any agency
4 peculiar, necessary conditions you can go to
5 contract without doing anything else but that
6 you also have the flexibility to add terms to
7 that order as long as they do not conflict
8 with the basic terms and conditions of the
9 schedule contract to meet an agency
10 requirement.

11 MR. DRABKIN: Actually, I would
12 phrase it a little differently because we want
13 to be careful because we do insist that the
14 ordering contracting officer cannot, at least
15 currently we insist, modify the underlying
16 terms and conditions of the contract. What
17 the ordering contracting officer can do in
18 terms of shaping her requirement is to add to
19 that requirement anything else other than
20 form, fit and function that is necessary to
21 meet her procurement objective. So it doesn't
22 modify the underlying terms and conditions.

1 It becomes a requirement of the order being
2 placed here.

3 And while I know you understand
4 this, it's a nuance that is often
5 misunderstood by many people. And, by the
6 way, to the extent we have conflicts,
7 disputes, under the Schedules program, I think
8 you would find other than the source selection
9 issues that that's probably the second largest
10 category of disputes is that the ordering
11 contracting officer tried to amend the terms
12 and conditions as opposed to making their
13 additional terms and conditions a part of
14 their requirement.

15 For example, they wanted to hire
16 small business subcontracting goal. You
17 cannot amend the schedule subcontracting
18 goals, but you can say for purposes of this
19 order you must achieve an additional five
20 percent over the current schedule contracting
21 goal. It becomes a term of the order, not a
22 modification of the subcontracting goals

1 already in the Schedules contract.

2 So I'm not sure how to capture
3 that, but I think that's -- I don't think you
4 disagree with that.

5 CHAIRMAN BRANCH: No, I don't
6 disagree with that and that's why I used the
7 word "supplement" as opposed to "modify." So
8 I can't do anything that is inconsistent with
9 the terms of the Schedules contract. But to
10 the extent that I have agency peculiar
11 requirements and let's pick an easy one.
12 Okay.

13 So to the extent that I buy
14 services for people onsite, my implementation
15 of HSPD-12 is different from Homeland
16 Security's. So I would have the right to add
17 a DD-254 or terms and conditions with respect
18 to badging hours of work, those sorts of
19 things. None of those are inconsistent with
20 the basic terms, but they supplement the basic
21 terms to meet agency's needs and they are
22 things that agencies I believe would generally

1 characterize as terms and conditions versus
2 scope.

3 So what I'm really trying to
4 capture is while there is no authority to
5 modify the basic clauses, the terms and
6 conditions, of that solicitation, there is the
7 ability to add additional terms and conditions
8 to address particular agency needs. On the
9 other hand, if I have none of those needs, the
10 terms and conditions in the Schedules contract
11 are sufficient for me to form a binding
12 contract and maybe it's a little bit of a
13 nuance. But I think it's very important for
14 a more general readership of our report.

15 MS. SCOTT: I offer a rewrite and
16 I'll give it to David.

17 CHAIRMAN BRANCH: Okay.

18 MR. DRABKIN: Any further
19 discussion?

20 CHAIRMAN BRANCH: Yes, Pat.

21 MS. BROOKS: You had two that you
22 were going to revisit. There were two

1 recommendations.

2 MR. DRABKIN: I think we said we'd
3 revisit them after lunch before we go back to
4 the organization because I believe Judith
5 needed to read the transcripts. Thank you.

6 CHAIRMAN BRANCH: It's 12:23 p.m.
7 by Pat's clock. Why don't we take an hour and
8 be back here at 1:30 p.m. to pick up with the
9 recommendations we were going to revisit and
10 hear how we're going to proceed on. Off the
11 record.

12 (Whereupon, the above-entitled
13 matter went off the record at 12:23 p.m. and
14 resumed at 1:37 p.m.)

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1 Services. So it is A.6 and I had no question
2 about the recommendation in and of itself. I
3 only wondered whether or not the context of
4 the recommendation was that which David had
5 drafted underneath and indeed it is.

6 MR. DRABKIN: Surprise. Surprise.

7 MS. NELSON: I see you showed up
8 just in time. So I had gone back to check
9 that and so any question I had regarding the
10 discussion underneath is put to bed. I think
11 I was the only one who did.

12 The other thing was I had asked
13 whether or not under Services Recommendations
14 4 and 5, four being that of a discussion of
15 revisiting the SINS and there being within
16 that recommendation there is specific
17 discussion of labor categories and that of
18 five which is the next recommendation to
19 evaluation overall the schedules, not the
20 program, but the individual schedules and how
21 their scopes meet the marketplace and the
22 agency requirements. And again in the

1 September 19th transcripts it is very clear.
2 In one place Lesa Scott makes recommendations
3 regarding the SINS to the changing
4 technologies and several other people do to
5 changing product that it was an intention of
6 the panel that, well, the first recommendation
7 that it be all the SINS be revisited and taken
8 a look at.

9 And actually within there's a
10 discussion as to whether or not it actually
11 fell within the intent of the scope of the
12 panel and where that recommendation should be
13 placed and there was an agreement of the panel
14 that it should be a recommendation of the
15 panel, but where within the report.

16 And then I think it's Glenn, it
17 was either Glenn or Jan who said, "Well, not
18 just the SINS but let's have an ensuing
19 recommendation that the Schedules be looked at
20 overall." So there are recommendations but
21 with reference to the program overall, not
22 just services.

1 CHAIRMAN BRANCH: Yes, I see that
2 reference on page 224 of that transcript. You
3 recommended that GSA or that all of the GSA
4 schedules that the SINS be -- That's probably
5 a transcription change we made. I don't think
6 you said "dilated."

7 MS. NELSON: No.

8 CHAIRMAN BRANCH: But to be better
9 current to the market and the needs of our
10 government customers, yes. Okay. So that's
11 clearly a recommendation that addresses the
12 Schedules program in general and not just
13 services and we should note that in the
14 report.

15 MR. DRABKIN: I'm sorry. That's
16 four and five or just four.

17 MS. NELSON: From what I read and
18 the next recommendation comes straight on
19 after it, it was four and five because five
20 was a follow-up that it not just be SINS but
21 it be the schedules themselves, each of them.

22 CHAIRMAN BRANCH: Yes, and as I

1 read the transcript your conclusions appear
2 accurate.

3 MR. DRABKIN: So, as I reformat
4 this and go to the buckets, it seems to me
5 that we'll have another bucket for that. No,
6 we just make it clear in the --

7 CHAIRMAN BRANCH: In the
8 accompanying narrative.

9 MR. DRABKIN: Right. Okay.

10 CHAIRMAN BRANCH: Because we start
11 with SINS and then Alan Chvotkin makes a
12 follow-on suggestion that it not only be SINS
13 but it be Schedules in general.

14 Okay. So I believe that resolves
15 questions had with respect to the transcript.

16 MS. SONDERMAN: Were we also
17 looking at the transcript on the Products
18 Recommendation No. 2 or did we -- I had a note
19 scribbled on the side that said come back to
20 this. We would come back to that.

21 MS. NELSON: I think Theddie was
22 going to offer some different language for the

1 write-up underneath that.

2 MS. SONDERMAN: Okay.

3 MS. SCOTT: Actually, I did it.

4 CHAIRMAN BRANCH: Have we resolved
5 all the things that we needed to revisit from
6 this morning? Anybody have any outstanding
7 action item?

8 (No verbal response.)

9 Okay. Then I think that takes us
10 through the recommendations and I think Debra
11 made a suggestion before lunch that the first
12 thing that we do after lunch is to kind of
13 look at the bucketing and to see whether now
14 that we've gone through the recommendations
15 whether that's a path we want to go down.

16 MS. SONDERMAN: So that's under
17 Section 5 of the outline.

18 CHAIRMAN BRANCH: That's Section 5
19 of the outline. You know, let me say as an
20 outset just looking at the recommendations I
21 did this because they seemed fairly similar.
22 I'm certainly not whetted to this approach.

1 We should only adopt it if we believe it adds
2 some clarity to the report. I think David's
3 done a pretty good job with the
4 recommendations. So I'm flexible either way.

5 Any other views on how we want to
6 render that material?

7 MR. ALLEN: Is the intent to
8 supply the order and the outline with the
9 matter that we reviewed this morning? I ask
10 that without any preconceived. It's just a
11 point of clarification.

12 MS. SONDERMAN: I thought from
13 what we had discussed on Friday the intent was
14 to and David had commented this morning that
15 he didn't reorder his draft but that we would
16 take whatever we had agreed on in the
17 Recommendations section and reorder it into
18 the buckets --

19 MR. ALLEN: That are in the
20 outline.

21 MS. SONDERMAN: -- that are in the
22 outline. Right.

1 MR. ALLEN: Okay.

2 MS. SONDERMAN: And that's what we
3 were going to look at because we started
4 having these discussions of "Was that only for
5 products or was that only for services or was
6 that a more general program thing" like four
7 and five that we just discussed.

8 CHAIRMAN BRANCH: Yes. Let me
9 talk about why I did this. I just thought
10 this might be an easier way to present them so
11 that when they get adopted, I'm being an
12 optimist here, that, if you will, the policy
13 changes that follow from them could be looked
14 at in a more holistic way. You know, we have
15 some things with price reduction cost, task
16 order and delivery competition. We don't set
17 up the FAR nor do we set up the GSAM for the
18 most part broken up by supplies, services or
19 solutions.

20 So it was my intent to provide a
21 little bit of a roadmap to the people who
22 would be tasked to think about these things,

1 to give them a way to think about them, so
2 that when policy was changed it could be
3 changed holistically.

4 MR. DRABKIN: My recollection is
5 on Friday we agreed that this was a better
6 approach, a better way to express ourselves,
7 than to simply break it out into three
8 categories of services, products and
9 solutions. I don't think that our discussions
10 over the last two days, well today and last
11 Friday, have suggested at least to me that
12 that's still not the case.

13 CHAIRMAN BRANCH: Okay. So I guess
14 I'll canvas the panel again. Is everybody
15 comfortable with presenting them in this set
16 of buckets? All right. Then that's what
17 we'll do.

18 MS. SCOTT: I'm very comfortable
19 with the buckets. What I'm concerned about is
20 the translation from one format to the other
21 format without losing anything or causing a
22 lost thought or discontinuity.

1 MS. SONDERMAN: Right. Well, so I
2 think it would be helpful, although tedious,
3 for 15 minutes for us to actually go through
4 and make sure that we got them all and that
5 the ones Judith just researched for us that
6 were under the Services category but the
7 context of the discussion was that they were
8 both that we're going to need to make some
9 changes to the outline in order at a minimum
10 to accommodate those things. Are you willing
11 to do that?

12 CHAIRMAN BRANCH: Yes, absolutely.
13 You know, I'm reasonably certain we got them
14 all simply because I cut and pasted them from
15 the document. But a little due diligence
16 never hurt.

17 MS. SONDERMAN: So I did the first
18 section for cross references. Does everybody
19 have the outline?

20 So the first one and in our other
21 format we have Sections A, B and C. So the
22 first, what's now A.1 was A.1 before. The new

1 A.2 was B.1. A.3 was B.4. A.4 was C.4. A.5
2 was C.3. A.6 was C.5.

3 MR. DRABKIN: Bingo.

4 (Laughter.)

5 MS. SCOTT: Well, Deb, you're
6 doing such a fine job. Keep rolling.

7 MR. PERRY: Is A.6 appropriate to
8 stay under price reduction clause and
9 competition requirements versus moving it to
10 price reasonableness?

11 MS. SCOTT: That was a discussion
12 you missed this morning.

13 MR. PERRY: Yes, I did. I'm
14 sorry. I apologize.

15 CHAIRMAN BRANCH: Yes, I'll talk a
16 little bit while I bucketed there originally
17 because I thought it flowed out of our
18 recommendations to get rid of the price
19 reduction clause and to Jackie's I think
20 rather important question during our
21 deliberations, it says, "Okay. So if you get
22 rid of it, what then?" So it kind of reads

1 "All right. We get rid of the price reduction
2 clause. We make it clear."

3 Yes, that was it.

4 MS. SONDERMAN: Yes, B.1 was A.6.

5 B.2 was B.2. I'm looking for B.3.

6 (Off the record comments.)

7 CHAIRMAN BRANCH: Yes, that's

8 correct. Bingo.

9 MS. SONDERMAN: Yes.

10 MS. NELSON: I'm torn between
11 whether or not -- I understand that it gets to
12 price reasonableness. But I'm wondering. I'm
13 torn between as to whether or not it's
14 disclosure or price reasonableness because in
15 a sense it is working with the agencies to
16 disclose pricing information that eventually
17 will get to price reasonableness. But it is
18 not the price reasonableness upon which the
19 contract is formed. It is a process of
20 disclosures at the task order level, right?
21 It's a system.

22 CHAIRMAN BRANCH: Again, I'll just

1 kind of walk through why I left it there is if
2 you look at the three recommendations with
3 respect to disclosure they really talk to what
4 we're asking GSA to do in terms of getting
5 information out to the user agencies the
6 ordering activities. So again, I think it's
7 less filling tastes great.

8 MS. NELSON: Actually I'll be very
9 frank. I understand that we didn't go to --
10 that we didn't go to the implementation, but
11 eventually the correction of the transactional
12 data will be there and if we put this fully in
13 the price reasonableness, to me it leaves one
14 down the path of the onus is fully on GSA to
15 figure out how to put out this transactional
16 data as opposed to any burden upon the
17 customer agencies to help supply this data.

18 MR. DRABKIN: With revenue comes
19 responsibility.

20 I was asked if I'm retiring in
21 2010. That is my intention.

22 (Laughter.)

1 I mean seriously I think that was
2 the -- My recollection of the discussion was
3 that is GSA's responsibility. If we're going
4 to run the Schedules program, if we're going
5 to collect a contract fee for using our
6 Schedules, if we are going to represent that
7 the Schedules are a sound way to do business,
8 then the obligation to provide this
9 information and to figure out how to obtain it
10 is ours.

11 (Off the record comment.)

12 You need to repeat what you said
13 on the microphone.

14 MR. SHARPE: I said to do it the
15 other way there's value to it. We would
16 collect it and sell it to you.

17 MR. DRABKIN: I really do think
18 it's right where it belongs and it says what
19 it's supposed to say and it's not something
20 that we would like to hear, but I think it's
21 the right answer. That's me personally.
22 That's why I voted for it.

1 CHAIRMAN BRANCH: I guess my
2 question would be whether putting it another
3 category would fundamentally change the
4 recommendation or benefit the people who are
5 likely going to have to implement this in
6 policy process and tools and, if that's the
7 case, I'm all for moving it. But I think that
8 is really the spirit in which we kind of
9 ordered this set of recommendations to make it
10 easier for people to pick it up and say,
11 "Okay, I have to do some changes in pricing
12 policy and I know those are in these sections
13 of the GSAM and I can go do that all at once.
14 I know I have to go do this stuff with respect
15 to disclosure. So I know this is all kind of
16 internal government stuff. So I can go do
17 that, put that on the done list" and so forth.
18 So I think that really ought to be our
19 objective what most benefits the reader and
20 the implementer.

21 MS. SONDERMAN: So are we ready to
22 look at new B.4? That was new B.3, right,

1 formerly A.2? New B.4 was old B.5, that
2 Administrator of GSA develop a solution that
3 captures pricing at the order level. New B.5
4 was old B.6.

5 It's in the next section. So,
6 Elliott, I'm still processing the information
7 that you just said a little bit ago, although
8 this we were looking at Recommendation B.5
9 according to the outline that the GSA
10 Administrator use whatever data is available
11 to regularly review and refresh prices on
12 Schedules contract to reflect relevant market
13 prices.

14 Do we -- This was proposed in the
15 context of a discussion about products. It
16 was on Products day. Do we mean for it also
17 to also apply to Services?

18 CHAIRMAN BRANCH: No, I certainly
19 didn't and if we're going to do it in this way
20 we probably need to put a parenthetical
21 notation there that we're talking about
22 products. No, my intent was not to change

1 these recommendations, but to make them more
2 general.

3 MS. SONDERMAN: Okay. Anybody
4 have any other questions about that section?

5 (No verbal response.)

6 The next section, Section C
7 Disclosure, C.1 was A.3. C.2 was B.3. C.3
8 was A.7. Is everybody okay with that? We're
9 missing A.4 by the way.

10 CHAIRMAN BRANCH: Oh, we are?

11 MS. SONDERMAN: Yes.

12 CHAIRMAN BRANCH: Okay.

13 MS. SONDERMAN: There were any.
14 The SINS got left out. See, Elliott was
15 hearing me. Let's ditch our SINS, but the
16 SINS got left off. But we'll put them back
17 in.

18 CHAIRMAN BRANCH: All right. Yes,
19 that was an oversight on my part, not an
20 issue.

21 MS. SONDERMAN: That's why there's
22 value in doing this.

1 So moving onto Section D, Contract
2 Type, D.1.

3 CHAIRMAN BRANCH: No, SINS are
4 here.

5 MS. SONDERMAN: D.1 -- Is there
6 another page?

7 CHAIRMAN BRANCH: Yes, there's
8 another page.

9 MS. SONDERMAN: Ah, here we go.
10 There's A.4. D.1 was A.8. Here it is. D.2
11 was C.2. And then in the last section,
12 Program Evaluation and Review, E.1 was A.5.
13 E.2 was B.7. E.3 was C.1. And then turn the
14 page as I failed to do E.4 was A.4. So we got
15 A.4 and A.5 as Judith had researched for us at
16 lunch to the general section as opposed to
17 specific to Services.

18 MR. DRABKIN: Would you just
19 repeat for me please what B.1 and B.2 are?

20 MS. SONDERMAN: The new B.1 and
21 B.2?

22 MR. DRABKIN: Yes ma'am.

1 MS. SONDERMAN: B.1 was A.6 and
2 B.2 was B.2.

3 MR. DRABKIN: Thank you.

4 MS. SONDERMAN: You're welcome.

5 MS. NELSON: As far as I'm
6 concerned this was the hardest part of all of
7 our months.

8 CHAIRMAN BRANCH: Okay. Since
9 we've agreed this is probably the right format
10 to present them.

11 MS. NELSON: Elliott.

12 CHAIRMAN BRANCH: Yes.

13 MS. NELSON: The one thing that is
14 not in here actually which David did do and
15 you did not include are those motions that
16 were put forward and either not seconded or
17 were not carried by a majority of the panel
18 and I think there should be a section for
19 that. So if we could make that section F.

20 CHAIRMAN BRANCH: Yes, I think
21 that's appropriate. I think David's original
22 characterization again to Section F is simply

1 recommendations not adopted by the panel.

2 MR. DRABKIN: Yes, and Judith
3 continues to whisper to me "and those not
4 seconded."

5 CHAIRMAN BRANCH: Well, if they
6 either failed for lack of second or they were
7 voted down they were not adopted by the panel.

8 MR. DRABKIN: I understand but she
9 wanted to be distinct.

10 CHAIRMAN BRANCH: Yes. It's
11 become clear to me that we're going to have to
12 conclude our work fairly soon because we're
13 losing it here.

14 (Laughter.)

15 So since we have --

16 MR. DRABKIN: Only some of us are
17 losing it. Some of us already lost it.

18 CHAIRMAN BRANCH: Right. So we've
19 reached a consensus I think on this piece of
20 the report and how we'll be organized and I'm
21 sure Mr. Drabkin as he goes through his clean-
22 up will develop it so it conforms with the

1 outline.

2 At this point, I think it might be
3 a good idea to move on to Glenn's section of
4 the report which is a Findings of Fact. So if
5 you could bring that up, Pat.

6 MS. SONDERMAN: Glenn, I have a
7 question between the January 30th and the
8 January 31st additions of the document because
9 I looked at -- I marked up the January 30th
10 version.

11 (Off the record comment.)

12 Okay. All right. So it was just
13 an artifact of the way I printed it. Great.
14 Lovely.

15 MR. PERRY: I'm sorry. It's
16 exactly the same as what was provided to Pat
17 last week before Friday. I didn't do anything
18 with it because I wasn't sure where it fit
19 into the way we agreed to the outline on
20 Friday.

21 CHAIRMAN BRANCH: Yes, and I think
22 --

1 MR. PERRY: It was done without --

2 CHAIRMAN BRANCH: And I think
3 that's fine. I think probably the more
4 important thing is we agree on the sense of
5 what you've drafted here and then we'll leave
6 it to you to drop those back into the
7 sections.

8 MR. PERRY: Okay.

9 CHAIRMAN BRANCH: Yes, this is
10 kind of general observation. We could
11 probably take the general overview, much of
12 that and incorporate it into the introduction
13 piece.

14 MS. SONDERMAN: The report
15 introduction or that section introduction?

16 CHAIRMAN BRANCH: The report
17 introduction piece and if you go back and look
18 at the outline a lot of what Glenn talks about
19 we covered in outline form in report
20 introduction piece.

21 MR. PERRY: Yes, the difference I
22 did between what -- I took it more from what

1 we -- I see the order of the way we were
2 charged to look at policy, procedures, the
3 clauses and the other and then I just -- Then
4 I ran out of gas. When you get to the
5 services and the other thing, it started to
6 get repetitive. So I welcomed the way you had
7 restructured it.

8 The two items we haven't talked
9 about here that are in here are I heard a lot
10 of, I heard some cause and effect based on
11 what GSA's policy sets forth as what they're
12 supposed to do or what this they were doing
13 was predicated upon.

14 And one thing we haven't talked
15 about in here is having the resources
16 available to do whatever we end up coming out
17 of this with. We didn't really make an
18 recommendations but it was behind some of the
19 things we said. Well, okay, if they don't
20 have enough folks to do X, then we came up
21 with some recommendations to make better use
22 of the collective resources between the

1 agencies and GSA to address the issue of the
2 fact that if you kept doing it the way you
3 were doing it you're just not doing it anyway.

4 We didn't talk about oversight in
5 that role as far as also in what we'd done so
6 far and that did make up some of the time
7 because we did have, we have on the record the
8 issues with what amount of oversight is being
9 done so far to sort of feed back information
10 to everyone on what is real and what's not.

11 And we haven't really covered that, but I
12 wasn't -- I don't know if we can just make
13 some comment to that or some mention of it in
14 some the text behind some of this.

15 CHAIRMAN BRANCH: You know we did
16 that when we talked. If you look at David's
17 section, we did that when we talked about cost
18 reimbursement line items. So I'd find that
19 approach acceptable. I guess the difference
20 in this section is that we never really,
21 unlike the motions, agreed on a finding of
22 fact. So I think we have a lot more

1 flexibility in how we cast that here.

2 MS. SONDERMAN: Glenn, I'll pass
3 along some minor edits that I have.

4 MR. PERRY: Okay.

5 CHAIRMAN BRANCH: I think the meat
6 of Glenn's section probably begins on page
7 three because I think some of page one goes in
8 the intro. A good deal of page two goes in
9 the background section. So that's been
10 covered there. But it's at page three, the
11 top of page three, we really start talking
12 about things that in my view look like
13 findings where we start referencing what the
14 panel heard from the vendor community, the
15 disparities and so forth.

16 So if we take a look at the second
17 paragraph on page three, I matched that up to
18 I guess our Finding C where we talk about
19 price reduction clause because we do give as
20 one of the subtopics there C.3 "The price
21 reduction is not the most effective way of
22 ensuring that the government achieves the

1 objectives of the Schedules program." So that
2 theme seems to map fairly well into that
3 finding.

4 MS. NELSON: I'm sorry, Elliott.
5 I missed your last comment. I was reading
6 something else.

7 CHAIRMAN BRANCH: If you go to the
8 top of page three we have one more
9 introductory paragraph and then Glenn picks up
10 "Concerning the price reduction clause
11 itself..." and just looking at that, that
12 appears to map into the accompanying narrative
13 or could be the accompanying narrative behind
14 Finding C, I guess, Topic 3 which is "The
15 price reduction clause is not the most
16 effective way of ensuring the government
17 achieves the objectives of the program." So
18 I think we've covered that. What I'm
19 attempting to replicate is Debra's kind of
20 cross referencing from what we have to the
21 outline.

22 MS. SONDERMAN: And that may mean

1 the paragraph at the top of that page goes
2 under either C.1 or C.2 because it discusses
3 how the basis of award is established. I'm
4 not sure where the best --

5 CHAIRMAN BRANCH: Let's see here.
6 Yes, I would certainly entertain comments from
7 folks but that seems to map to C.1 to me, that
8 first paragraph.

9 MS. NELSON: Yes, I would agree
10 with that.

11 MS. JONES: I have a comment. In
12 the second paragraph, the first sentence --

13 MS. SONDERMAN: What page?

14 MS. JONES: On page three, sorry,
15 where it talks about "Concerning the price
16 reduction clause the panel heard that GSA is
17 responsible for negotiating the Schedules
18 contracts." That sentence there, does that
19 match what was in the transcript because I
20 remember differing opinions from the centers
21 that were represented in terms of their
22 opinion of the value of the price reductions

1 clause?

2 CHAIRMAN BRANCH: Yes, I guess
3 memory serves me none of your contracting
4 officers thought it was worth much, but your
5 auditors liked it.

6 MS. SONDERMAN: That's what I
7 remember.

8 MS. JONES: I think the IT center.
9 I think they had a different opinion.

10 MR. DRABKIN: Actually, I think
11 Jackie's recollection is correct. We heard
12 from three contracting officers. The Services
13 contracting officer said it was of no use to
14 them. The contracting officer from Region 7
15 indicated they didn't think it was much use.
16 But the contracting officer from the IT
17 Schedule 70 was emphatic that they needed and
18 used the clause and then, of course, Mr.
19 Chairman, you're absolutely correct. Both our
20 IG and the VA IG thought that the clause was
21 essential to their ability to do their job.

22 MS. SCOTT: I was just going to

1 suggest a minor rewrite and take out the word
2 "articulate" and replace it with "convince the
3 panel." In effective that might --

4 MS. NELSON: No, I actually would
5 be more specific and say --

6 CHAIRMAN BRANCH: Yes, I think it
7 would be fair to represent all positions
8 there. So if we had two contracting officers
9 saying they had no value and one who said it
10 had value and the audit community said it had
11 value that ought to be reflected as part of
12 that.

13 MR. PERRY: I'll go back and
14 reread the -- I believe also though at the end
15 at some point in time during that interchange
16 with the people who said they did value it I
17 don't believe there was much of an answer as
18 to how in fact it was valued or how it was
19 used after. Even though we stated that we
20 needed it there, no one was able to articulate
21 when they would then use it after that because
22 we didn't audit it. We didn't check it. We

1 didn't all those things. But I certainly
2 would go back and to be fair, I'll --

3 CHAIRMAN BRANCH: Well, but I
4 think if that's the case that's a really
5 important thought to put in the finding. You
6 know while we had people who said it have
7 valuable that they couldn't really tell us how
8 it had value.

9 MR. DRABKIN: And I think also if
10 you go back, when you read the transcript,
11 you'll find that the members of the panel
12 after the presentations came to the conclusion
13 that, or a majority of the panel came to the
14 conclusion that, it was of no value. But
15 there was definite testimony.

16 By the way, the fact that somebody
17 makes a presentation or gives testimony
18 doesn't mean that we're required to give the
19 same amount of weight to each person's
20 testimony. We give it whatever weight we deem
21 appropriate. So our discussion afterwards may
22 be of equal or more importance than what was

1 actually said.

2 CHAIRMAN BRANCH: Actually, as I
3 look at this next paragraph, those two
4 paragraphs really talk to C.3.

5 MS. NELSON: I do have a comment
6 regarding the following paragraph and I
7 believe it was addressed in a follow-up
8 meeting after the GSA OIG came to give
9 testimony. After the IG came and gave
10 testimony and brought forward some slides and
11 unfortunately they were largely misrepresented
12 in the press after the testimony, although for
13 the lack of one or two words and so I would
14 just like to be sure that carefully articulate
15 them here. Mr. Patchin when he gave testimony
16 and Glenn has put it in here correctly, but I
17 just would like to emphasize it here.

18 (Off the record comment.)

19 MR. PERRY: It's still not on. I'm
20 sorry.

21 I looked at -- It's also in
22 Management Issues that your IG did in 2003 and

1 2008 financial statements.

2 MS. NELSON: So Glenn has put it
3 in here correctly. I just want to make sure
4 that we did put it in here. It is very much
5 correct. The over 70 percent error that the
6 IG found was on the submission of proposals by
7 schedule contractors, not after the award by
8 contracting officers on the part of GSA
9 Schedules and that is how it was
10 misrepresented in the press and I do want to
11 make sure that it is correctly reflected in
12 the report because those proposals and those
13 findings then are passed on to our contracting
14 officers in order to improve our audits in
15 order to be able to afford better
16 negotiations.

17 MR. DRABKIN: Could I suggest to
18 Glenn that you add the word "initial"
19 immediately before the word "proposals" and I
20 think that will make it clearer because that
21 clearly was the testimony of the IG that it
22 was on initial proposals that they then

1 audited that they found these errors, not when
2 the contracting officer had awarded the
3 contract that they had done an audit and found
4 pricing errors.

5 CHAIRMAN BRANCH: I believe the
6 next paragraph that starts "The panel also
7 heard testimony from GSA that a few
8 circumstances triggered the use of the price
9 reduction clause" are probably also the lines
10 under topic C.3 in the outline.

11 MS. SONDERMAN: Glenn, on page
12 four at the top, four lines down, do you mean
13 "vigor" or do you mean "rigor"?

14 MR. PERRY: "Rigor."

15 CHAIRMAN BRANCH: And I think that
16 also addresses C.3.

17 MS. JONES: Can we go back a
18 second to page three? I just digested where
19 we were talking about the 70 percent issue of
20 the initial proposals. That sentence starts
21 out by saying "For those few contracts" and
22 then in the end we call them "initial

1 proposals." That's -- Yes, that's a conflict.

2 MS. SONDERMAN: Do you want awards
3 or schedules or what? "For those few
4 schedules where the IG did review."

5 MS. SCOTT: We can change it
6 "actions."

7 MS. JONES: It should be
8 consistently "contracts" or consistently
9 "proposals."

10 MS. NELSON: They are pre-award
11 audits or pre-award reviews.

12 MS. JONES: But that's a contract.

13 MR. DRABKIN: It's not a contract
14 until after the contracting officer receives
15 the pre-award review and then makes an award.

16 MS. JONES: Okay, but we first
17 start out by calling them "contract."

18 MR. DRABKIN: Well, then change
19 the word "contracts" to "proposals."

20 MR. PERRY: Yes, I already have
21 that here.

22 MS. JONES: Okay.

1 CHAIRMAN BRANCH: Looking at the
2 outline here and Glenn's narrative, I think
3 the first three paragraphs under Data and
4 Transparency probably track to Finding C.4
5 which is "Lack of transparency among ordering
6 activities as to how schedule lower pricing is
7 determined to be fair and reasonable."

8 MS. SONDERMAN: It looks the next
9 section on Competition could go into Section
10 A.

11 CHAIRMAN BRANCH: Debra, the whole
12 section or would you parse that up and
13 allocate it across our findings?

14 MS. SONDERMAN: I think most of it
15 addresses the pieces that we discussed on
16 Friday as being in A.

17 CHAIRMAN BRANCH: I think you may
18 have to --

19 (Off the record comments.)

20 MR. PERRY: Are you looking at
21 this version -- or something like this?

22 CHAIRMAN BRANCH: I'm looking at

1 Pat's version.

2 MR. PERRY: It has a C.

3 MS. SONDERMAN: Roman numeral IV.

4 MR. PERRY: It has a IV.A and then
5 GSA. It says C, D.

6 CHAIRMAN BRANCH: But, see, mine
7 is --

8 (Off the record comments.)

9 MS. SONDERMAN: The little a, the
10 little b.

11 MR. PERRY: I'm sorry. I'm not --
12 I have none of the above.

13 CHAIRMAN BRANCH: Okay. So we've
14 reestablished configuration control.

15 Now just kind of I think you might
16 have to parse it more finely than that because
17 just looking at competition the first
18 paragraph is general and it actually lays out
19 the framework we used here.

20 MS. SONDERMAN: You could pull
21 that back into Section II.D.5 which is where
22 you had the four questions in your outline.

1 CHAIRMAN BRANCH: Right. Yes,
2 some of that needs to be pulled forward to how
3 the panel deliberated and if I look at that
4 paragraph on page five it starts "The majority
5 of the panel expressed their beliefs that
6 meaningful competition occurs at the order
7 level." That could be pulled into A.1.b.
8 "Procurement requirements for various
9 customers cannot be seen at the time of award.
10 Contracts are not awarded based on a
11 requirement of a forecast."

12 MS. SONDERMAN: I think the next
13 paragraph, "While the panel heard that the
14 determination..." that also fits in A.1.b.

15 CHAIRMAN BRANCH: I think maybe
16 that goes somewhere else. I think "While the
17 panel heard that the determination from GSA
18 fair and reasonable is of marginal value. It
19 did serve the purpose of providing a basis for
20 forming a binding contract at the schedule
21 level" maybe more appropriately belongs in
22 B.3. "Statutes require pricing at the schedule

1 level for contract formation." Does that make
2 more sense?

3 MS. SONDERMAN: Yes.

4 CHAIRMAN BRANCH: Then I think the
5 next paragraph we can -- Actually, I think
6 you've written David's footnote.

7 MS. SONDERMAN: You missed that.
8 In our discussions this morning we recommended
9 that David add a footnote to say that Section
10 863 now applies to all agencies.

11 MS. NELSON: Just take credit for
12 it, Glenn, and move on.

13 (Off the record comment.)

14 CHAIRMAN BRANCH: All right.

15 MR. PERRY: The next section is
16 really stuff under D.

17 MS. SCOTT: D or E?

18 MR. PERRY: D or E?

19 MS. SCOTT: I was going to put it
20 under E.2.

21 MR. PERRY: I don't have the right
22 version.

1 MS. SONDERMAN: Are you talking
2 about A.1.d?

3 (Off the record comment.)

4 MS. SCOTT: I'm looking at page
5 five, the first paragraph under "Currency and
6 Relevancy" and I'm thinking that paragraph
7 belongs under new E.2 which says that "the GSA
8 Administrator review the length of the MAS
9 schedule contracts." Am I in the right place?

10 MR. PERRY: No, I'm in the
11 Findings. We're trying to map these to the
12 Findings.

13 MS. SCOTT: Oh, to the findings.
14 I'm in the wrong.

15 MS. SONDERMAN: You have to go
16 back to Section 4.

17 MR. PERRY: Which would be D.

18 MS. SCOTT: Pardon me.

19 MS. SONDERMAN: So you mean A.1.d?

20 MR. PERRY: A.1.d.

21 MS. SONDERMAN: There isn't a "d."
22 d, We decided was essentially the transition

1 to the recommendations.

2 CHAIRMAN BRANCH: You know as I
3 read this "Currency and Relevance" and I look
4 back at the outline, I think we're missing
5 something in the outline. I think it might be
6 useful to either I guess expand paragraph d
7 which really kinds of takes us to the
8 recommendations and answers the question of so
9 if we're doing currently is inadequate how do
10 we improve that to say "In addition to issues
11 that directly address pricing there are some
12 other structural issues with respect to the
13 Schedules program that we recommend that the
14 Administrator take a look at."

15 Because as I look at my outline
16 here, we don't really talk about the questions
17 of contract length, SINS and what goes on the
18 schedule. So I think we may need to add
19 another topic to the outline. So for working
20 reasons, I'm going to just pen that in as d
21 and call it "Other Recommendations."

22 MS. SONDERMAN: "Other Findings."

1 CHAIRMAN BRANCH: "Other Findings
2 Not Directly Related" --

3 MS. SONDERMAN: "To Price."

4 CHAIRMAN BRANCH: -- "To Pricing"
5 and that will give that paragraph a home and
6 make it consistent with our recommendations.
7 Is everybody okay with that?

8 (A chorus of yes.)

9 MR. PERRY: On the other hand, I
10 knew you were going to do that, the piece that
11 isn't really addressed in here that came out
12 of what we did Friday is under Summary
13 Findings A and the things we added that talk
14 about (1) suppressed competition and (2) the
15 constant thinking ourselves smarter as we go
16 over time with data that keeps feeding into
17 the system again in a circular motion, the
18 points that Tom brought up on Friday.

19 CHAIRMAN BRANCH: Okay.

20 MR. PERRY: So I'll move that.
21 I'll put something there.

22 CHAIRMAN BRANCH: Okay.

1 MR. PERRY: And things like used
2 vendors sales data, that's sort of the other
3 things that need to be done in conjunction
4 with actually doing the changes to the policy.

5 CHAIRMAN BRANCH: Okay. Yes, I
6 think probably if we can finish this mapping
7 what you have and let's go back through the
8 outline and see what we have left to cover,
9 you know, I think this is a pretty good start
10 against the findings. I think our discussion
11 on Friday helped us kind of fill in the blanks
12 of the thoughts. We need to craft some more
13 words for it.

14 MS. NELSON: Glenn, I'm having a
15 hard time and maybe it's the hour. But I'm
16 having a hard time understanding what you're
17 conveying in the paragraph under "Products."

18 MR. PERRY: The only point I was
19 making is I was recognizing the fact that the
20 products were conceptually easier to quantify
21 and the pricing around those doesn't have
22 quite the -- the way we're handling it doesn't

1 have quite the impact as we have on the issues
2 we have with Services. That's all.

3 And I was just trying to -- At
4 that point in time, I was starting to struggle
5 with trying to do this by breaking it out by
6 Products, Services and Solutions. But that
7 seemed to be the only distinctive thing is
8 they were hard things you could put your hands
9 on. You could find equivalence in the
10 marketplace. You didn't have quite the degree
11 of issues that we were findings in the other
12 areas, but nonetheless they were there still.

13 CHAIRMAN BRANCH: Given our
14 outline structures, I guess are the last three
15 paragraphs important to retain?

16 MR. PERRY: No.

17 CHAIRMAN BRANCH: Okay. So we
18 scrap the last three paragraphs, Product,
19 Services and Solutions.

20 All right. So what I'd like to do
21 now is let's just go back through our outline
22 on Summary Findings to see where we have to

1 pick up some thoughts based on Glenn's draft
2 and I think we probably have to pick up a
3 thought for A.1.a and if I remember correctly
4 discussions surrounding that is you really
5 have to have a statement of work so you can
6 determine the amount, the type and the skill
7 mix of the labor to really determine whether
8 is fair and reasonable and that has to be done
9 within the context of an individual offeror's
10 proposal.

11 So if we set aside to purchase the
12 job one way and I decide to approach the other
13 way that's going to drive different numbers of
14 labor hours, the mix of the skills and the
15 types of labor. So you really can't apply
16 fair and reasonableness to a labor rate there.

17 MS. SONDERMAN: And I actually
18 think the Services paragraph that's on page
19 six starts that discussion.

20 CHAIRMAN BRANCH: Okay.

21 MS. SONDERMAN: You could use that
22 and then elaborate on that because it says

1 it's extremely difficult to establish a fair
2 and reasonable price at the contract level due
3 to the preponderance of unknowns.

4 CHAIRMAN BRANCH: Right. So I
5 think Debra's observation is you could map
6 that A.1.a instead of getting rid of that.

7 MS. NELSON: I think, Glenn,
8 you've gone in several cases to A.4. So you
9 might want to take a look in there and just
10 reference the ordering instructions
11 specifically for services requirements because
12 it does break out within their ordering
13 instructions for ordering with or without a
14 statement of work, right? There is guidance
15 specifically that recognizes the difficulty
16 for doing it with a statement or work.

17 CHAIRMAN BRANCH: All right. So
18 we have them a map to A.1.a. I think we have
19 a map to A.1.b already and that's your
20 paragraph on page five of six of the outline
21 which talks about meaningful competition
22 occurring at the order level because we don't

1 know what the requirement is.

2 Okay. And I think if we go back
3 to page four, the paragraph that starts "The
4 panel found that GSA had limited, if any in
5 some instances, data available for its use as
6 well as for the use of the ordering agencies"
7 that may well map to the additional thought we
8 put under there A.1.c, "GSA and the agencies
9 do not currently use transaction data to
10 improve future schedule prices."

11 MS. NELSON: I think it might --
12 also move A.1.e "Schedule prices in some
13 circumstances are based upon a limited dataset
14 versus head-to-head competition." "Limited
15 dataset."

16 CHAIRMAN BRANCH: Okay. So are
17 you suggesting that we break that paragraph up
18 into those two thoughts?

19 MS. NELSON: I don't know what I'm
20 suggesting. I think it bolsters both
21 subparagraphs.

22 CHAIRMAN BRANCH: Well, I guess

1 the only thing that I don't see in that
2 paragraph is where we specifically address the
3 idea of horizontal competition which is what
4 I think we're trying to address in A.1.e. So
5 I think we may need a new paragraph for A.1 to
6 express that thought.

7 MS. NELSON: Fair enough.

8 CHAIRMAN BRANCH: Okay. So going
9 back to d, I didn't really see that in there
10 and I think that was something that really
11 came up in Tom's observation about why this
12 wasn't particularly useful, the idea of
13 suppressed competition. Do you recall that
14 discussion well enough to write that or, Tom,
15 would you like to run through that?

16 MR. PERRY: Actually, it would
17 help, Tom, if you could just give a quick
18 read, articulate it as you would like. I
19 thought it was what you said. I didn't take
20 it down.

21 MR. SHARPE: You want me just to
22 suggest a paragraph. I mean to me this was

1 the three levels. I mean at the schedule
2 level it's limited dataset, it's unique to the
3 customer, it's not horizontal. And at the
4 order level, it's limited competition, right?
5 And then the third thing was bringing the
6 actual data back through the process, the
7 actual pricing data.

8 CHAIRMAN BRANCH: I think we've
9 probably got everything covered, but the
10 suppressed competition piece. So if you could
11 kind of walk through that so Glenn's got some
12 sense of how that thinking flows.

13 MR. SHARPE: Do you want me to
14 send you a paragraph?

15 MR. PERRY: Yes.

16 CHAIRMAN BRANCH: Yes, I think
17 that would be great.

18 MS. THOMPSON: If I may make a
19 comment. I have some concerns about the use
20 of "suppressed competition" because it sounds
21 as if someone is actually holding. There's
22 some outside force that's the competition down

1 and --

2 CHAIRMAN BRANCH: Point taken
3 which I think is why we have it up there in
4 quotes.

5 MS. THOMPSON: You keep using it.

6 CHAIRMAN BRANCH: Yes, I don't
7 think that will show up in the next draft.

8 MS. THOMPSON: Okay.

9 CHAIRMAN BRANCH: So I think that
10 probably gets us through Finding A.

11 And now that we've gone through
12 the whole document, I think we probably need
13 two more paragraphs for Findings B.1 and B.2.
14 It's an important market research tool and
15 then it acts as a ceiling and I think we have
16 everything in C covered except for C.2, "Lack
17 of understanding of the relationship amongst
18 most favored contractor pricing, fair and
19 reasonable pricing and lowest overall cost to
20 the Government."

21 MS. NELSON: Most favored
22 customer.

1 CHAIRMAN BRANCH: Oh, most favored
2 customer. So you remember enough on that one
3 to take a crack at a paragraph. Okay.

4 So have we pretty much covered the
5 Findings section? It is almost 3:00 p.m. and
6 I think we have probably done as much today as
7 we are going to do profitability. So we have
8 covered Recommendations, covered Findings,
9 which I think are the most significant pieces
10 of the report. We have Intro and Background
11 to do.

12 What I would suggest is that we
13 simply integrate those two pieces with the
14 other two sections because those are mostly
15 factual and there shouldn't be any great -- I
16 would hope there's no great controversy over
17 the words there and bring those pieces
18 together for a full reading session at our
19 next meeting.

20 So I'm going to turn it back over
21 to Pat now and ask her to get everybody's
22 calendar together to see when we can meet

1 next.

2 MS. BROOKS: Okay. As I am
3 looking to you on Friday because of the 15-day
4 rule for the public announcement in The
5 Federal Register and we were trying to get
6 this finished up the last meeting between the
7 25th and the 4th of March, that's the window
8 because after starting on the 7th of March I
9 will be on travel for about three weeks. So
10 hopefully we can get this finished by then.

11 MR. DRABKIN: Who's letting you go
12 on travel for three weeks?

13 MS. BROOKS: You approved it.

14 MR. DRABKIN: Oh.

15 (Laughter.)

16 Never mind.

17 MS. BROOKS: I guess we can always
18 appoint an alternate DFO. But the window of
19 opportunity is between February 25th and March
20 4th even though I have had a couple of
21 recommendations that it be between February
22 25th and March 3rd.

1 Remember you also recommended that
2 we go ahead and schedule it for two days. But
3 if it only takes one then it's okay given
4 again that to have a subsequent meeting with
5 the time frame again that I need to do The
6 Federal Register notice 15 days in advance.

7 MR. DRABKIN: Pat, could I
8 recommend Friday, February 27th and then
9 Monday, March 2nd which gives us a Monday and
10 Friday? If there's any additional work to be
11 done, it could be done over the weekend if we
12 need to meet on Monday, the 2nd if that works
13 for everybody else.

14 MS. SONDERMAN: I won't be able to
15 attend, but you can go ahead without me. I'm
16 presuming since I had signed up to edit that
17 I'm going to get this ahead of that meeting
18 anyway to do editing like decide whether price
19 reduction clause is capitalized all of the
20 time. We have no consistency in our format
21 and so that's the kind of technical editing
22 I'm anticipating that I had signed up for.

1 MS. BROOKS: The Chairman is going
2 to establish a deadline.

3 MS. SONDERMAN: Excellent.

4 MR. DRABKIN: And his enforcement
5 mechanism? I guess another set of meetings,
6 huh?

7 (Laughter.)

8 CHAIRMAN BRANCH: That's about the
9 size of it and we will schedule them when we
10 do not have Pat to shepherd us through this
11 process. So they could be exceedingly
12 painful.

13 Are people's calendars okay with
14 David's suggestion? I can live with that.
15 Okay. So let's set those as meeting dates.
16 I guess this primarily falls on Glenn and
17 David, myself. I'm assuming that you guys did
18 a stellar job in describing the GSA process
19 for doing this. So what are you comfortable
20 with establishing as a hard stop to get your
21 sections of the final report out to the
22 committee for a pre-reading and an editing?

1 MR. DRABKIN: I would be less than
2 intellectually honest with you if I told you
3 giving me more time would make any difference.

4 (Laughter.)

5 Pick a date and I'll work to the
6 date probably the night before. So I leave it
7 to you.

8 CHAIRMAN BRANCH: All right. So
9 are there any dates that I could pick that
10 would be really bad to have you do an all-
11 nighter?

12 MR. DRABKIN: I will be in South
13 America all next week.

14 CHAIRMAN BRANCH: Okay.

15 (Off the record comment.)

16 MS. SONDERMAN: How about this
17 Friday?

18 MR. DRABKIN: This Friday would
19 actually be more reasonable.

20 MS. SONDERMAN: Let's -- Is that
21 possible?

22 CHAIRMAN BRANCH: Do you think you

1 can get your piece done by Friday? David, you
2 do you think you can finish this up?

3 MR. DRABKIN: I don't see any
4 reason if that's my deadline.

5 CHAIRMAN BRANCH: All right. This
6 Friday. So Friday we'll have all the sections
7 to Pat and, Pat, you'll get them out or are
8 you going to take the job of trying to knit
9 this together under a cohesive report?

10 MS. BROOKS: I will make that
11 effort.

12 CHAIRMAN BRANCH: Okay. All
13 right. Subject to the wise advice of counsel.

14 MS. SONDERMAN: That's why we
15 needed to get it sooner rather than later.

16 CHAIRMAN BRANCH: Got it.

17 MS. SCOTT: If you tell me when,
18 I'll come help.

19 CHAIRMAN BRANCH: Okay. So we've
20 established this Friday as a deadline for I
21 guess the first final draft. Get that to Pat.
22 Pat can get it out so we can kind of bring it

1 together. So I guess we'll give you a
2 deadline of the 13th.

3 MS. SONDERMAN: Okay.

4 CHAIRMAN BRANCH: And that way we
5 will have a true first final draft edited by
6 one set of hands and then we ought to be able
7 to lock in here with any final comments we
8 have on the last Friday in February and put
9 this to bed. Does it sound like a plan?

10 MS. BROOKS: Can I clarify one
11 thing? David, Glenn and Elliott, your initial
12 drafts are to me by this Friday.

13 CHAIRMAN BRANCH: This Friday.

14 MS. BROOKS: I'm sending them to -
15 - I'm sending it out to everybody.

16 CHAIRMAN BRANCH: Sending it out
17 to everybody, but Debra with assistance from
18 Lesa and Theddie I think are going to pull it
19 together into a coherent document.

20 MS. BROOKS: Okay.

21 CHAIRMAN BRANCH: So that we
22 reflect a single style.

1 MS. BROOKS: And then they will
2 get it back to me on the 13th and I will send
3 it out to everybody again.

4 CHAIRMAN BRANCH: Right, and it's
5 my expectation and that gives everybody two
6 weeks to look at it and bring in your no-
7 kidding final edits on it and then we just
8 work until it's done.

9 MS. BROOKS: Okay.

10 MS. SCOTT: Any chance we could
11 move our 13th back a day or two? I have to be
12 out of town most of that week and I won't be
13 much help to them, maybe the 18th, like a
14 Monday or Tuesday.

15 CHAIRMAN BRANCH: Okay.

16 MS. SONDERMAN: You're totally out
17 of pocket the 17th, 18th and 19th and Monday is
18 a holiday and --

19 MS. SCOTT: Well, let me just
20 compare notes with you and figure out when.

21 MS. SONDERMAN: Okay.

22 CHAIRMAN BRANCH: Okay.

1 MS. THOMPSON: I can do it with
2 Debra.

3 CHAIRMAN BRANCH: Okay. I think
4 those are our hard dates and, if we stay on
5 that schedule, we should be done by the
6 beginning of March and then Judith can stop
7 slipping the date in her report. Okay.

8 Any other comments before we
9 finish up for the day?

10 (No verbal response.)

11 Well, I entertain a motion to
12 adjourn then.

13 MR. DRABKIN: So moved.

14 MS. SONDERMAN: Second.

15 CHAIRMAN BRANCH: All right.
16 Everybody?

17 (Chorus of ayes.)

18 CHAIRMAN BRANCH: We'll have those
19 products in in February and we'll see you at
20 the end of the month. Off the record.

21 (Whereupon, at 3:04 p.m., the
22 above-entitled matter was concluded.)

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