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A BRIDGE TO NOWHERE: EXPOSING COMPETITION AND PRICING  
REGULATIONS THAT LEAD TO MISMANAGEMENT AND WASTE IN  
GOVERNMENT CONTRACTING

JIM R. MOYE\*

“The Federal Government has an overriding obligation to American taxpayers. It should perform its functions efficiently and effectively while ensuring that its actions result in the best value for the taxpayers.”<sup>1</sup>

I. INTRODUCTION

The United States government has a dubious history of grossly overpaying for goods and services in its contracts. A recent United States Department of Defense Inspector General Report found over \$23 billion of wasted spending in contracts from Government Fiscal Year 2013 alone.<sup>2</sup> This was an increase of almost \$21 billion over the Inspector General’s findings in Government Fiscal Year 2012.<sup>3</sup> One of the most egregious findings in the report was that the United States Army was purchasing coin-sized rubber wheels for over \$1,600 each; the actual value of the individual parts was only \$7.71 each.<sup>4</sup>

In a separate June 2013 report, the Department of Defense Inspector General detailed further financial mismanagement.<sup>5</sup> In the report, the Inspector General determined that the Defense Logistics Agency (DLA), a subsidiary agency within the Department of Defense, overpaid a defense contractor by almost \$14 million.<sup>6</sup> Specifically, the report found that DLA Contracting Officers failed to establish “fair and reasonable prices” for the parts in question and failed to exercise proper contract oversight.<sup>7</sup> Finally, the report suggested

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\* B.A., University of Southern California; J.D., The Catholic University of America, Columbus School of Law. The Author would like to dedicate this Article to his father and mother, Jimmy R. Moye and Ulyesses Moye. They stand as a shining example of the American Dream and the heights small business owners can reach with hard work and good ideas. The Author can be reached for comments, questions, and suggestions at jim.r.moye@gmail.com.

1. Government Contracting Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 9755 (Mar. 4, 2009).

2. See Paul D. Shinkman, *DoD Wastes Billions While Searching for Cuts*, U.S. NEWS & WORLD REPORT (July 15, 2013, 4:00 PM), <http://www.usnews.com/news/articles/2013/07/15/pentagon-wastes-billions-on-contractors-and-lack-of-oversight-while-searching-for-cuts>.

3. See *id.*

4. See *id.* (“Investigators also uncovered an instance in fiscal year 2011 where the Army was purchasing coin-sized rubber roller wheels used to load cargo for the inflated price of \$1,678 each from Boeing. They are each valued at only \$7.71.”).

5. See Michael Fabey, *Pentagon IG Faults Spare Parts Purchases from Boeing*, AEROSPACE DAILY & DEF. REPORT (Oct. 4, 2013), available at [http://awin.aviationweek.com/portals/awin/cmsfiles/media/pdf/as\\_pdf/2013/10/04/asd\\_10\\_04\\_2013.txt](http://awin.aviationweek.com/portals/awin/cmsfiles/media/pdf/as_pdf/2013/10/04/asd_10_04_2013.txt).

6. See *id.*

7. See *id.* (“DLA Aviation guidance, the IG says, failed to require contracting officers to obtain and review contractor purchase order histories when determining fair and reasonable prices, or complete a subsequent review of pricing for spare parts after the parts were initially

that if DLA did not renegotiate the contracts with the defense contractor, it would continue to overpay for those parts long into the future.<sup>8</sup>

Federal government contracting, despite a sagging economy, is big business. Based on figures quoted in a United States House of Representatives Armed Services Committee Hearing, in Government Fiscal Year 2012,<sup>9</sup> the United States government had contractual obligations totaling over \$515 billion.<sup>10</sup> Those obligations totaled 14% of the total U.S. budget for that year.<sup>11</sup> The Department of Defense alone accounted for over \$360 billion worth of “federal contracts, which was more than all other [federal] agencies combined.”<sup>12</sup>

The federal procurement system is heavily regulated, and with such intense scrutiny, it leads one to this question: how does the government substantially overpay time and time again for goods and services? While there could be a number of reasons for the waste and mismanagement described above, there are three intertwined issues that seem to have the greatest impact. Specifically, these issues center around the government’s inability to (1) create competition among a qualified pool of companies for contracts, (2) ensure that the bids from these companies reflect that competition, and (3) negotiate a final price that is reasonable. Under the Federal Acquisition Regulation, all government contracts must have overall competition, adequate price competition, and a “fair and reasonable price.”<sup>13</sup> As shown in the instances above, the regulations seem to consistently fail to adequately protect taxpayers from overpayment snafus.

Seemingly, the government’s contracting regulations are not in sync with the commercial market, make little sense, and lead to bad contract awards. The average American should be alarmed at this trend, as the government’s inability to properly price and its tendency to overpay for items have been an issue since the early 1980s, and its current financial austerity measures do not lend themselves to such extensive waste. This Article will examine the controlling competition and price determination regulations and analyze them using a common sense approach. Section II examines the overall competition process for federal contracts. Section III discusses whether the competition results in adequate prices. Section IV outlines whether the successful price offer from a competition has a fair and reasonable price. Section V notes the problems with each of these provisions. Section VI provides various policy recommendations that will increase competition, create prices reflective of that competition, and result in fair and reasonable contract award prices. These changes would better

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placed on long-term contracts, as allowed by the contract.”).

8. *See id.* (“If prices are not corrected, IG says, DLA Aviation will continue to overpay on future sole-source spare parts procured from Boeing on the contracts cited in the report.”).

9. The United States Government 2012 Fiscal Year is October 1, 2011 through September 30, 2012. *See* 31 U.S.C. § 1102 (2012).

10. *See Twenty-five Years of Acquisition Reform: Where Do We Go from Here?: Hearing Before the H. Comm. on Armed Servs.*, 113th Cong. 1 (2013) [hereinafter *Twenty-five Years of Acquisition Reform*].

11. *See id.* (statement of Moshe Schwartz, Specialist in Defense Acquisition Policy, Congressional Research Service).

12. *See id.*

13. *See* 48 C.F.R. § 15.402 (2009).

ensure the best value for the government and protect taxpayers. This Article concludes that these regulations are poorly written, lead to bad government contracts and embarrassing newspaper headlines, and fail to serve the greater good.

## II. OVERALL COMPETITION REQUIREMENTS

To better understand the depth and range of the fair and reasonable price issue, one must first understand who may submit offers and the process the federal government utilizes to accept offers to provide goods and services. Under the Federal Acquisition Regulation (FAR), there are only three ways in which procurements may be conducted.<sup>14</sup> According to the regulations, offers are generated through full and open competition,<sup>15</sup> through full and open competition after the exclusion of sources,<sup>16</sup> and under listed statutory authority.<sup>17</sup> Full and open competition “when used with respect to a contract action, means that all responsible sources are permitted to compete.”<sup>18</sup> Examples of full and open competition include sealed bids, competitive proposals, and a combination of competitive procedures.<sup>19</sup> A practical example of full and open competition would be the General Services Administration releasing a Request for Proposal to provide property management services at a government installation and inviting all interested facilities management companies to submit timely and appropriate proposals.

Under the requirements for full and open competition after the exclusion of sources, the government may exclude companies from submitting offers on a specific procurement if doing so would, among other things, increase or maintain competition, be in the interest of the national defense, or satisfy projected needs based on a history of high demand.<sup>20</sup> It is important to note that the authority to exclude sources is vested with the head of a federal agency,

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14. *See id.* §§ 6.000–603.

15. *See id.* § 6.102.

16. *See id.* § 6.202.

17. *See id.* § 6.302.

18. *Id.* § 2.101 (2013).

19. *See id.* § 6.102. This provision calls for sealed bids, competitive proposals, and specialized proposal processes for specified situations. *See id.*

20. *Id.* § 6.202. The six reasons for excluding sources from a procurement are to:

- (1) Increase or maintain competition and likely result in reduced overall costs for the acquisition, or for any anticipated acquisition;
- (2) Be in the interest of national defense in having a facility (or a producer, manufacturer, or other supplier) available for furnishing the supplies or services in case of a national emergency or industrial mobilization;
- (3) Be in the interest of national defense in establishing or maintaining an essential engineering, research, or development capability to be provided by an educational or other nonprofit institution or a federally funded research and development center;
- (4) Ensure the continuous availability of a reliable source of supplies or services;
- (5) Satisfy projected needs based on a history of high demand; or
- (6) Satisfy a critical need for medical, safety, or emergency supplies.

*Id.*

not with procurement or contracts professionals.<sup>21</sup> The decision to exclude sources must be in writing and signed by the agency head.<sup>22</sup> A practical example of full and open competition after exclusion of sources is when the federal government releases a Request for Proposal and limits which companies may participate to those that already provide a specific service to the federal government because the costs of initiating service would be inconsistent with the budget and timeline of the government's acquisition plan.

Finally, the regulations specifically define when non-competitive processes may be utilized to receive offers.<sup>23</sup> Failure to use full and open competition is strictly prohibited by law, except in certain specifically defined situations.<sup>24</sup> These instances include, but are not limited to, where there is: only one responsible offeror, and the agency's requirements cannot be satisfied elsewhere;<sup>25</sup> unusual and compelling urgency;<sup>26</sup> statutory authorization or requirements;<sup>27</sup> national security interests;<sup>28</sup> and a public interest.<sup>29</sup> Each of the listed reasons has its own applications and limitations, which are generally spelled out in the individual provisions.<sup>30</sup> A particularly infamous example of non-competitive processes is the sole source contract, which occurs when there is only one offeror for the contract.

### III. IS THERE ADEQUATE PRICE COMPETITION?

After creating overall competition, the government verifies whether there was adequate price competition. Adequate price competition can be achieved in three ways. The first is when two responsible offerors, competing independently, submit priced offers that meet the government's express

21. *See id.* § 6.202(b)(1).

22. *See id.*

23. *See id.* §§ 6.300–305.

24. *See id.*

25. *See id.* § 6.302-1(a)(2) (“When the supplies or services required by the agency are available from only one responsible source, or, for DOD, NASA, and the Coast Guard, from only one or a limited number of responsible sources, and no other type of supplies or services will satisfy agency requirements, full and open competition need not be provided for.”).

26. *See id.* § 6.302-2(a)(2) (“When the agency's need for the supplies or services is of such an unusual and compelling urgency that the Government would be seriously injured unless the agency is permitted to limit the number of sources from which it solicits bids or proposals, full and open competition need not be provided for.”). The regulation also states that this provision applies if there is “unusual and compelling urgency preclud[ing] full and open competition, and [] delay in award of a contract would result in serious injury . . . to the Government.” *Id.*

27. *See id.* § 6.302-5(a)(2) (“Full and open competition need not be provided for when (i) A statute expressly authorizes or requires that the acquisition be made through another agency or from a specified source, or (ii) the agency's need is for a brand name commercial item for authorized resale.”).

28. *See id.* § 6.302-6(a)(2) (“Full and open competition need not be provided for when the disclosure of the agency's needs would compromise the national security unless the agency is permitted to limit the number of sources from which it solicits bids or proposals.”).

29. *See id.* § 6.302-7(a)(2) (“Full and open competition need not be provided for when the agency head determines that it is not in the public interest in the particular acquisition concerned.”).

30. *See generally id.* § 6.302.

requirements.<sup>31</sup> The second is when there is an expectation that two responsible offerors, competing independently, would submit priced offers meeting the government's express requirements, but only one submits an offer.<sup>32</sup> The last way is when price analysis clearly demonstrates that the price is reasonable based on current or recent prices for the same or similar items, once the price has been adjusted to reflect changes in market conditions, economic conditions, quantities, or terms and conditions under contracts that resulted from adequate price competition.<sup>33</sup>

The first definition of adequate price competition focuses on comparing the offers received. First, the government verifies that there are two independent companies, deemed to be responsible as defined in FAR,<sup>34</sup> that submitted offers to provide goods or services. Next, the government awards the resulting contract to one of the companies, and price is a significant factor in the award.<sup>35</sup> Finally, the government makes a finding that the successful offeror's price is not unreasonable.<sup>36</sup>

So what would this look like in an actual federal procurement? Assume that PayneCo and Nahraf are long time federal contractors. They both submit

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31. *See generally id.* § 15.403-1(c)(1)(i). The provision reads as follows:

Two or more responsible offerors, competing independently, submit priced offers that satisfy the Government's expressed requirement and if—

(A) Award will be made to the offeror whose proposal represents the best value where price is a substantial factor in source selection; and

(B) There is no finding that the price of the otherwise successful offeror is unreasonable. Any finding that the price is unreasonable must be supported by a statement of the facts and approved at a level above the contracting officer . . . .

*Id.* (citation omitted).

32. *See generally id.* § 15.403-1(c)(1)(ii). The provision states:

There was a reasonable expectation, based on market research or other assessment, that two or more responsible offerors, competing independently, would submit priced offers in response to the solicitation's expressed requirement, even though only one offer is received from a responsible offeror and if—

(A) Based on the offer received, the contracting officer can reasonably conclude that the offer was submitted with the expectation of competition, e.g., circumstances indicate that—

(1) The offeror believed that at least one other offeror was capable of submitting a meaningful offer; and

(2) The offeror had no reason to believe that other potential offerors did not intend to submit an offer; and

(B) The determination that the proposed price is based on adequate price competition and is reasonable has been approved at a level above the contracting officer . . . .

*Id.*

33. *See generally id.* § 15.403-1(c)(1)(iii). The provision reads:

Price analysis clearly demonstrates that the proposed price is reasonable in comparison with current or recent prices for the same or similar items, adjusted to reflect changes in market conditions, economic conditions, quantities, or terms and conditions under contracts that resulted from adequate price competition.

*Id.*

34. *See id.* § 15.403-1(c)(1)(i).

35. *See id.*

36. *See id.*

offers to provide office supplies to the United States Department of Agriculture. Both offers meet the government's requirements. Ultimately, the government chooses PayneCo's offer because PayneCo has a commercial relationship with an office supply corporation and its price was lower by 2.5%. In addition, there is nothing in the competition to make the government believe that PayneCo's price is not reasonable. Therefore, PayneCo's successful offer is based on adequate price competition.

The second definition of adequate price competition centers on expectations. Specifically, the federal government conducts market research and uses past history to develop its requirements.<sup>37</sup> The government then releases a solicitation for goods and services, expecting at least two independent, responsible companies would submit offers. Instead, only one offer is received; the sole offeror believes that other responsible companies were capable of submitting and would submit offers. Finally, agency executives above the Contracting Officer approve the award.

For example, the government conducts market research and, based on that research, believes that at least five companies will submit proposals to provide said service. The government releases a Request for Proposal to provide staffing services. Argonis Company, who is deemed responsible, is the only company that submits a proposal. Argonis Company had no inside knowledge of its competitors' intentions, nor did it see any business-related reason not to submit a proposal. The Contracting Officer, in the interest of time, recommended award to Argonis Company, and received approval from the Secretary of Agriculture. Therefore, Argonis Company's proposal would be deemed to be based on adequate price competition.

The third definition of adequate price competition looks only at price analysis. Specifically, the government conducts a price analysis of an offer and finds that the proposal price is reasonable because it is consistent with other similar procurements once it is "adjusted to reflect changes in market conditions, economic conditions, quantities, or terms and conditions under contracts that resulted from adequate price competition."<sup>38</sup> This definition would seem to be most appropriate for a non-competitive procurement, as it makes no reference to multiple offerors.

The following example shows how price competition can be achieved through the third definition. Assume that the Department of Defense issues a sole source contract to Darby Limited to provide storage containers to forward bases in Afghanistan. Darby Limited submitted an offer to provide the containers for a two-year period. The contract-award price was consistent with other contracts awarded to this company in Iraq and carried the same terms and conditions as the Iraq contract. The Contracting Officer completed a price analysis of Darby Limited's offer and found there was adequate price competition based on the similarity of the product, price, and contract terms.

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37. *See id.* § 15.403-1(c)(1)(ii).

38. *See id.* § 15.403-1(c)(1)(iii).

## IV. THE FAIR AND REASONABLE PRICE RULE

After assessing overall competition and determining whether there is adequate price competition, FAR requires the federal government to purchase supplies and services from responsible sources at “fair and reasonable prices.”<sup>39</sup> Under FAR, the government establishes fair and reasonable pricing through three different means.<sup>40</sup> To meet this standard, the Contracting Officer must obtain one of the following: (1) certified cost or pricing data, along with data other than certified cost or pricing data; (2) data other than certified cost or pricing data; or (3) “data necessary to establish a fair and reasonable price, but not more data than is necessary.”<sup>41</sup> The regulation provides that until the price is found to be fair and reasonable, the government must continue requesting—and the contractor must continue providing—data.<sup>42</sup> Finally, the pricing

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39. *See generally id.* § 15.402.

40. *See id.*

41. *See id.* § 15.402(a). The provision requires that Contracting Officers:

(a) Purchase supplies and services from responsible sources at fair and reasonable prices. In establishing the reasonableness of the offered prices, the contracting officer—

(1) Shall obtain certified cost or pricing data when required by 15.403-4, along with data other than certified cost or pricing data as necessary to establish a fair and reasonable price; or

(2) When certified cost or pricing data are not required by 15.403-4, shall obtain data other than certified cost or pricing data as necessary to establish a fair and reasonable price, generally using the following order of preference in determining the type of data required:

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

(ii) Data other than certified cost or pricing data such as—

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

(B) Cost data to the extent necessary for the contracting officer to determine a fair and reasonable price.

(3) Obtain the type and quantity of data necessary to establish a fair and reasonable price, but not more data than is necessary. Requesting unnecessary data can lead to increased proposal preparation costs, generally extend acquisition lead time, and consume additional contractor and Government resources. Use techniques such as, but not limited to, price analysis, cost analysis, and/or cost realism analysis to establish a fair and reasonable price. If a fair and reasonable price cannot be established by the contracting officer from the analyses of the data obtained or submitted to date, the contracting officer shall require the submission of additional data sufficient for the contracting officer to support the determination of the fair and reasonable price.

*Id.*

42. *See id.*

determinations must be separate and independent of any other contracts, and may not use price reductions as an evaluation factor nor consider profits or losses from other contracts.<sup>43</sup>

A deeper review of the fair and reasonable price regulations proves that it is a complicated system. First, FAR defines certified cost or pricing data as meaning “‘cost or pricing data’ that were required to be submitted in accordance with FAR 15.403-4 and 15.403-5 and have been certified, or are required to be certified, in accordance with 15.406-2.”<sup>44</sup> The definition continues: “[the] certification states that, to the best of the person’s knowledge and belief, the cost or pricing data are accurate, complete, and current as of a date certain before contract award. Cost or pricing data are required to be certified in certain procurements.”<sup>45</sup>

Second, FAR does not define “other than cost or pricing data.” Therefore, the federal government and contractors are left to interpret the language on their own. A plain language understanding of the definition is information that the offeror has not certified that would assist a reasonable person in understanding an offeror’s pricing methodology.

Third, the regulations require the submission of data necessary to establish the fair and reasonable price. The provisions provide no timelines, definitions, or guidance on how to submit such necessary data. Presumptively, the fact-finding needed to establish a fair and reasonable price could continue indefinitely.

The following example helps to better illustrate this issue of fact-finding continuing indefinitely. The United States Department of Treasury announces its intention to award a sole source contract to Reynolds LLC to provide high-capacity printers. The company submits a price proposal, which included subcontractor and labor quotes, internal general and administrative information, and a certificate of cost and pricing data. The Contracting Officer reviews the information, but feels the submitted information was insufficient to establish the price as fair and reasonable. The Contracting Officer requests additional information from Reynolds LLC, which then submits a copy of a similar contract with the United States Department of Commerce. The Contracting Officer reviews the contract and still is unable to determine whether the price is fair and reasonable. The acquisition plan calls for the contract to be fully awarded within ninety days. Because of the Contracting Officer’s inability to establish a fair and reasonable price, six months have elapsed and the contract is still not awarded.

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43. See *id.* § 15.402(b). The provision requires the government to “[p]rice each contract separately and independently and not—(1) Use proposed price reductions under other contracts as an evaluation factor; or (2) Consider losses or profits realized or anticipated under other contracts.” *Id.*

44. *Id.* § 2.101.

45. *Id.* (citation omitted).

V. AS CLEAR AS MUD: PROBLEMS WITH THE COMPETITION AND PRICING REGULATIONS

“If someone were asked to devise a contracting system for the federal government, it is inconceivable that one reasonable person or a committee of reasonable people could come up with our current system.”<sup>46</sup>

If one reviews the overall competition, adequate price competition, and the fair and reasonable provisions, it becomes abundantly clear that the system is broken. On its face, the process is onerous and vague, and it fails to ensure that the contracts awarded are of the best value for the government.

A. *Problems with the Overall Competition Requirements*

There are three succinct problems with regulations governing the overall competition requirements. First, the regulations do not adequately define two of the three provisions. While the definition of full and open competition seems to be sufficient, the definitions for “full and open competition with excluded sources” and “other than full and open competition” are inadequate. At first glance, the title and the definition of full and open competition with excluded sources are in conflict. It is not “full and open” if a qualified source is removed from the competition, regardless of the rationale. The term “other than full and open competition” is an apt title for the requirement, but the definitions in support of the requirement are lacking and contain no real protection from indiscretion.

Second, the full and open competition requirements refer to the government’s obligation to utilize competitive procedures, but the provision outlines solicitation types. Additionally, the list is not exhaustive. This undoubtedly leads to a lack of standardization across federal agencies.

Finally, the reasons provided for excluding sources do not make sense. Specifically, under the current language, the reasons provided include: to increase or maintain competition to lead to reduced overall costs; to ensure the continuous availability of a reliable source; to satisfy projected needs based on high demand; and to satisfy a critical need for medical, safety, or emergency supplies. These reasons, commercially and practically, are all the reasons to expand competition. The government cannot actually increase or maintain competition by restricting it, as it clearly states in the language. Restricting the number of bidders would have the reverse effect and would ensure that the government does not have sufficient sources to meet critical high demand for medical, safety, or emergency supplies. To read these provisions out of context would lead a reasonable reader to believe that they are the reasons for supporting unrestricted full and open competition, not for exclusionary

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46. *Twenty-five Years of Acquisition Reform*, *supra* note 10 (quoting J. RONALD FOX, DEFENSE ACQUISITION REFORM 1960–2009: AN ELUSIVE GOAL (2011)). This quote has been commonly used throughout the past two decades, with its first use attributed to James F. Nagle. See JAMES F. NAGLE, A HISTORY OF GOVERNMENT CONTRACTING 519 (2d ed. 1999).

purposes.

B. *Concerns with Adequate Price Competition Requirements*

There are three distinct inconsistencies with the adequate price competition provisions. First, in the primary definition of adequate price competition, it states that such competition exists when, among other things, a proposed contract award is based on best value and price was a significant factor. The provision fails to define “significant factor.” Is it five, ten, or forty percent? Does it even have to be a quantifiable percentage? Even though this requirement exists, there is insufficient guidance provided in the regulation. The lack of guidance ensures there will be no uniform application across agencies and gives excessive discretion to the Contracting Officer.

The secondary definition of adequate price competition is even more troubling. According to the regulation, if the government only receives one offer—but had an expectation that it would receive two or more offers—there is adequate price competition. This may occur if the sole offeror had an expectation that there would be competition, had no reason to believe there would not be competition, and anticipated that at least one other competitor would submit an offer. Such a requirement makes little sense because there is an underlying assumption that the offeror has inside information on other offerors. In many instances, if a contractor had such intimate knowledge, there would be a sufficient basis to question the integrity of the procurement. Further, the requirement has the perverse consequence of giving a contractor’s perception some measure of control over the government’s procurement.

Additionally, a key element of the provision centers on the government’s market research or “other assessment.” There are no standards placed on the market research or assessment. It places no timeframe, depth, or quality provisions for this requirement. The regulation does not even require the market research to be tied to the commodity or service area contemplated in the procurement. In short, it gives uncomfortably wide discretion to the Contracting Officer in this regard.

The third instance, whereby adequate price competition is established strictly from a price analysis, is fatally flawed. It places no overall competition requirement on the federal government. Further, it relies solely upon other, similar contracts that have been adjusted for economic conditions, terms and conditions, and other changes. This regulation is flawed on its face because it is attempting to compare procurements in which the ultimate goods or services are similar, but it compares nothing else. Further, it does not place a time limit on the age of comparable procurement and, due to the lack of guidance, ensures uneven administration of the provision. The provision lacks any controls and provides no guidance to a Contracting Officer attempting to comply with the requirements.

*C. Issues with the Fair and Reasonable Price Rule*

There are four practical issues with the fair and reasonable price regulations. As an initial matter, the regulations—and FAR for that matter—fail to adequately define certified cost or pricing data. Certified cost or pricing data is defined as “‘cost or pricing data’ that were required to be submitted in accordance with FAR 15.403-4 and 15.403-5 and have been certified, or are required to be certified, in accordance with 15.406-2.”<sup>47</sup> There are neither examples provided nor guidance given on what information is acceptable. Additionally, there are no timeframes placed on the validity of the information presented or reviewed and no quality standards about said information.

Second, in detailing the order of precedence of “other than cost or pricing data,” the regulations state that government agencies must first rely on information internally available; then on sources other than the offeror; and finally on sources from the offeror, if necessary. This seems to force the government to go through a circuitous route to validate the data. The regulations provide no guidance on whether the government can utilize information it already possesses. Further, it places no standard on the applicability of the information based on the goods or services provided, on the timeframe in which the information covers, or on other contextual matters that may impact the quality of the data. To state that the offeror should be the last source of information makes little sense, as they have generated the proposed price and can best explain the rationale behind the price offer.

Finally, the regulations are vague as to the submission, compilation, and review of data. For example, one regulation states that the Contracting Officer shall “[o]btain the type and quantity of data necessary to establish a fair and reasonable price, but not more data than is necessary.”<sup>48</sup> Further, the provision states that “[i]f a fair and reasonable price cannot be established by the contracting officer from the analyses of the data obtained or submitted to date, the contracting officer shall require the submission of additional data sufficient for the contracting officer to support the determination of the fair and reasonable price.”<sup>49</sup> How is that language to be interpreted? It does not adequately define what kind of data can be considered cost or pricing data. If a contractor provided a quote for similar services to another government agency or on the commercial market, would that be considered cost or pricing data? What if those quotes were five years old and were for 20% less? Should the cost or pricing data reflect the fully burdened cost of providing the services or goods? In short, the provisions are poorly drafted and raise more questions than they answer.

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47. See 48 C.F.R. § 2.101.

48. *Id.* § 15.402(a)(3).

49. *Id.*

## VI. POLICY RECOMMENDATIONS

“Government inefficiency is no secret. Massive cost overruns and \$500 hammers kill millions of trees in auditor reports, white papers and newspaper series. In short, if you hadn’t heard, you weren’t paying attention.”<sup>50</sup>

The regulatory problems outlined above are significant, so it is essential that policy recommendations be made in hopes of creating a more efficient procurement system that does not end in embarrassing, bad procurement decisions.

### A. Overall Competition Requirements

There are three proposed regulatory changes to bolster overall competition requirements. The underlying goals of these proposed changes are to ensure consistency and to reinforce appropriate roles and responsibilities.

#### 1. Rewrite and Clarify Overall Competition Requirements

A more efficient way to administer the overall competition requirements would be through a re-write of those requirements. The proposed provision, which would replace title 48, sections 16.102, 16.202, and 16.302 of the Code of Federal Regulations, would read:

Contract awards shall be achieved by full and open competition or other than full and open competition. Full and open competition, when used with respect to a contract action, means that all responsible sources are permitted to compete. In support of full and open competition, the Contracting Officer shall utilize the contracting methods contained in FAR parts 13, 14, 15 and 17.

“Other than full competition” is any solicitation process in which participating offerors are restricted in any way or in which there is no solicitation process for purposes of contract award. Full and open competition is the preferred method of contract-awarding for all government procurements. “Other than full and open competition” may only be utilized in urgent and compelling circumstances; in support of classified missions for national security; in cases when a law or statute requires it; or a situation in which there is only one or a limited number of potential offerors. The Contracting Officer and Head of the Contracting Activity will sign a Determination and Finding providing the faces of the contract-awarding. The Determination and Finding will also state:

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50. Editorial, *FBI Takes Aim at John Wiley Price’s Role in Dallas County IT Deal*, DALLAS NEWS (Nov. 21, 2012, 10:44 PM), <http://www.dallasnews.com/opinion/editorials/20121120-editorial-fbi-takes-aim-at-john-wiley-prices-role-in-dallas-county-it-deal.ece>.

- that the factual circumstances support an award based on other full and open competition,
- that cost control methods will be utilized throughout the period of performance,
- that awarded contracts will only utilize the Firm Fixed Price contract type, and
- that quarterly performance and financial reports will be submitted to the Inspector General of the awarding department.

There are a number of advantages to implementing the proposed modification. First, it limits the categories of overall competition, which should alleviate confusion. Second, the provision makes clear that full and open competition is preferred as a way of forcing Contracting Officers to always at least consider its utilization. Generally, if there is full and open competition, it should result in the most commercially-practical contracts and pricing. Third, the fact-finding that is required from the Contracting Officer should dissuade the use of other than full and open competition and increase accountability. The required quarterly reports to the Inspector General should make it easier to monitor any contracts not awarded under full and open competition. Finally, restricting the type of any contract awarded under other than full and open competition is critical, as a Firm Fixed Price contract places all of the risk on the contractor, which should provide some measure of protection to the federal government.

#### *B. Adequate Price Competition*

##### *1. Remove the Ability to Find Adequate Price Competition Based on a Price Analysis*

As previously discussed, adequate price competition can be found strictly by a price analysis.<sup>51</sup> The most pressing policy recommendation is to remove this requirement from the regulations. If overall competition cannot be established in a procurement, it is improbable that a Contracting Officer could find adequate price competition. Further, the lack of guidance and control over this process, especially given that it is utilized in support of sole and single source contracts, makes it a prime area for fraud and mismanagement. This proposed change would also remove language that is vague and gives unnecessary discretion to the Contracting Officer.

##### *2. Remove All References to Contractor Knowledge and Expectations*

Currently, adequate price competition can be established when there is a single offer, when—among other things—the contractor believed there would be other offers, when other responsible offerors existed, and when other offerors

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51. See generally 48 C.F.R. § 15.403-1(c)(1)(iii).

were capable of submitting an offer.<sup>52</sup> For purposes of competition, it is irrelevant what an offeror believes, and there is no stated or evidentiary standard by which to prove or disprove such beliefs. Additionally, the provision is self-serving to the successful offeror, because it is not unreasonable to assume that any contractor placed in this position would act in its self-interest and attempt to preserve its proposed contract award.

3. *Rewrite the Adequate Price Competition Provisions*

There is no doubt that establishing adequate price competition is vital to ensure good competition for the federal government within the commercial marketplace and best value contract awards. The proposed revision, which would replace title 48, section 16.403-1(c)(1)(i) through (iii) of the Code of Federal Regulations, states:

Subsequent to the establishment of overall competition, the Contracting Officer shall find there is adequate price competition. Adequate price competition means, when used with respect to a contract action, there are sufficient price offers to establish price competition for a best value contract award. Adequate price competition shall be established when three or more responsible, independent offerors submit timely and responsive offers. If adequate price competition cannot be established because there are less than three responsible, independent offerors who submit timely and responsive offers, the Contracting Officer shall conduct market research to establish commercial reasonableness of the price offer. The market research shall be consistent with the service or good being procured, based on pricing within the last two calendar years, and based on quantities consistent with the current procurement. A Determination and Finding, signed by the Contracting Officer and the Head of the Contracting Activity, shall be completed wherein it clearly denotes the facts surrounding the procurement and the facts ascertained from the market research.

C. *Fair and Reasonable Prices*

1. *Clarify the Definition of Certified Cost or Pricing Data*

The definition of certified cost or pricing data, which is cited in title 48, section 2.101, of the Code of Federal Regulations should be modified. A modified version of the language is:

Certified cost or pricing data is defined as any prime or subcontract offeror data, presented to the government or government prime contractor, for the purpose of establishing the reasonableness of offeror pricing. Certification is achieved by submission of written

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52. See generally *id.* § 15.403-1(c)(1)(ii).

confirmation by an authorized offeror representative stating:

“This certification states that, to the best of the person’s knowledge and belief, the cost or pricing data are accurate, complete, and current as of a date certain before contract award.”

Examples of certified cost or pricing data include, but are not limited to, supplier quotes, commercial catalogs, price lists, supplier agreements, distribution agreements, labor records, general and administrative accounting records, or other government contracts for the same or similar goods or services. Certified cost or pricing data shall be considered valid if the information provided has been active and valid within the preceding three years.

Unlike the current definition, this language actually explains the purpose of the data, gives concrete examples of the type of data that can be utilized without making it unnecessarily restrictive, and places reasonable limits on the data submitted.

2. *Clarify the Utilization of Certified Cost or Pricing Data or Other than Cost or Pricing Data in Establishment of Fair and Reasonable Prices*

The second policy recommendation is to modify the current language as it relates to certified cost or pricing data in establishing fair and reasonable prices. Proposed alternate language, which would modify title 48, section 15.402, of the Code of Federal Regulations, would read:

Certified cost or pricing data shall be required for all prime or subcontract offerors and all procurements above the simplified acquisition threshold. The Contracting Officer may utilize data from internal government sources, the commercial market, or other forms of market research. Said external research must be for the same or similar goods or services and have been active within the last three years. The Contracting Officer shall request only sufficient information to establish the fair and reasonable nature of offers and no more. Information submitted under these provisions shall be used strictly to establish whether an offer(s) are fair and reasonable in price.

This recommendation is significant because it gives specific guidance and examples of information that a Contracting Officer can consider in establishing fair and reasonable prices. The current language is so vague that the proposed level of specificity should assist in making better pricing decisions. Further, it should help prospective offerors understand the types of information that they will need to produce in conjunction with their offer. Overall, it should make the process easier for all parties and yield faster, more efficient results.

#### VII. CONCLUSION

The United States government has been subjected to bad government contract awards and embarrassing newspaper headlines because of inadequate competition and pricing procurement regulations. There is a general lack of clarity; language that conflicts with its stated purpose creates unnecessary loopholes, gives contractors impressions and contentions of control over government procurements, and provides a general lack of direction and guidance. The government could improve these regulations by re-writing them, removing any references to beliefs and contentions, and writing better definitions. The government is in a unique position, due to current austerity measures, to actually improve the government contract system. The government can avoid the \$500 hammers and \$750 toilet seats, but it will be a bridge to nowhere if the regulations are not revised.