

**COMPETITIVE QUOTES ON FSS BUYS: HOLD THE PICKLE,  
HOLD THE MAYO—CAN YOU HAVE IT YOUR WAY AND  
STILL HAVE COMPETITION?<sup>†</sup>**

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I. Introduction

When government agencies want to buy commercial supplies or services quickly, they turn to the U.S. General Services Administration's (GSA)<sup>1</sup> Federal Supply Schedules (FSS)<sup>2</sup> to meet their needs. Instead of

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<sup>†</sup> Referring to the 1974 Burger King advertising campaign created by Batten, Burton, Durstine, and Osborne, in which patrons were encouraged to customize the toppings on their hamburgers.

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<sup>1</sup> The GSA is a government agency which works in conjunction with the executive branch to develop policies and guidelines for a variety of business interests to include: property management, travel, transportation, commercial acquisition, global supply, and vehicle acquisition and leasing services. Its mission is to assist federal agencies in their service to the public by providing, "at best value, superior workplaces, expert solutions, acquisition services, and management policies." See General Services Administration, *GSA Federal Supply Service*, at <http://www.gsa.gov/Portal/gsa/ep/channelView.do?pageTypeId=8199&channelPage=%2Fep%2Fchannel%2FgsaOverview.jsp&channelId=-13263> (last visited May 17, 2005) [hereinafter *GSA Overview*].

The GSA operates eleven regional offices, located in Boston, New York, Philadelphia, Atlanta, Chicago, Kansas City, Fort Worth, Denver, San Francisco, Auburn, and Washington, DC, to service customers worldwide in the acquisition of office space, equipment, supplies, telecommunication, and information technology. See General Service Administration, *GSA Regions*, at <http://www.gsa.gov/Porta/gsa/ep/channelView.do?pageTypeId=8199&channelPage=/ep/channel/gsaOverview.jsp&channelId=-13362> (last visited May 17, 2005) [hereinafter *GSA Regions*].

The GSA's acquisition services assist federal agencies in accomplishing their mission by ensuring an effective and efficient federal procurement system through guidance and support, which is available on the GSA website. According to GSA for FY

contracting directly with vendors, government agencies use the FSS program as a simplified process to obtain “commonly used” commercial supplies and services.<sup>3</sup> These purchases satisfy the requirements for full and open competition, thereby allowing contracting officers to use different contracting vehicles such as Blanket Purchase Agreements (BPA),<sup>4</sup> sole-source acquisitions,<sup>5</sup> and negotiation-like competitions<sup>6</sup> to

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2004, its services are used in procurements totaling nearly \$34.96 billion. *GSA 2004 Annual Performance and Accountability Report: Creating a Successful Future at GSA*, GENERAL SERVS. ADMIN., Nov. 15, 2004, at 52, available at <http://www.gsa.gov/gsa/cm-attachments/GSA-DOCUMENT/GSAFY2004PAR-R2F-aAB-0Z5RDZ-i34K-pR.ddf> [hereinafter *GSA 2004 Ann. Rep.*].

<sup>2</sup> The FSS are part of a program is also known as the “GSA Schedules Program or the Multiple Award Schedule Program” whereby vendors are awarded indefinite delivery contracts for supplies and services “at stated prices for given periods of time.” GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 8.402(a) (Mar. 2005) [hereinafter FAR]. The GSA directs and manages the Federal Supply Schedule program the purpose of which is to provide “Federal agencies with a simplified process for obtaining commercial supplies and services at prices associated with volume buying.” *Id.*

Vendors awarded contracts by GSA under the schedule are required to publish an “Authorized Federal Supply Schedule Pricelist,” which comprises all of the supplies and services provided by a schedule contractor. *Id.* at 8.402(b). Any federal agency that orders under the FSS program can obtain a pricelist from any schedule contractor. *Id.*

Government agencies use the Federal Acquisition Regulation (FAR) subpart 8.402 and the pricelists to place task and delivery orders with schedule contractors. *Id.* In addition, the GSA schedule contracting office issues FSS publications that contain a general overview of the FSS program and address pertinent topics within FSS acquisitions. *Id.*

<sup>3</sup> W. NOEL KEYES, GOVERNMENT CONTRACTS UNDER THE FEDERAL ACQUISITION REGULATION 881 (2d ed. 1996).

<sup>4</sup> FAR, *supra* note 2, at 8.405-3(c). A Blanket Purchase Agreement (BPA) is a contract established with FSS contractors to fill repetitive needs for supplies and services. *Id.* A government agency can establish either a single BPA in which only one schedule contractor provides the supply or service, or a multiple BPA where multiple schedule contractors for supplies and services. *Id.* The BPA must be the best value to the government and should not exceed five years. *Id.*

<sup>5</sup> *Id.* at 8.405-6(a). Normally orders placed under the FSS are exempt from the requirements of FAR Part 6, Full and Open Competition, however, if government agencies are going to procure from only one source (sole-source), the need to conduct the acquisition as a sole-source must be justified in writing and approved at the levels outlined in FAR Subpart 8.405-6. *Id.*

<sup>6</sup> *Id.* at 15.000. A negotiated procurement is any contract that is awarded using other than sealed bidding procedures under FAR part 15 in which the contracting officer discusses the contract with offerors. *Id.* at 15.102. In instances where the FSS is used to conduct competitions, contracting officers will conduct a competition similar to that of FAR part 15. *Id.* at 8.405-2.

obtain needed commercial supplies and services without having to pursue a lengthy procurement process.<sup>7</sup>

Government agencies can obtain needed commercial supplies and services at a lower cost from the FSS than contracting directly with the vendor, due to the FSS program's ability to buy commercial supplies and services in volume.<sup>8</sup> The GSA accomplishes this by awarding vendors indefinite delivery/indefinite quantity (IDIQ)<sup>9</sup> contracts for their commercial supplies and services.<sup>10</sup> Currently, there are over 6.8 million commercial supplies and services available from more than 14,000 vendors on the GSA schedules.<sup>11</sup> These GSA schedules divide the vendors' commercial supplies and services into general categories, such as office supplies.<sup>12</sup> The general categories are then subdivided into numbered schedules that give a general description of the commercial supplies and services available within that numbered schedule along with a pricelist.<sup>13</sup> Government agencies use the schedule contractor pricelists to determine which schedule contractor offers the best price on the needed supplies and services.<sup>14</sup> The agencies then place task and delivery orders<sup>15</sup> for the needed commercial supplies and services to the schedule contractors who offer the best value.<sup>16</sup>

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<sup>7</sup> Sales Res. Consultants Inc., Comp. Gen. B-284943, B-284943.2, June 9, 200, 2000 CPD ¶ 102; FAR, *supra* note 2, at subpt. 8.404(a); John G. Stafford Jr. & Pang Khou Yank, *The Federal Supply Schedules Program*, Briefing Papers No. 04-05, 2 (Apr. 2004).

<sup>8</sup> KEYES, *supra* note 3, at 881.

<sup>9</sup> FAR, *supra* note 2, at 16.501-1. Indefinite delivery contracts are used when the exact time or amount of supplies or services is unknown at the time of contract formation. *Id.* "There are three types of indefinite-delivery contracts: definite-quantity contracts, requirements contracts, and indefinite-quantity contracts." *Id.* at 16.501-2(a).

The indefinite delivery/indefinite quantity contract allows the government to place orders for supplies or services when they are needed during a fixed period. *Id.* at 16.504(a). The orders placed must be within a stated amount provided for in the contract in either "number of units" or "dollar values." *Id.*

<sup>10</sup> Stafford & Yank, *supra* note 7, at 2.

<sup>11</sup> Current FSS data is available from the GSA website. General Services Administration, *GSA Schedules*, at [http://www.gsa.gov/Portal/gsa/ep/contentView.do?contentId=8106&contentType=GSA\\_OVERVIEW](http://www.gsa.gov/Portal/gsa/ep/contentView.do?contentId=8106&contentType=GSA_OVERVIEW) (last visited May 17, 2005) [hereinafter *GSA Schedules*].

<sup>12</sup> Past GSA FSS are available from the GSA website. General Services Administration, *GSA Schedules e-Library*, at <http://www.gsaelibrary.gsa.gov/ElibMain/ElibHome> (last visited May 2, 2005) [hereinafter *GSA Schedules e-Library*].

<sup>13</sup> *Id.*

<sup>14</sup> Stafford & Yank, *supra* note 7, at 2.

<sup>15</sup> "Pursuant to 10 U.S.C. § 2304d and section 303K of the Federal Property and Administrative Services Act of 1949, task and delivery order contracts are also known as

With the ease of the FSS purchase process, the amount of supplies and services purchased using the FSS has increased substantially in recent years due to legislative changes to streamline further the acquisition process.<sup>17</sup> The increase in FSS purchases is evident in the statistics provided in the Government Accountability Office's (GAO)<sup>18</sup> annual reports. For example, FSS purchases totaled \$8.1 billion in fiscal year (FY) 1997,<sup>19</sup> and \$34.96 billion in FY 2004,<sup>20</sup> thus making a 25 billion dollar increase in FSS sales in less than ten years.

Although the FSS is designed to simplify purchases for supplies and services, government agencies must still comply with the Federal Acquisition Regulation (FAR)<sup>21</sup> when ordering commercial supplies and services at various threshold amounts.<sup>22</sup> These ordering procedures are in place to assist the government in achieving the best value through competition for available commercial supplies and services using government funds.<sup>23</sup> Further, FAR section 8.404(a),<sup>24</sup> Use of Federal

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requirements contracts and indefinite quantity contracts." FAR, *supra* note 2, at 16.501-2(a).

<sup>16</sup> Stafford & Yank, *supra* note 7, at 2.

<sup>17</sup> *Id.* at 1. This Briefing Paper focuses on the impact of the Federal Acquisition Streamlining Act (FASA), Pub. L. No. 103-355, 108 Stat. 3243 (1994) and Clinger-Cohen Act, Pub. L. No. 104-106, 110 Stat. 186 (1996), on purchases under the FSS program. The Briefing Paper identified the concept that FASA and Clinger-Cohen were enacted to have the federal government to purchase more supplies and services using the commercial contracting methods that GSA could provide. *Id.*

<sup>18</sup> The Government Accountability Office (GAO) evaluates almost every federal program, activity, and function on behalf of Congress to improve government operations through legislation and provide financial benefits to taxpayers. Government Accountability Office, *History of the GAO*, at <http://www.gao.gov/about/history> (last visited May 2, 2005) [hereinafter *GAO History*]. Specifically, the GAO, through its Inspector General, will review the FSS and how purchases are being made by government agencies and will hear bid protests on issues arising under government contracting. *Id.*

<sup>19</sup> *GSA 1997 Annual Report*, GENERAL SERVS. ADMIN., Sept. 30, 1997, at 44, available at [http://www.gsa.gov/gsa/cm\\_attachments/GSA\\_DOCUMENT/1997AnnRpt\\_R2F\\_aAB\\_0Z5RDZ-i34K-pR.doc](http://www.gsa.gov/gsa/cm_attachments/GSA_DOCUMENT/1997AnnRpt_R2F_aAB_0Z5RDZ-i34K-pR.doc) [hereinafter *GSA 1997 Ann. Rep.*].

<sup>20</sup> See *GSA 2004 Ann. Rep.*, *supra* note 1.

<sup>21</sup> The *Federal Acquisition Regulation* (FAR) is a system that codifies and publishes "uniform policies and procedures for acquisition by all executive agencies." FAR, *supra* note 2, at 1.101. The FAR system consists of the primary document of the FAR, "and agency acquisition regulations that implement or supplement the FAR," such as the *Army Federal Acquisition Regulation* (AFAR), the *Defense Federal Acquisition Regulation* (DFAR) and the *Special Operations Federal Acquisition Regulation* (SOFAR). *Id.*

<sup>22</sup> *Id.* at 8.404(b)(1)-(3).

<sup>23</sup> *Id.* at 8.404(a). Competition under the FSS is determined as follows:

Supply Schedules, exempts the requirements under the FAR for FSS purchases made through the contracting methods of sealed bidding,<sup>25</sup> negotiated procurements,<sup>26</sup> and simplified acquisitions.<sup>27</sup>

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Because orders placed against a MAS contract satisfy full and open competition, “ordering agencies need not seek further competition, synopsise the requirement, make a separate determination of fair and reasonable pricing, or consider small business programs” when buying off a schedule contract. Although this language seemingly eliminates the need for further competition, the FAR nonetheless requires some minimal competition among MAS vendors depending on the dollar value of the acquisition. Centered on “maximum order threshold” (based on bulk buying), such minimal competition requires the government to compare catalogs and pricelists among scheduled vendors, and sometimes negotiate price reductions with those vendors.

*Contract and Fiscal Law Developments of 2001—The Year in Review*, ARMY LAW., Jan./Feb. 2002, at 35-36 (internal footnotes omitted).

<sup>24</sup> FAR, *supra* note 2, at 8.404(a). FAR 8.404(a) states generally that Parts 13, Simplified Acquisition Procedures, 14, Sealed Bidding, 15, Contract by Negotiation, and 19, Small Business Program, do not apply to BPAs or orders placed against a FSS, since orders using the procedures in Subpart 8.4 are considered to have been issued using full and open competition.

<sup>25</sup> *Id.* at 14.101(e). Sealed bidding is a method of contracting that “awards a contract based upon submission of competitive bids in response to an invitation for bids from the government.” *Id.* These bids are then opened in a public forum at a prescribed date and time and the contract is awarded without discussions to the “responsible bidder whose bid, conform[ed] to the invitation for bids” and is the “most advantageous to the government, considering only price and the price-related factors included in the invitation” for bids. *Id.*

<sup>26</sup> *Id.* at 15.000-15.102. A negotiated procurement is any contract that is awarded using other than sealed bidding procedures. *Id.* at 15.000. There are two types of negotiation procurements: sole source acquisition where only one contractor has the required supply or service and competitive acquisitions where numerous contractor's supplies and services are put through three types of source selection processes and techniques, tradeoff, lowest price technically acceptable, and oral presentations, to determine which contractor to award. *Id.* at 15.101-1-15.102.

<sup>27</sup> *Id.* at pt. 13. Simplified acquisitions are acquisitions conducted using procedures such as the government purchase card, purchase orders, and Blanket Purchase Agreements for supplies or services not exceeding the simplified acquisition threshold of \$100,000, however, under FAR 13.5, the simplified acquisition threshold is \$5 million for certain supplies and services. *Id.* The purpose of simplified acquisition procedures is to “reduce administrative costs; improve opportunities for small, small disadvantaged, and women-owned small business concerns to obtain a fair proportion of Government contracts; promote efficiency and economy in contracting; and avoid unnecessary burdens for agencies and contractors.” *Id.* at 13.002(a)-(d).

When government agencies are looking to acquire best value<sup>28</sup> from the FSS, however, they will use FAR part 15, Contracting by Negotiation, procedures to hold a FAR part 15 type competition.<sup>29</sup> Even though contracting officers are not required under FAR section 8.404 to use FAR part 15 procedures when conducting negotiation-like competitions for FSS purchases, the GAO will apply FAR part 15 requirements when reviewing vendor protests.<sup>30</sup> The GAO determined that, “where an agency intends to use . . . an approach [for FSS procurements] that is like a competition in a negotiated procurement, . . . and a protest is filed, we will review the protested agency actions to ensure that they were reasonable and consistent with the terms of the solicitation.”<sup>31</sup> The GAO further held that, “while the provisions of FAR part 15 . . . do not directly apply, we analyze [the protest] by the standards applied to negotiated procurements.”<sup>32</sup> This standard of review contrasts with the language in FAR section 8.404, which states that, “[p]arts 13 (except 13.303-2(c)(3)), 14, 15, and 19 (except for the requirement at 19.202-1(e)(1)(iii)) do not apply to BPAs or orders placed against Federal Supply Schedules contracts.”<sup>33</sup> Therefore, contracting officers are not on notice that the GAO will apply FAR part 15 procedures when reviewing FSS purchases using negotiation-like procedures.

This article examines the purpose and history of the FSS and analyzes the current level of competition under the FSS. This article analyzes how FSS purchases through the use of Blanket Purchase Agreements (BPA), sole-source acquisitions, and unduly restrictive requirements limit competition. Specifically, this article concludes by

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<sup>28</sup> Best value is a determination by the government that the outcome of the acquisition will “provide the greatest overall benefit in response to the requirement.” *Id.* at 2.101. This means that the government agency can choose an item with a greater cost and higher quality as long as all the evaluation criteria are met. *Id.* at 15.101.

<sup>29</sup> Ralph C. Nash & John Cibinic, *Federal Supply Schedule Procurements: The Protest Process*, 16 NASH & CIBINIC REP. 5 ¶ 26 (2002).

<sup>30</sup> See *ATA Def. Indus., Inc. v. United States*, 38 Fed. Cl. 489 (1997); *Cross Match Tech., Inc.*, Comp. Gen. B-293024.3, B-293024.4, June 25, 2004; *Symplicity Corp.*, Comp. Gen. B-291902, Apr. 29, 2003; *Garner Multimedia, Inc.*, Comp. Gen. B-291651, Feb. 11, 2003, 2003 CPD ¶ 35 (holding that the agency failed to properly evaluate contractor quotations after applying FAR Part 15).

<sup>31</sup> *Uniband, Inc.*, Comp. Gen. B-289305, Feb. 8, 2002, 2002 CPD ¶ 51, at 7 (citations omitted); see also Nash & Cibinic, *supra* note 29, ¶ 26.

<sup>32</sup> *Digital Sys. Group, Inc.*, Comp. Gen. B-286931, B-286931.2, Mar. 7, 2001, 2001 CPD ¶ 50, at 6; see also Nash & Cibinic, *supra* note 29, ¶ 26.

<sup>33</sup> FAR, *supra* note 2, at 8.404(a).

analyzing recent protests on FSS acquisitions, that negotiation-like FSS competitions contradict the original intent of the FSS. This article concludes that contracting officers must apply FAR part 15 procedures when conducting FSS competitions over the simplified acquisition threshold and that the Department of Defense, Defense Federal Acquisition (DFAR) Supplement 208.404-70 should be added to FAR subpart 8.4 as a means to ensure full and open competition.

## II. How Did We Get Here?

In order to understand the changes in purchases made under the GSA FSS one must first look at the FSS program from its inception. This section discusses the purpose of the GSA FSS and the statutory changes that have affected the GSA FSS in the past twenty years. This section will demonstrate how the GSA FSS transformed from a highly regulated procurement vehicle to a streamlined method for government agencies to obtain commercial supplies and services through regulatory and statutory changes and how ultimately these changes limited competition.<sup>34</sup>

### A. The GSA FSS Program

Section 201 of the Federal Property and Administrative Service Act of 1949,<sup>35</sup> gives the GSA authority to administer the FSS program.<sup>36</sup> The purpose of the FSS program is to provide government agencies with a convenient method of purchasing supplies and services by taking advantage of commercial buying practices, thereby saving the government time and money through volume buying.<sup>37</sup> The GSA provides two types of schedules to accomplish its purpose. The first is the single award schedule, whereby a contract is awarded to one

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<sup>34</sup> Gov't Accountability Office, *Ineffective Management of GSA's Multiple Award Schedule Program— A Costly, Serious, and Longstanding Problem*, PSAD-79-71, at 47-48 (May 1979) (concluding that due to GSA's poor management of the multiple award schedule, legislation mandating action to ensure price competition and competitive purchase methods was needed); JAMES F. NAGLE, *HISTORY OF GOVERNMENT CONTRACTING* 511 (2d ed. 1999).

<sup>35</sup> 40 U.S.C. § 501(b) (2000).

<sup>36</sup> Michael Fames Lohnes, *Attempting to Spur Competition for Orders Placed Under Multiple Award Task Order and MAS Contracts: The Journey to the Unworkable Section 803*, 33 PUB. CONT. L.J. 599, 602 (2004).

<sup>37</sup> *Id.*

contractor to provide a single product at a specific price and location.<sup>38</sup> The second, and most used, is the multiple award schedule (MAS)<sup>39</sup> in which the GSA negotiates indefinite delivery/indefinite quantity contracts with thousands of contractors for millions of commercial supplies and services.<sup>40</sup> Once the government awards contracts to the vendors the GSA issues a catalog, separated into general categories and subcategories, known as the FSS or schedules to government agencies.<sup>41</sup> This catalog contains pricelists for every supply and service that a schedule contractor offers.<sup>42</sup> The pricelist also contains a listing of the terms and conditions of each item on the schedule.<sup>43</sup> Government agencies, in turn, use the FSS catalog to place orders with the contractors listed in the schedule.<sup>44</sup> The schedules make ordering commercial supplies and services easy, allowing government agencies to obligate funds on the FSS purchases quickly.<sup>45</sup>

The success of the FSS is evident in the number and variety of schedule contractors in the program. According to the GSA, the FSS program has more than 14,000 contractors providing more than 6.8 million products and services.<sup>46</sup> This adds up to more than 34 billion dollars of government purchases from the FSS each year and the amounts purchased keep rising.<sup>47</sup> However, even with the large number of contractors and items available on the FSS, competition in contracting is a concern for the federal government, which spends billions of dollars each year on goods and services.<sup>48</sup>

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<sup>38</sup> Stafford & Yank, *supra* note 7, at 2.

<sup>39</sup> Multiple award schedules (MAS) are contracts awarded by GSA for supplies and services with more than one schedule contractor. FAR, *supra* note 2, at 8.401. "The primary statutory authority for the MAS program is derived from both Title III of the Administrative Services Act of 1949 and Title 40 U.S.C., Public Buildings, Property and Works." *Id.*

<sup>40</sup> Stafford & Yank, *supra* note 7, at 2.

<sup>41</sup> Lohnes, *supra* note 36, at 602.

<sup>42</sup> FAR, *supra* note 2, at 8.402(b).

<sup>43</sup> *Id.*

<sup>44</sup> Lohnes, *supra* note 36, at 602.

<sup>45</sup> John A. Howell, *Governmentwide Agency Contracts: Vehicle Overcrowding on the Procurement Highway*, 27 PUB. CONT. L.J. 395, 405 (1998).

<sup>46</sup> *GSA Overview*, *supra* note 1.

<sup>47</sup> *GSA 1997 Ann. Rep.*, *supra* note 19, at 44.

<sup>48</sup> NAGLE, *supra* note 34, at 496.



B. Competition in Contracting Act of 1984 (CICA)<sup>49</sup>

Congress enacted the CICA in response to a scandal involving government agencies spending thousands of dollars for readily available commercial items such as toilet seats, hammers, and wrenches.<sup>50</sup> Congress determined that these inflated costs resulted from inadequate competition for government contracts.<sup>51</sup> The CICA requires government agencies to seek full and open competition in contracting.<sup>52</sup> This means that government agencies must use competitive contracting procedures, allowing all responsible sources<sup>53</sup> to compete, through sealed bidding, contracting by negotiation and FSS purchases when obtaining supplies and services.<sup>54</sup>

The FSS program meets the requirements of a competitive contracting procedure in accordance with the CICA when participation in “the FSS program is open to all responsible sources and orders or contracts under the FSS program result in the lowest overall cost alternative to meet the needs of the government.”<sup>55</sup> In addition to the statutory requirements of the CICA, government agencies must also use the ordering procedures of FAR subpart 8.4 in order to satisfy all of the CICA’s requirements.<sup>56</sup> Further, the GAO has determined that if the government agency follows FAR subpart 8.4 ordering procedures<sup>57</sup> there is no requirement for the government agency to seek further competition outside the FSS.<sup>58</sup>

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<sup>49</sup> 10 U.S.C. § 2306 (2000).

<sup>50</sup> NAGLE, *supra* note 34, at 496. In 1983 inflation on routine items caught the attention of the country and Congress held hearings discussing “procurements of \$400 hammers, \$700 toilet seats, \$2,000 pliers, and \$9,000 wrenches.” *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> 10 U.S.C. § 2306.

<sup>53</sup> FAR, *supra* note 2, at 5.203. All responsible sources are defined as all vendors who could compete for the proposed contract. *Id.* FAR part 5.1, Dissemination of Information and FAR part 5.2, Synopses of Proposed Contract Actions, require that notification of contracts over specified amounts be publicized to all responsible sources. *Id.* at 5.1, 5.2. This is not the same with the FSS. Under the FSS all vendors currently on the schedule are deemed to be responsible sources and there is no requirement to go outside the FSS to fulfill contract requirements. *Id.* at 8.404(a).

<sup>54</sup> *Id.* at subpt. 6.1 (Full and Open Competition).

<sup>55</sup> Robert J. Sherry, et al., *The Present and Future of MAS Contracting*, 27 PUB. CONT. L.J. 369, 380 (1998) (citing 10 U.S.C. § 2302(2)(C) (1994)).

<sup>56</sup> Stafford & Yank, *supra* note 7, at 2.

<sup>57</sup> FAR, *supra* note 2, at 8.405.

<sup>58</sup> *FSS Program Satisfies Competition Requirements of CICA*, 42 GOV’T CONTRACTOR 25 ¶ 260 (2000) (citing 41 U.S.C. § 259(b)(3), FAR 6.102(d)(3), and Sales Res. Consultants,

### C. The Packard Commission

Even though the CICA's goal was to prevent any further scandal in government contracting, the GAO found that "over half of the top 100 defense contractors" were involved in "approximately 200 fraud investigations."<sup>59</sup> In an attempt to restore the public's trust in defense contracting, Congress and President Ronald W. Reagan "created the Blue Ribbon Commission on Defense Management" also known as the Packard Commission.<sup>60</sup>

In 1986, the Packard Commission submitted their report to the President regarding defense acquisitions.<sup>61</sup> This report emphasized that the Department of Defense (DOD) was spending too much money and too much time acquiring items that could be purchased commercially.<sup>62</sup> The Packard Commission's report found that even though the DOD acquisition program "is the largest business enterprise in the world" with purchases exceeding that of "General Motors, Exxon, and IBM combined," the DOD acquisition process was so cumbersome and overregulated that acquisition personnel could not use their own

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Inc, Comp. Gen. B-284943, B-284943.2, June 9, 2000, 2000 CPD ¶ 102). In *Sales Res. Consultants*, the Comptroller General held that an agency is not required to consider unsolicited offers from non-FSS vendors when making a purchase under the FSS because the program is open to all responsible sources and ensures selection of the lowest-cost alternative, therefore, requiring consideration of non-FSS vendor proposals is inconsistent with the purpose of the FSS. *Sales Res. Consultants, Inc.*, 2000 CPD ¶ 102 at 8.

<sup>59</sup> NAGLE, *supra* note 34, at 497.

<sup>60</sup> *Id.* (citing Pub. L. No. 99-433 100 Stat. 992 (1984)). President Reagan selected former Deputy Defense Secretary David Packard, who was the Chairman of the Board for Hewlett Packard to head the Commission, consequently resulting in the name the Packard Commission. *Id.*

<sup>61</sup> THE PRESIDENT'S BLUE RIBBON COMMISSION ON DEFENSE MANAGEMENT, *A FORMULA FOR ACTION* (Apr. 1986).

<sup>62</sup> *Id.* at 1. The report stated that:

All of our analysis leads us unequivocally to the conclusion that the defense acquisition system has basic problems that must be corrected. These problems are deeply entrenched and have developed over several decades from an increasingly bureaucratic and overregulated process. As a result, all too many of our weapon systems cost too much, take too long to develop, and, by the time they are fielded, incorporate obsolete technology.

*Id.* at 5.

judgment to determine how to purchase supplies.<sup>63</sup> Not only were acquisition personnel bound by rigid procurement regulations and statutes, the government itself insisted that contractors use only government specifications for items, even if a commercially available item would suffice.<sup>64</sup>

The Packard Commission's report concluded with several recommendations to streamline the acquisition process.<sup>65</sup> This included a recommendation to revamp existing procurement laws into one simplified statute applicable to all government agencies.<sup>66</sup> The Commission believed that Congress's and DOD's past attempts to improve the acquisition system by passing more intricate and detailed statutes and regulations only caused the acquisition system to become so cumbersome that it cost the government more money to purchase needed items.<sup>67</sup> Even though the commission made several recommendations to streamline the acquisition process, Congress implemented none of them.<sup>68</sup>

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<sup>63</sup> *Id.* at 3.

<sup>64</sup> *Id.* at 1. At the time of the Packard Commission, DOD made only a small percentage of its own equipment and relied on defense contractors to make manufacture everything that was needed, even if it was available in the commercial market place. *Id.* at 3. When creating an item for the military, the DOD would establish an approved set of military requirements that either require the contractor to come up with new technology to meet the military requirements. *Id.* at 6. The DOD would not allow the contractors to deviate from these military requirements even when it would benefit the cost of the item. *Id.* at 7. At the time the contract was entered into, these requirements would only meet the needs of the military. *Id.* at 23. However, with advances in technology, these once military items became items that were available to the public and readily purchased. *Id.* The DOD would maintain the military requirement for the item, even though they could save money purchasing the commercial item off the contractor's shelf. *Id.* at 25.

<sup>65</sup> *Id.* at 15-33. The Commission recommended streamlining acquisition organization and procedures by: (1) creating through statute a new position of Under Secretary of Defense (Acquisition) and the appointment of an additional Level II in the Office of the Secretary of Defense (OSD); the presidential appointment of a comparable senior civilian in the Army, Navy, and Air Force who would then appoint numerous program executive officers and reduce the number of acquisition personnel; and simplified government-wide procurement statutes; (2) using technology to reduce procurement costs; (3) balance cost and performance through trade-offs; (4) stabilize procurement programs through "baselining" major weapon systems and expanding "multi-year procurement for high-priority systems;" (5) expand the use of commercial off the shelf items; (6) increase the use of competition through the use of commercial practices; (7) enhance the quality of acquisition personnel through education and training. *Id.* at 15-33.

<sup>66</sup> *Id.* at 18.

<sup>67</sup> *Id.*

<sup>68</sup> NAGLE, *supra* note 34, at 498.

D. The Section 800 Panel<sup>69</sup>

The Packard Commission's recommendations were given new life in 1990, when Congress directed the DOD to establish a panel to study the various acquisition methods and laws, and to recommend how best to streamline those laws, regulations and the acquisition process.<sup>70</sup> Congress gave the panel two years to complete the study and provide a report.<sup>71</sup>

*1. Truth In Negotiations Act (TINA)*

The Section 800 Panel released their extensive report entitled "Streamlining the Defense Acquisition Law" to Congress on January 12, 1993.<sup>72</sup> In the report, the Panel recommended amending and repealing various statutes to include recommending relief from the TINA<sup>73</sup> when contracting for commercial items.<sup>74</sup> The TINA requires that contractors certify certain cost or pricing data when conducting negotiated contracts with the government.<sup>75</sup> As a result, contractors must provide all information that "prudent buyers and sellers would reasonably expect to affect price negotiations significantly" and certify that the provided cost or pricing data is "current, accurate and complete" as of the date the contractor and the government agency agreed upon the price.<sup>76</sup> If a

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<sup>69</sup> Pub. L. No. 101-510, § 800, 104 Stat. 1587 (1990). Section 800 of the National Defense Authorization Act for Fiscal Year 1991, enacted 5 November 1990 mandated the DOD to study acquisition methods, adopting the name Section 800 Panel. See The Honorable Jeff Bingaman, *The Twelfth Annual Gilbert A. Cuneo Lecture: The Origins and Development of the Federal Acquisition Streamlining Act*, 145 MIL. L. REV. 149, 154 (1994).

<sup>70</sup> See Cheryl Lee Sandner & Mary Ita Snyder, *Multiple Award Task and Delivery Order Contracting: A Contracting Primer*, 30 PUB. CONT. L.J. 461, 462 (2001).

<sup>71</sup> Bingaman, *supra* note 69, at 157.

<sup>72</sup> NAGLE, *supra* note 34, at 511.

<sup>73</sup> 10 U.S.C. § 2306 (2000) (applying to defense contracts); 41 U.S.C. § 254b) (applying to civilian agencies).

<sup>74</sup> Richard J. Wall & Christopher B. Pockney, *Revisiting Commercial Pricing Reform*, 27 PUB. CONT. L.J. 315, 317-18 (1998).

<sup>75</sup> 10 U.S.C. § 2306. Prior to the passage of the statutory changes to TINA through FASA and FARA, contractors had to certify cost or pricing data on contracts over \$100,000. After the passage of FASA and FARA that amount was raised to \$500,000. See Major Nathanael Causey et al., *1994 Contract Law Developments— The Year in Review*, ARMY LAW., Feb. 1995, at 5.

<sup>76</sup> James W. Brown & James E. Shipley, Jr., *Defense Commercial Pricing Management Improvement: Back to the Commercial Acquisition Reform Drawing Board?*, 18 J.L. & COM. 31, 34 (1998) (citing 10 U.S.C. § 2306a).

contractor fails to certify properly the cost or pricing data, the government agency may bring a “defective pricing claim” against the contractor.<sup>77</sup> Under a defective pricing claim, the government agency can demand compensation for the effect of the inaccurate data through a reduction in the contract price.<sup>78</sup> Contractors complain that they should not have to provide any cost or pricing data since that information is not provided to commercial customers and is therefore inconsistent with “commercial sales practices.”<sup>79</sup>

The TINA, however, does contain an exception for “catalog or market prices of commercial items sold in substantial quantities to the general public.”<sup>80</sup> Federal Supply Schedule contracts are negotiated under this exemption to the TINA when the GSA conducts a reasonable price analysis of the commercial items to ensure they are receiving the same discounted price of a commercial customer.<sup>81</sup>

## 2. *The Federal Acquisition Streamlining Act (FASA)*<sup>82</sup>

In addition to the Panel’s recommendations to amend the TINA, the Panel also recommended overhauling the procurement system by enacting new laws which also affected the TINA by eliminating cost and pricing data certification.<sup>83</sup> One such law, the FASA<sup>84</sup> sought to reduce the costs and administrative burden of government contracting through the proper utilization of the FSS.<sup>85</sup>

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<sup>77</sup> *Id.* (citing 10 U.S.C. § 2306a).

<sup>78</sup> *Id.*

<sup>79</sup> *Offices of the GSA Inspector General and VA Inspector General, Procurement Reform and the MAS Program -- Safeguarding the Taxpayer’s Interests*, GENERAL SERVS. ADMIN., July 1995, at 6, 12, available at [http://www.gsa.gov/gsa/cm\\_attachments/GSA\\_DOCUMENT/reform\\_R2W\\_t35-0Z5RDZ-i34k-pR.doc](http://www.gsa.gov/gsa/cm_attachments/GSA_DOCUMENT/reform_R2W_t35-0Z5RDZ-i34k-pR.doc) [hereinafter *GSA IG Position Paper*]. The contractors argue that no information regarding discounts is given to any commercial customer and that time and money are wasted by contractors gathering this information for the government. *Id.*

<sup>80</sup> Brown & Shipley, *supra* note 76, at 34 (citing 10 U.S.C. § 2306a(b)).

<sup>81</sup> *GSA IG Position Paper*, *supra* note 79, at 11-12 (citing 10 U.S.C. § 2306 (1994) and 48 C.F.R. § 15-804-3(h) (1994)).

<sup>82</sup> Pub. L. No. 103-355, 108 Stat. 3243 (1994).

<sup>83</sup> NAGLE, *supra* note 34, at 511.

<sup>84</sup> Pub. L. No. 103-355, 108 Stat. 3243.

<sup>85</sup> Sandner & Snyder, *supra* note 70, at 462.

The Federal Acquisition Streamlining Act of 1994 radically changed federal acquisition laws.<sup>86</sup> The Act, as its name implies, “promotes the Government’s use of flexible, streamlined procedures to purchase supplies and services to achieve procurement efficiencies and price savings.”<sup>87</sup> The provisions of the FASA which have had the greatest impact on the FSS are those dealing with the definition of commercial items, cost and pricing data requirements, and the evaluation of offers. For instance, section 8001 of the FASA broadened the definition of commercial item.<sup>88</sup> Before the FASA, an item had to be “sold in substantial quantities to the general public” in order to qualify as a commercial item.<sup>89</sup> Under the FASA, commercial items include products sold, offered for sale or offered to the government in time to meet its requirements.<sup>90</sup> The FASA also increased the simplified acquisition threshold from \$25,000 to \$100,000, thereby increasing the amount of supplies and services that could be acquired by government agencies using simplified acquisition procedures, which includes the FSS.<sup>91</sup> The FASA also amended the TINA by eliminating certified cost and pricing data for purchases less than \$500,000, in addition to eliminating or severely limiting the previous requirements for cost and pricing data on contract modifications.<sup>92</sup> As a result, the government relies on competition in the commercial market place to obtain fair and reasonable pricing rather than a price set through negotiation, which may be more than the market price.<sup>93</sup>

Most importantly, the FASA allowed contracting officers to consider best value—or factors other than price—when conducting simplified acquisition procurements, including FSS purchases.<sup>94</sup> However, contracting officers must still be fair and reasonable when evaluating offers from FSS contractors.<sup>95</sup> The FASA requires contracting officers acquiring supplies or services under FSS contracts to provide offerors

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<sup>86</sup> NAGLE, *supra* note 34, at 515-16.

<sup>87</sup> Linda S. Lebowitz, *Bid Protest Issues Arising in Commercial Item Acquisitions*, 27 PUB. CONT. L.J. 429 (1998).

<sup>88</sup> Pub. L. No. 103-355, 108 Stat. 3243 (1994).

<sup>89</sup> Wall & Pockney, *supra* note 74, at 319.

<sup>90</sup> *Id.* (citing FASA § 8001(a)(2)(B), 108 Stat. at 3384).

<sup>91</sup> 60 Fed. Reg. 34,784 (1996) (amending FAR 13.101 of 1994 and implementing FASA § 1502).

<sup>92</sup> Wall & Pockney, *supra* note 74, at 319.

<sup>93</sup> *Id.*

<sup>94</sup> Faculty, The Judge Advocate General’s School, *TJAGSA Practice Notes, Contract Law Notes, New Simplified Acquisition Rule Issued*, ARMY LAW., Nov. 1995, at 35.

<sup>95</sup> Lebowitz, *supra* note 87, at 429.

with a “fair opportunity to be considered”<sup>96</sup> on each order over the micro-purchase threshold.<sup>97</sup> Under the FASA this means that each solicitation shall contain a “statement of work (SOW),<sup>98</sup> specifications,<sup>99</sup> or other description that reasonably describes the general scope, nature, complexity, and purposes of the services or property to be procured under the contract.”<sup>100</sup>

### 3. *The Clinger-Cohen Act of 1996*<sup>101</sup>

Soon after Congress passed the FASA, it passed the Clinger-Cohen Act of 1996, also known as the Federal Acquisition Reform Act (FARA).<sup>102</sup> The Clinger-Cohen Act further amended the TINA by completely removing the catalog or market price exception for cost and pricing data and adding an exception for all commercial items.<sup>103</sup> All the contractor needs to do to qualify for this exception is to show that its goods and services meet the current definition of commercial item.<sup>104</sup> Consequently, government agencies no longer receive a guaranteed price or know the prices offered to commercial customers.<sup>105</sup>

The Clinger-Cohen Act also abolished the requirements for contractors to allow the government to audit and inspect contractor records for commercial products, including FSS contracts.<sup>106</sup> The Clinger-Cohen Act further eliminated the requirement of contractors to

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<sup>96</sup> FAR 16.505(b)(1) requires contracting officers to consider all vendors equally for MAS contracts over \$2,500. Even though the contracting officer has “broad discretion” determining which contracting procedures to use, the contracting officer must ensure that the procedures used will fairly consider each vendor and that the method used does not allocate or designate any preferred vendor. FAR, *supra* note 2, at 16.505(b)(1).

<sup>97</sup> Lohnes, *supra* note 36, at 605.

<sup>98</sup> A statement of work (SOW) is the section of the contract that defines “the work to be performed; location of work; period of performance; deliverable schedule; applicable performance standards; and any special requirements.” FAR, *supra* note 2, at 8.405-2.

<sup>99</sup> Specifications are the defined needs of the government agency stated as requirements in the contract of what functions to perform; what type of performance is required; or the essential physical characteristics of the item needed. *Id.* at 11.002(a)(2).

<sup>100</sup> Sandner & Snyder, *supra* note 70, at 478 (citing 10 U.S.C. § 2304 a(b)(3) (1994)).

<sup>101</sup> Pub. L. No. 104-106, 110 Stat. 186 (1996).

<sup>102</sup> *Id.*

<sup>103</sup> Wall & Pockney, *supra* note 74, at 319.

<sup>104</sup> *Id.*

<sup>105</sup> GSA IG Position Paper, *supra* note 79, at 3.

<sup>106</sup> NAGLE, *supra* note 34, at 517.

keep records of what it sold to the government and to other enterprises.<sup>107</sup> These changes were made to further streamline the acquisition process and use market forces to obtain the best value; however, the GAO Inspector General cautioned that eliminating audit rights and recordkeeping requirements would “eliminate or render ineffective key safeguards” in the procurement process which allowed the government to obtain best value.<sup>108</sup>

E. Section 803 of the National Defense Authorization Act for Fiscal Year 2002<sup>109</sup>

Congress imposed competition requirements in section 803 of the National Defense Authorization Act for Fiscal Year 2002 for the DOD, despite the enactment of the FASA and the FARA, due to what was viewed as a lack of competition in DOD purchases.<sup>110</sup> Section 803 requires contracting officers to implement procedures to promote competition.<sup>111</sup> It specifically requires contracting officers to award contracts on a competitive basis, even when making purchases under the FSS, unless an exception applies waiving the competition requirement.<sup>112</sup> The DFAR Supplement 208.404-70, implemented these changes, requiring contracting officers to provide notice of an intent to make a purchase over the simplified acquisition threshold to as many FSS vendors as practicable.<sup>113</sup>

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<sup>107</sup> *Id.*

<sup>108</sup> Wall & Pockney, *supra* note 74, at 330 (citing *GSA IG Position Paper*, *supra* note 79, at 11). The GSA IG was referring to requirements on vendors to disclose price and cost data, to certify that cost and pricing data, to provide price reductions when the contractor provides them to commercial customers, and to audit contracts up to three years after final payment if the vendor chose to do so. The IG argued that eliminating these requirements would “dilute” the government’s ability to use its volume buying power to get the best value for the taxpayer’s dollar. *GSA IG Position Paper*, *supra* note 79, at 11-25.

<sup>109</sup> Pub. L. No. 107-107, 115 Stat. 1012 (2001).

<sup>110</sup> Brown & Shipley, *supra* note 76, at 41-44.

<sup>111</sup> See Gov’t Accountability Office, *Contract Management: Guidance Needed to Promote Competition for Defense Task Orders*, GAO-04-874, at 2 (July 2004) [hereinafter GAO Report No. GAO-04-874].

<sup>112</sup> *Contract and Fiscal Law Developments of 2002—The Year in Review*, ARMY LAW., Jan./Feb. 2003, at 59.

<sup>113</sup> U.S. DEP’T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. 208.404-70 (Apr. 2005) [hereinafter DFAR]. This supplement requires that MAS contracts for services be placed on a competitive basis as follows:



## F. Federal Acquisition Regulation

The FAR subpart 8.4 governs the purchase of supplies and services by government agencies using the GSA FSS.<sup>114</sup> Pursuant to FAR section 8.404, contracting officers do not have to seek competition outside the FSS or “synthesize the requirement.”<sup>115</sup> However, FAR section 8.405-2 does give specific requirements that contracting officers must follow when ordering supplies or services requiring a SOW or when the order exceeds the micro-purchase threshold.<sup>116</sup> If contracting officers follow the procedures set out in FAR subpart 8.4, orders from the FSS are deemed to have been made on a competitive basis.<sup>117</sup>

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(c) An order for services exceeding \$100,000 is placed on a competitive basis only if the contracting officer provides a fair notice of the intent to make the purchase, including a description of the work the contractor shall perform and the basis upon which the contracting officer will make the selection to -

(1) As many schedule contractors as practicable, consistent with market research appropriate to the circumstances, to reasonably ensure that offers will be received from at least three contractors that can fulfill the work requirements, and the contracting officer --

(i)(A) Receives offers from at least three contractors that can fulfill the work requirements; or

(B) Determines in writing that no additional contractors that can fulfill the work requirements could be identified despite reasonable efforts to do so (documentation should clearly explain efforts made to obtain offers from at least three contractors); and

(ii) Ensures all offers received are fairly considered; or

(2) All contractors offering the required services under the applicable multiple award schedule, and affords all contractors responding to the notice a fair opportunity to submit an offer and have the offer fairly considered. Posting of a request for quotations on the General Services Administration's electronic quote system, “e-Buy” ([www.gsaAdvantage.gov](http://www.gsaAdvantage.gov)), is one medium for providing fair notice to all contractors as required by this paragraph (c).

*Id.*

<sup>114</sup> See generally FAR, *supra* note 2, at subpt. 8.4.

<sup>115</sup> *Id.* at 8.404(a). A synopsis is a method of disseminating information about a proposed contract to possible vendors. For acquisitions of supplies and services over \$25,000, the contracting officer must synopsise the proposed contract and submit it to [fedbizopps.gov](http://fedbizopps.gov). *Id.* at 5.101-5.202. However, if purchases are being made under the FSS no synopsis is required. *Id.* at 8.404(a).

<sup>116</sup> *Id.* at subpt. 8.405-2.

<sup>117</sup> Lohnes, *supra* note 36, at 610.

### III. Competition is Limited Under the FSS

The FSS program meets the competition standard of full and open competition when the GSA authorizes all responsible sources to compete for placement on a schedule.<sup>118</sup> The FAR authorizes government agencies various contracting vehicles under the FSS program: blanket purchase agreements, sole-source acquisitions, and negation-like competitions between FSS vendors.<sup>119</sup> Following the rules applicable to these contract vehicles ensures compliance with the competition standards.<sup>120</sup> However, these contract vehicles actually limit the competition that Congress intended when used under the FSS.<sup>121</sup> This section of the article will explore how these contract vehicles, when used under the FSS limit competition, thwart congressional intent.

#### A. Blanket Purchase Agreements (BPA)

A BPA is a simplified method of meeting the anticipated and repetitive needs for supplies and services of a government agency.<sup>122</sup> Government agencies establish charge accounts with one vendor or multiple vendors to provide maximum competition, simply ordering from the selected contractor(s) whenever the supply or service is needed.<sup>123</sup> Contracting officers may establish BPAs upon the determination that a BPA would be advantageous due to the varying amounts and variety of supplies and services required,<sup>124</sup> when there is a need to provide commercial supplies and services to more than one office or area that cannot purchase independently,<sup>125</sup> when avoiding the need to write numerous purchase orders,<sup>126</sup> or when there is no existing

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<sup>118</sup> Sales Res. Consultants, Inc, Comp. Gen. B-284943, B-284943.2, June 9, 2000, 2000 CPD ¶ 102, at 7.

<sup>119</sup> FAR, *supra* note 2, at 8.405-2, 8.405-3, 8.405-6.

<sup>120</sup> *Id.* at 8.405.

<sup>121</sup> Ralph C. Nash & John Cibinic, *Contracting Methods: Square Pegs and Round Holes*, 15 NASH & CIBINIC REP. 9 ¶ 48 (2001) (citing H.R. CONF. REP. NO. 98-861, June 23, 1984, which states: “the conferees believe that schedule contracts are a worthwhile method of meeting agency needs for a broad range of commercial products, while imposing a minimum administrative burden on the using agencies . . . and should be used when GSA can negotiate quantity discount[s].”).

<sup>122</sup> FAR, *supra* note 2, at 8.405-3(a)(1).

<sup>123</sup> *Id.* at 13.303-1(a).

<sup>124</sup> *Id.* at 13.303-2(a)(1).

<sup>125</sup> *Id.* at 13.303-2(a)(2).

<sup>126</sup> *Id.* at 13.303-2(a)(3).

contract for the supply or service used.<sup>127</sup> Once the contracting officer determines that “a BPA would be advantageous,” the contracting officer must establish purchase parameters regarding individual items, groups or classes of items and which supplier to use.<sup>128</sup> However, the simplified acquisition threshold and the five million dollar limit on individual purchases of commercial items do not apply to BPAs established with FSS vendors.<sup>129</sup>

Once a BPA is established, it can remain in effect for five years, but must be reviewed annually.<sup>130</sup> When the contracting officer conducts the annual review of the BPA he or she must determine: whether the vendor is still under that schedule contract; whether the BPA is still the best value for the government; and whether additional price reductions could be obtained due to an increase in the amounts of supplies and services purchased.<sup>131</sup> Finally, the contracting officer must document the results of the annual review.<sup>132</sup>

Blanket purchase agreements limit competition when contracting officers use them to make large purchases, involving millions of dollars, from the FSS.<sup>133</sup> Using the FSS to establish BPAs is appealing to contracting officers since there is no dollar limit for individual purchases of commercial items.<sup>134</sup> If the contracting officer were to establish a BPA with a vendor outside the FSS, there would a dollar limitation based upon the simplified acquisition threshold of \$100,000 and the commercial item threshold of five million dollars.<sup>135</sup> By creating a BPA with one vendor under the FSS, the contracting officer can exceed the thresholds by ordering unlimited dollar amounts of items.<sup>136</sup> Therefore, contracting officers look to vendors on the FSS, rather than all potential vendors when establishing BPAs to avoid these dollar thresholds. Furthermore, once a BPA is established under the FSS, it may remain in place for five years and the contracting office does not have to notify the public or other contractors when an order is placed against that BPA

<sup>127</sup> *Id.* at 13.303-2(a)(4).

<sup>128</sup> *Id.* at 13.303-2(b).

<sup>129</sup> *Id.* at 13.303-5(b)(1).

<sup>130</sup> *Id.* at 8.405-3(c)-(d).

<sup>131</sup> *Id.* at 8.405-3(d)(1).

<sup>132</sup> *Id.* at 8.405-3(d)(2).

<sup>133</sup> Ralph C. Nash & John Cibinic, *Postscript: Federal Supply Schedule Protests*, 18 NASH & CIBINIC REP. 3 ¶ 9 (2004).

<sup>134</sup> FAR, *supra* note 2, at 13.303-5(b)(1).

<sup>135</sup> *Id.* at 13.303-5(b)(2).

<sup>136</sup> *Id.* at 13.303-5(b)(1).

through solicitation or synopsis.<sup>137</sup> Consequently, a contracting officer can order unlimited dollar amounts of items from one vendor for five years without having to consider whether other vendors both in and outside the FSS offer a better value.<sup>138</sup> Using BPAs in this manner saves time, but does not necessarily obtain the best value for the government.<sup>139</sup> Requiring contracting officers to meet competition requirements for BPAs is no different than the requirement of the FSS to allow vendors a fair opportunity to compete for an FSS contract. All vendors should have the opportunity to compete for a BPA to ensure the best value to the government, instead of having the contracting officer select one vendor for a multi-million dollar long-term BPA.

### *1. Department of Army's BPA for Office Products*

The Department of the Army currently has a mandatory BPA for office supplies with twelve FSS contractors.<sup>140</sup> The decision to use a BPA for office supplies was based upon the amount of office supply purchases the Army makes annually.<sup>141</sup> According to the memorandum, issued by the Office of the Assistant Secretary of the Army, Acquisition Logistics and Technology, Army Contracting Agency, the Army purchases an estimated \$100 million in office supplies annually.<sup>142</sup> The Army Contracting Agency (ACA) determined that most purchases are made without using the FSS, resulting in the Army paying full retail price for most office supplies instead of getting the benefit of volume buying from the FSS.<sup>143</sup> Further, "many of the purchases ignored the statutory mandate to obtain comparable products available from blind and severely disable vendors under the Javits-Wagner-O'Day (JWOD) Program."<sup>144</sup>

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<sup>137</sup> *Id.* at 8.405-3(c); Ralph C. Nash & John Cibinic, *Blanket Purchase Agreements: The Ultimate In "Acquisition Reform,"* 18 NASH & CIBINIC REP. 7 ¶ 32 (2004).

<sup>138</sup> *See generally* FAR, *supra* note 2, at pt. 13.

<sup>139</sup> Nash & Cibinic, *supra* note 137, ¶ 32.

<sup>140</sup> Memorandum, Army Contracting Agency, to Heads of Contracting Activities, subject: Mandatory Use of BPAs for Office Products for the Army (26 Sept. 2002) [hereinafter *Mandatory Use of Blanket Purchase Agreements (BPAs) for Office Products for the Army Memo*] (on file with the Contract and Fiscal Law Department, The Judge Advocate General's Legal Center and School).

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* (citing 41 U.S.C. §§ 46-48c (2000)). The Javits-Wagner-O'Day Act of 1971, established a mandatory source of supplies for government agencies from nonprofit

The Army instituted the BPA to “standardize the Army’s method of procuring office supplies while offering requiring activities better prices (by maximizing quantity discounts), delivery of orders as quickly as within 24 hours, and enhancing the Army’s commitment to support the JWOD Program,” while promoting “the use of small and/or disadvantaged businesses.”<sup>145</sup> The ACA believes that the mandatory BPA will “ensure compliance with the JWOD [P]rogram, as the suppliers will automatically substitute JWOD products for like commercial products.”<sup>146</sup>

Despite the Army’s goal of promoting, the JWOD program and small and/or disadvantaged businesses, one has to wonder how awarding approximately \$100 million in annual purchases to only twelve vendors truly meets the overarching goal of full and open competition in government contracting. Full and open competition requires the government to solicit all responsible sources.<sup>147</sup> This means that all vendors who are able to meet the requirements of the BPA will be able to compete for that contract. However, when a government agency determines that they only want FSS vendors for the BPA, the level of competition is limited to only those vendors listed on the schedules that meet the requirements of the contract. The selection of only one or a few vendors from the selected schedule is a further limitation on competition from the beginning of the acquisition process where all responsible vendors are able to compete. Therefore, while the FSS is considered full and open competition if all responsible sources are allowed to compete for an FSS contract, a BPA under the FSS limits the ability of even those vendors on the FSS to obtain a portion of a large FSS BPA.<sup>148</sup> For the

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agencies who employ people who are blind or have other severe disabilities who, in return, provide training and jobs for these individuals. 41 U.S.C. §§ 46-48c. Information about the JWOD program is available at the JWOD Program website, at <http://www.jwod.com> (last visited May 2, 2005).

<sup>145</sup> Mandatory Use of BPAs for Office Products for the Army Memo, *supra* note 140.

<sup>146</sup> *Id.* Three months later, the ACA issued another memorandum clarifying the previous memorandum that instituted the mandatory BPA. This memorandum reiterated the requirement to purchase office supplies from the mandatory BPA. The only exception would be purchases made with the local Self Service Supply Centers which are generally “operated by JWOD-participating nonprofit agencies.” Memorandum, Army Contracting Agency, to Heads of Contracting Activities, subject: Mandatory Blanket Purchase Agreements (BPAs) for Office Products (23 Dec. 2002) (on file with the the Contract and Fiscal Law Department, The Judge Advocate General’s Legal Center and School).

<sup>147</sup> FAR, *supra* note 2, at subpt. 6.1.

<sup>148</sup> Sales Res. Consultants, Inc, Comp. Gen. B-284943, B-284943.2, June 9, 2000, 2000 CPD ¶ 102, at 7.

Army, the ACA selected only twelve vendors, some of whom are large businesses, out of hundreds of available vendors under the office supply FSS for a BPA that could last up to five years.<sup>149</sup>

Because the Army BPA is under the FSS there is no limitation on the amount of an order.<sup>150</sup> The limitations of the simplified acquisition threshold and the five million dollar commercial items limitation does not apply to BPAs created under the FSS.<sup>151</sup> The Army BPA for office supplies will enter its third year in September 2005 without any changes to the listed vendors. Even though there are hundreds of FSS vendors offering office supplies, there are thousands of other office supply businesses not represented on the FSS that the Army did not have to consider and that do not have a chance to compete for office supply purchases from the Army.<sup>152</sup>

Furthermore, the mandatory BPA does not have an enforcement mechanism in place to ensure that only those vendors who support the JWOD or are small and/or disadvantaged businesses obtain all Army office supply requirements. Each time an office needs supplies, the local contracting officer could conceivably go to the local office supply store without any fear of punishment from ACA for violating the mandatory BPA. Consequently, it seems that while government agencies are using the streamlined contracting procedures of the FSS to obtain the required supplies and services, potential vendors who could offer the same or similar items at the same or lower price are left out of the BPA agreement. "If 'full and open competition' has any meaning, it is to keep agencies from handpicking a few sources with which to deal."<sup>153</sup>

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<sup>149</sup> Mandatory Use of BPAs for Office Products for the Army Memo, *supra* note 140, enclosure. The vendors selected for the Army's office products BPA are: Adams Marketing Associates, Inc., George W. Allen Company, Inc., BENTCO Office Solutions, Inc., Boise Cascade Office Products, CADDO Design and Office Products, Corporate Express, Creative Sales Solutions, Inc., Metro Office Products, Inc., Miller's Office Products, Office Depot, Staples National Advantage, and Stephens Office Supply. *Id.*

<sup>150</sup> FAR, *supra* note 2, at 13.303-5(b)(1).

<sup>151</sup> *Id.*

<sup>152</sup> *Sales Res. Consultants, Inc.*, 2000 CPD ¶ 102, at 8.

<sup>153</sup> *Nash & Cibinic*, *supra* note 29, ¶ 26.

## 2. BPA Protest

Protests involving BPAs typically involve long-term BPA contracts worth millions of dollars.<sup>154</sup> Even though BPAs are part of the simplified acquisition procedures, they are not subject to the simplified acquisition threshold if they are established with FSS contractors.<sup>155</sup> Therefore, there is no limit on the amount of an individual order under a BPA established through the FSS.<sup>156</sup> Despite the BPA advantage of a simplified ordering arrangement to cut down on the need to complete multiple purchase requests, contracting officers also use BPAs to avoid complex and time consuming FAR competition and synopsis requirements.<sup>157</sup>

An example of how government agencies use a FSS BPA to limit competition can be seen in *OMNIPLEX World Services Corporation* (OMNIPLEX).<sup>158</sup> In this case, the Immigration and Naturalization Service (INS)<sup>159</sup> issued a request for proposals (RFP)<sup>160</sup> to award a BPA for investigative services from only three offerors for a total cost of more than seventy-five million dollars.<sup>161</sup> The awards were “to be made to the three offerors submitting technically acceptable proposals with the lowest prices.”<sup>162</sup> Proposals from the offerors were required to contain all necessary information to conduct a comprehensive evaluation of the price proposed by the offeror for “price realism and reasonableness, as

<sup>154</sup> *Id.* (citing *RVJ Int’l Inc.*, Comp. Gen. B-292161, B-292161.2, July 2, 2003, 2003 CPD ¶ 124 and *KPMG Consulting LLP*, Comp. Gen. B-290716, B-290716.2, Sept. 23, 2002, 2002 CPD ¶ 196). *RVJ Int’l Inc.*, 2003 CPD ¶ 124, was a single award BPA with a fifty-three-month period of performance worth between \$352,000 and \$4.9 million. *Id.* at 2-4. *KPMG Consulting LLP*, 2002 CPD ¶ 196, was a single award BPA for five years worth approximately \$33 million. *Id.* at 2-3.

<sup>155</sup> *Nash & Cibinic*, *supra* note 121, ¶ 48 (citing FAR 13.303-2(c)(3)).

<sup>156</sup> *Id.*

<sup>157</sup> *Nash & Cibinic*, *supra* note 137, ¶ 32.

<sup>158</sup> *OMNIPLEX World Servs. Corp.*, Comp. Gen. B-291105, Nov. 6, 2002, 2002 CPD ¶ 199.

<sup>159</sup> The INS is now named the U.S. Bureau of Citizenship and Immigration Services (USCIS). The USCIS transitioned to the Department of Homeland Security on March 1, 2003, under the Homeland Security Act of 2002. Homeland Security Act of 2002, 6 U.S.C. § 271 (LEXIS 2004).

<sup>160</sup> A request for proposals is the name of the solicitation when using negotiated contracting procedures. A solicitation is “any request to submit offers or quotations to the Government.” FAR, *supra* note 2, at 2.101.

<sup>161</sup> *OMNIPLEX World Servs. Corp.*, 2002 CPD ¶ 199, at 1-5.

<sup>162</sup> *Id.* at 3.

well as total evaluated price.”<sup>163</sup> The INS evaluated the proposals and awarded the BPA to the three offerors with the lowest price.<sup>164</sup> OMNIPLEX argued that one of the winning vendors, B&W Technologies, “was improper and contrary to the terms of the solicitation.”<sup>165</sup> Specifically, OMNIPLEX asserted that the INS failed to properly evaluate B&W’s technical proposal in accordance with the solicitation and that the BPA awarded to B&W exceeded the scope of the FSS contract.<sup>166</sup>

The Comptroller General sustained OMNIPLEX’s protest addressing what it viewed as the misuse of a BPA to limit competition by the INS.<sup>167</sup> The Comptroller General opinion stated:

Here, it appears that INS and the private parties view the issuance of BPAs as the form of “down-select” that will effectively determine which vendors INS will consider to meet its requirements. Presumably because the process of issuing BPAs is serving as a key step in the selection process, the agency, instead of simply choosing among FSS vendors (with or without a BPA “charge account”), elected to conduct what was treated as a Part 15 negotiated procurement, beginning with the issuance of the RFP and continuing through the evaluation and selection process.<sup>168</sup>

In this case, the INS used a FAR part 15-type-competition to obtain the offer with the best value.<sup>169</sup> However, the case illustrates that the contracting officer was not genuinely seeking best value from multiple vendors for this BPA.<sup>170</sup> Here, the contracting officer selected a few of the available vendors from the FSS and further limited competition through the use of a negotiation-like competition.<sup>171</sup> Blanket purchase agreements that are awarded in this manner allow the contracting officer to limit competition from all responsible sources to a few vendors

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<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 5.

<sup>165</sup> *Id.* at 6.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 2, 7.

<sup>168</sup> *Id.* at 7.

<sup>169</sup> Nash & Cibinic, *supra* note 133, ¶ 9.

<sup>170</sup> *OMNIPLEX World Servs. Corp.*, 2002 CPD ¶ 199, at 7.

<sup>171</sup> *Id.* at 2.



available on the FSS.<sup>172</sup> The only true requirement to establish a BPA is the contracting officer's determination that a BPA is most advantageous to the government.<sup>173</sup> It was unnecessary to compete the requirement among the vendors.<sup>174</sup> The contracting officer merely needed to select any vendors it believed would meet the requirements of the RFP.<sup>175</sup> By conducting a negotiation-like competition to select a vendor for a BPA, the acquisition process was not streamlined, rather it was used as a means of limiting the number of vendors who can compete for and win the BPA award.<sup>176</sup>

#### B. Sole-Source Contracts

In addition to BPAs, contracting officers also use sole-source acquisitions under the FSS to limit competition.<sup>177</sup> Generally, government acquisitions must be conducted using full and open competition.<sup>178</sup> However, there are regulatory exceptions for other than full and open competition.<sup>179</sup> One such exception is when there is only one responsible source and no other supplies or services will satisfy agency requirements, or what is known as sole-source.<sup>180</sup> When an agency determines that there is only one responsible source, it must be able to support that determination through a justification and approval process documenting why the contract can only be awarded to one vendor.<sup>181</sup> However, contracting officers fail to properly award sole-source contracts in accordance with the requirements of FAR subpart 6.3, Other Than Full and Open Competition, thereby limiting competition.<sup>182</sup>

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<sup>172</sup> Nash & Cibinic, *supra* note 133, ¶ 9 (citing *OMNIPLEX World Servs. Corp.*, 2002 CPD ¶ 199).

<sup>173</sup> FAR, *supra* note 2, at 13.303.

<sup>174</sup> *OMNIPLEX World Servs. Corp.*, 2002 CPD ¶ 199, at 7.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*; see also Nash & Cibinic, *supra* note 29, ¶ 26.

<sup>177</sup> Nash & Cibinic, *supra* note 133, at ¶ 9.

<sup>178</sup> FAR, *supra* note 2, at pt. 6.

<sup>179</sup> *Id.* at subpt. 6.3.

<sup>180</sup> See generally *id.* at 6.302-1.

<sup>181</sup> See generally *id.* at 6.303.

<sup>182</sup> GAO Report No. GAO-04-874, *supra* note 111, at 3.

*1. Contracting Officers Inappropriately Using Sole-Source Contracts*

Despite the requirements for contracting officers to use competition to obtain best value from vendors under the FSS, contracting officers continually award to only one FSS vendor, typically the incumbent, without considering competition.<sup>183</sup> In November of 2000, the GAO released a report to Congress that determined that most DOD contracting officers did not follow procedures established by the GSA to ensure fair and reasonable prices when procuring commercial supplies and services using the FSS.<sup>184</sup> The GAO study found that a majority of contracting officers were not obtaining competitive quotes from multiple contractors prior to making purchases under the FSS.<sup>185</sup> This study led to the enactment of section 803 of the National Defense Authorization Act for FY 2002, which was subsequently implemented in *DFAR Supplement 208.404-70*, in an effort to increase competition.<sup>186</sup>

Section 803 of the National Defense Authorization Act for FY 2002 (FY 2002 NDAA) requires DOD contracting officers to solicit offers from all contractors that are offering the required services under a FSS contract exceeding the simplified acquisition threshold of \$100,000.<sup>187</sup> Contracting officers are required to solicit all contractors under the selected schedule or at least enough contractors to ensure the receipt of three offers.<sup>188</sup> If the contracting officer fails to obtain three offers, the contracting officer must determine in writing that no additional contractors could be identified despite reasonable efforts to do so.<sup>189</sup>

Based upon a requirement in the FY 2002 NDAA, the GAO conducted a subsequent study to: (1) identify the to extent to which competition requirements under section 803 were waived by the selected DOD organizations; and (2) determine the level of competition for available orders.<sup>190</sup> The results of the study showed that DOD contracting officers waived competition requirements in nearly half (34

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<sup>183</sup> *Id.* at 4.

<sup>184</sup> Gov't Accountability Office, *Contract Management: Not Following Procedures Undermines Best Pricing Under GSA's Schedule*, GAO-01-125, at 4 (Nov. 2000).

<sup>185</sup> *Id.*

<sup>186</sup> Pub. L. No. 107-107, 115 Stat. 1012 (2001); *see also* DFAR, *supra* note 113, 208.404-70.

<sup>187</sup> DFAR, *supra* note 113, at 208.404-70(c).

<sup>188</sup> *Id.* at 208.404-70(c)(1).

<sup>189</sup> *Id.* at 208.404-70(c)(1)(i)(B).

<sup>190</sup> GAO Report No. GAO-04-874, *supra* note 111, at 2.

of 74) of the FSS orders reviewed.<sup>191</sup> In most of these cases the contracting officer waived competition based on a determination that a sole-source award was the only viable option.<sup>192</sup> The GAO determined, however, that these competition waivers were based on a desire to retain the current contractor rather than waivers based upon the requirements of section 803 or FAR subpart 6.3.<sup>193</sup> The GAO identified that the “guidance for granting waivers did not sufficiently describe the circumstances under which a waiver of competition could be used. In addition, the requirements for documenting the basis for waivers were not specific, and there was no requirement that waivers be approved above the level of the contracting officer.”<sup>194</sup> The GAO concluded that competition was limited for most of the orders that were available for competition during the study.<sup>195</sup> Based upon the results of the study, GAO made three recommendations to the Secretary of Defense: “(1) [d]evelop additional guidance on the circumstances under which competition may be waived; (2) require detailed documentation to support competition waivers; and (3) establish approval levels above the contracting officers for waivers of competition on orders exceeding specified thresholds.”<sup>196</sup>

Even when contracting officers have specific competition requirements to meet, the lack of oversight and review limits the effect these requirements have on competition.<sup>197</sup> The recommendations from the July 2004 GAO study offer some guidance. However, enforcement is needed to ensure competition. This can be accomplished through either refusal by the GAO to authorize the award of FSS sole-source contracts without proper documentation or punishment of contracting officers who fail to properly meet competition requirements for sole-source acquisitions.

## 2. *Sole-Source Protest*

In addition to the aforementioned study, *REEP Inc.* (REEP), further illustrates how contracting officers limit competition by awarding sole-

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<sup>191</sup> *Id.* at 3.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 4.

<sup>195</sup> *Id.* at 3.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

source FSS contracts.<sup>198</sup> In *REEP*, the U.S. Army 5th Special Forces Group (SFG) required continuing language training services and had a current FSS contract with Worldwide Language Resources, Inc., (Worldwide) that was due to expire.<sup>199</sup> The 5th SFG issued two delivery orders to Worldwide without issuing a solicitation or receiving any competitive quotes.<sup>200</sup> Worldwide provided language training under schedule 69 and was the only vendor on that schedule that provided language training.<sup>201</sup> REEP and numerous other vendors had language training contracts under another schedule, 738-II.<sup>202</sup> REEP argued that it was improper for the agency to award delivery orders to Worldwide without considering other vendors on schedules other than schedule 69.<sup>203</sup>

The GAO agreed and sustained REEP's protest stating, that government agencies are required to "consider reasonably available information, typically by reviewing the prices of at least three schedule vendors" when purchasing goods and services under the FSS to ensure that it is meeting the requirement to "obtain the best value at the lowest overall cost to the Government."<sup>204</sup> The GAO determined that government agencies must consider information gleaned from other schedules in the FSS even though government agencies "are not required to conduct competitive acquisitions when making purchases under the FSS."<sup>205</sup> According to the GAO, failing to consider other applicable schedules did not meet the requirement of full and open competition.<sup>206</sup> The GAO commented on the 5th SFG's obvious attempt to limit competition by awarding a sole-source contract to Worldwide even though it knew there were other contractors that could provide language training and at a lower cost to the government.<sup>207</sup> The GAO stated:

Here the agency's only explanation for its actions is that it placed the delivery orders with Worldwide because it was the only vendor with a contract under FSS No. 69.

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<sup>198</sup> REEP, Inc., Comp. Gen. B-290665, Sept. 17, 2002, 2002 CPD ¶ 158, at 3.

<sup>199</sup> *Id.* at 2.

<sup>200</sup> *Id.* at 3.

<sup>201</sup> *Id.* at 5.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at 3.

<sup>204</sup> *Id.* at 4 (citing FAR § 8.404(b)(2) and Commercial Drapery Contractors, Inc., Comp. Gen. B-271222, B-271222.2, June 27, 1996, 96-1 CPD ¶ 290, at 3).

<sup>205</sup> *Id.* at 3-4.

<sup>206</sup> *Id.* at 5.

<sup>207</sup> *Id.*

However, the record shows that the agency had actual knowledge of numerous other vendors that offered the same language training services under FSS No. 738-II. The agency has not asserted that there is anything unique about the training offered by Worldwide under its FSS contract ... that would provide a basis for paying a price premium for the services. Accordingly, we find the agency failed to meet its obligation to consider reasonably available information, namely, the prices offered by other vendors under FSS No. 738-II, before placing its delivery orders with Worldwide. Had it done so, it would apparently have discovered that same requirement could be met at a lower overall cost to the government.<sup>208</sup>

In *REEP*, the contracting officer failed to follow the requirements of FAR Subpart 6.3 when sole-sourcing the language contract to Worldwide.<sup>209</sup> The contracting officer erroneously awarded Worldwide the language contract, determining it was the only responsible source under schedule 69 even though the contracting officer was aware that REEP also provided language training under another schedule as they previously protested the same language contract.<sup>210</sup> The contracting officer's actions in *REEP*, are the same as those highlighted in the July 2004 GAO study.<sup>211</sup> Contracting officers in the study were failing to compete contracts and instead waived competition to award the contract to the incumbent.<sup>212</sup> The contracting officer in *REEP* awarded the contract to the incumbent, Worldwide, rather than competing the requirement as required under section 803 of the FY 2002 NDAA.<sup>213</sup> Even though there is a competition requirement under section 803 of the FY 2002 NDAA, there is an exception for unusual and compelling urgency, where delay in awarding the contract would cause serious injury to the government.<sup>214</sup> However, in this case there is no evidence that the need for language training was urgent and compelling nor did the contracting officer document any urgent requirement.<sup>215</sup> Therefore, the

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<sup>208</sup> *Id.* at 4-5.

<sup>209</sup> *Id.* at 4.

<sup>210</sup> *Id.* at 3; REEP, Inc., Comp. Gen. B-290688, Sept. 20, 2002, 2002 CPD ¶ 156.

<sup>211</sup> GAO Report No. GAO-04-874, *supra* note 111, at 3.

<sup>212</sup> *Id.* at 3-6.

<sup>213</sup> *Id.* at 1-5.

<sup>214</sup> FAR, *supra* note 2, at 6.302-2.

<sup>215</sup> REEP, Inc., 2002 CPD ¶ 158, at 3-5.

contracting officer limited competition by awarding the contract to Worldwide on a sole-source basis.

*REEP* demonstrates how, without proper oversight, contracting officers can award millions of dollars in sole-source contracts to one vendor selected under the FSS.<sup>216</sup> There are millions of supplies and services and thousands of vendors from which to choose.<sup>217</sup> By limiting the pool to only one vendor or schedule, contracting officers fail to use potential competition among FSS vendors to obtain best value for the government.<sup>218</sup>

### C. Unduly Restrictive Requirements

Contracting officers also have great discretion in determining which contractors can compete for FSS awards.<sup>219</sup> Contracting officers can exclude contractors from participation in the competition for an FSS award if they determine that the contractor will not provide best value to the government and if the contracting officer has a sufficient number of other contractors competing for the award.<sup>220</sup> Contracting officers may also exclude contractors from competition by writing restrictive requirements and pre-selecting contractors that meet the unduly restrictive requirements.<sup>221</sup>

In *Delta International Inc.* (Delta), the Federal Bureau of Investigation (FBI) issued a purchase order for portable x-ray inspection systems from Science Applications International Corporation (SAIC).<sup>222</sup> The FBI did not consider purchasing the portable x-ray inspection systems from Delta because it believed that only the SAIC portable x-ray machine would meet the needs of the FBI.<sup>223</sup> When questioned by the

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<sup>216</sup> *Id.*

<sup>217</sup> *GSA Schedules*, *supra* note 11.

<sup>218</sup> *REEP, Inc.*, 2002 CPD ¶ 158, at 5.

<sup>219</sup> Ralph C. Nash & John Cibinic, *Federal Supply Schedule Procurements: Choosing The Right Schedules*, 17 NASH & CIBINIC REP. 1 ¶ 1 (2003).

<sup>220</sup> *Id.*

<sup>221</sup> Nash & Cibinic, *supra* note 29, ¶ 26.

<sup>222</sup> *Delta Int'l, Inc.*, Comp. Gen. B-284364.2, May 11, 2000, 2000 CPD ¶ 78, at 1.

<sup>223</sup> *Id.* at 2-3. The FBI wanted a fully digitized machine and believed that only SAIC's machine met that requirement. *Id.* at 9. However, Delta's machine was also digitized, thereby meeting the FBI's requirements. *Id.* at 10.

GAO, the contracting officer could not identify what qualities of the SAIC machine made it more desirable than the Delta machine.<sup>224</sup>

The GAO sustained the protest concluding that the FBI's requirements were too restrictive.<sup>225</sup> Specifically, the GAO stated that:

In connection with an FSS purchase in excess of the micro-purchase threshold, a bid protest [that] challenges an agency's definition of its needs that excludes consideration of supplies or services offered by the protesting FSS vendor, we will review the agency's documentation, including its report to our Office, in order to determine whether the agency's definition of its needs has a reasonable basis.<sup>226</sup>

Although the needs of the agency and the determination of which products meet those needs are within the discretion of the contracting officer, the agency determination must have a reasonable basis.<sup>227</sup> Again, as with other contracting vehicles, there is no oversight, other than protest by an eliminated vendor, to determine whether the requirements are reasonable and not unduly restrictive. Without oversight, contracting officers can continue to eliminate vendors from competition by drafting contract requirements so restrictively that only one, pre-selected vendor can meet those requirements. Pre-selecting contractors and drafting unduly restrictive requirements only serve to limit competition.

#### D. Analysis

Contracting officers have great discretion to determine which contracting methods to use for an acquisition. When planning an acquisition, however, they must seek the method that promotes full and open competition.<sup>228</sup> Since the FSS is open to all responsible sources,

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<sup>224</sup> *Id.* at 9.

<sup>225</sup> Nash & Cibinic, *supra* note 29, ¶ 26.

<sup>226</sup> *Id.* (citing *Design Contempo, Inc.*, B-270483, Mar. 12, 1996, 96-1 CPD ¶ 146 at 3; *National Mailing Sys.*, B-250411, Jan. 28, 1993, 93-1 CPD ¶ 72 at 2, recon. denied, B-250411.2, June 28, 1993, 93-1 CPD ¶ 496; *TSI Inc.*, B-249815, Dec. 22 1992, 92-2 CPD ¶ 429 at 2).

<sup>227</sup> *Id.* (citing *Design Contempo, Inc.*, 96-1 CPD ¶ 146, at 3).

<sup>228</sup> FAR, *supra* note 2, at subpt. 7.1.

purchases under the FSS are made pursuant to full and open competition.<sup>229</sup> Nevertheless, in practice, contracting officers are procuring millions of dollars of commercial supplies and services using FSS BPAs, sole-source awards, and excluding FSS vendors through unduly restrictive requirements, thereby failing to achieve competition.<sup>230</sup> The purpose of the FSS is to obtain supplies and services using streamlined procedures, not to avoid competition altogether.<sup>231</sup> Thus, there must be a balance between streamlined acquisition procedures under the FSS and competition. This balance can be obtained through review by higher authority and enforcement of competition requirements. For example, to balance the need between streamlined procedures and competition for BPAs, BPAs over the simplified acquisition threshold should be reviewed by higher authority as there is no limit on purchases made from one FSS vendor as opposed to the simplified acquisition threshold limit on BPAs created outside the FSS.<sup>232</sup> This review would prevent one vendor from obtaining a multi-million dollar BPA to the exclusion of all other potential vendors. Oversight from higher authority on contracts over the simplified acquisition threshold also would prevent contracting officers from drafting unduly restrictive requirements that effectively allow for the pre-selection of a contractor prior to solicitation. Finally, enforcement of competition requirements, through either refusal to authorize the award or punishment of contracting officers for failure to meet competition requirements for sole-source contracts would ensure that competition requirements are met.

The July 2004 GAO report revealed that contracting officers are failing properly to award and document awards under the FSS.<sup>233</sup> The GSA is aware that there is a problem with the methods contracting officers use to procure commercial supplies and services through the FSS

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<sup>229</sup> Sales Res. Consultants, Inc., Comp. Gen. B-284943, B-284943.2, June 9, 2000, 2000 CPD ¶ 102, at 7.

<sup>230</sup> Nash & Cibinic, *supra* note 133, ¶ 9 (citing RVJ Int'l, Inc., Comp. Gen. B-292161, B-292161.2, July 2, 2003, 2003 CPD ¶ 124; KPMG Consulting LLP, Comp. Gen. B-290716, B-290716.2, Sept. 23, 2002 CPD ¶ 196; OMNIPLEX World Servs. Corp., Comp. Gen. B-291105, Nov. 6, 2002, 2002 CPD ¶ 199; and Warden Assoc., Inc., Comp. Gen. B-291238, Dec. 9, 2002, 2002 CPD ¶ 215).

<sup>231</sup> Lohnes, *supra* note 36, at 602.

<sup>232</sup> FAR, *supra* note 2, at 13.303-5(b)(1).

<sup>233</sup> GAO Report No. GAO-04-874, *supra* note 111, at 3. The GAO's report with recommendations went to the DOD for comment and the Secretary of Defense for action. *Id.* at 17.



and, with the DOD, has implemented a plan called “Get It Right” to ensure the proper use of GSA’s FSS.<sup>234</sup> But will this plan work?

#### IV. GSA’s “Get It Right” Plan

On 13 July 2004, the GSA and DOD released to the public a plan to improve contracting operations with GSA and to ensure the proper use of the FSS.<sup>235</sup> The GSA “Get It Right” plan calls for the GSA to “proactively supervise the proper use of its contract vehicles and services to ensure the best value for the American taxpayer and federal agencies.”<sup>236</sup> The major objectives of the “Get It Right” plan are to:

- (1) ensure compliance with federal contracting regulations;
- (2) make contracting policies and procedures clear and explicit;
- (3) ensure the integrity of GSA’s contract vehicles and services;
- (4) improve competition in the marketplace when GSA’s contract vehicles and services are used;
- (5) improve transparency related to how GSA’s contract vehicles and services are used;
- (6) ensure that taxpayers get the best value for their tax dollar whenever GSA’s contract vehicles or services are used.<sup>237</sup>

The “Get It Right” plan responds to GAO Inspector General reports over the past few years that documented the abuse of the GSA schedules by government agencies.<sup>238</sup> To this end, the GSA is reviewing all awarded contracts over \$100,000 and determining whether proper procedures were followed.<sup>239</sup> The plan also includes training of contracting personnel on proper contracting procedures and includes

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<sup>234</sup> General Servs. Admin, News Release #10097 GSA, “*Get It Right*” Plan Will Ensure Proper Use of GSA Contract Vehicles (July 13, 2004), available at, [http://www.gsa.gov/Portal/gsa/ep/contentView.do?pageTypeId=8199&channelId=3259&P=XIcontented=16390&contentType=GSA\\_BASIC](http://www.gsa.gov/Portal/gsa/ep/contentView.do?pageTypeId=8199&channelId=3259&P=XIcontented=16390&contentType=GSA_BASIC).

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> Shane Harris, *Defense, GSA Officials Vow To Clean Up Contracting*, GovExec.Com (July 13, 2004), available at [http://www.govexec.com/story\\_page.cfm?articleid=28979&printerfriendlyVers=1&](http://www.govexec.com/story_page.cfm?articleid=28979&printerfriendlyVers=1&).

<sup>239</sup> *Id.*

checklists for GSA employees to conduct self-assessments on the proper use of GSA contract vehicles.<sup>240</sup>

While the goal of the “Get It Right” plan is to eliminate the misuse of the GSA’s FSS, the plan does not have an enforcement mechanism. There is nothing in the “Get It Right” plan to prevent contracting officers or government agencies from continuing to avoid competition. There is no punishment for contracting officers or government agencies who fail to follow the “Get It Right” plan. There is no threat to contracting officers that they could lose their warrant to contract.<sup>241</sup> The plan is simply another requirement for contracting officers and government agencies to complete before contracting with their pre-selected FSS contractor. Without an enforcement mechanism, the “Get It Right” plan will be unsuccessful.

The purposes of the FASA and the Clinger-Cohen Act were to limit the restrictions on FSS purchases and to make the process more like buying commercial items in the general market place.<sup>242</sup> However, in the effort to make FSS purchases more commercial, the oversight that once ensured competition eroded. While contracting officers should have discretion to determine which contract vehicles to use, higher authority should review the documentation before the contracting officer awards the contract when awarding FSS contracts using BPAs, sole-source acquisitions or using restrictive requirements. Requiring review by higher authority would provide needed oversight to force contracting officers to document properly their business decisions and keep a record of that determination in the event of a protest.

#### V. Contracting Officers Should Use FAR Part 15 Procedures When Conducting Complex FSS Buys

Government agencies are required to conduct acquisitions using full and open competition to the maximum extent practicable.<sup>243</sup> The FSS meets this requirement when participation in the FSS program is open to

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<sup>240</sup> *Id.*

<sup>241</sup> A warrant is a contracting officer’s “authority to enter into, administer, or terminate contracts and make related determinations and findings.” FAR, *supra* note 2, at 1.602-1. Contracting officers may only “bind the Government to the extent of the authority delegated to them” in writing from the appointing authority. *Id.*

<sup>242</sup> Stafford & Yank, *supra* note 7, at 2.

<sup>243</sup> 10 U.S.C. § 2306 (2000).

all responsible sources and the requirements of FAR subpart 8.4 are followed.<sup>244</sup> Further, when contracting officers purchase commercial supplies and services from the FSS, they may use negotiation-like procurements among FSS vendors, but they are not required by FAR section 8.404 to use FAR part 15 procedures.<sup>245</sup> However, when the GAO reviews protests of FSS purchases using negotiation-like procedures they will use FAR part 15 procedures to determine whether the government agency was “reasonable and consistent with the terms of the solicitation.”<sup>246</sup> Requiring contracting officers to use FAR part 15 procedures may increase competition by forcing contracting officers to determine whether to use the FSS or to solicit the procurement to all potential vendors. If the contracting officer determines that the FSS is the best alternative, FAR part 15 procedures, in combination with FAR section 8.405 ordering procedures, require contracting officers to consider all possible vendors instead of focusing on only one vendor or schedule to the exclusion of others,<sup>247</sup> thereby, increasing competition within the FSS.

#### A. Contracting by Negotiation Procedures

FAR part 15 details the policies and procedures contracting officers must follow when using competitive negotiations.<sup>248</sup> Competitive negotiation procedures, according to the FAR, “are intended to minimize the complexity of the solicitation, the evaluation, and the source selection decision, while maintaining a process designed to foster an impartial and comprehensive evaluation of offerors’ proposals, leading to selection of the proposal representing the best value to the Government.”<sup>249</sup> To do this the contracting officer may employ any one or a combination of three source selection processes in order to determine which acquisition represents the best value for the government.<sup>250</sup>

The contracting officer could use the tradeoff process, in which there is a determination that factors other than price are more important to

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<sup>244</sup> Sherry, *supra* note 55, at 380.

<sup>245</sup> Sales Res. Consultants, Inc., Comp. Gen. B-284943, B-284943.2, June 9, 2000, 2000 CPD ¶ 102, at 8; *see also* FAR, *supra* note 2, at 8.404.

<sup>246</sup> Uniband, Inc., Comp. Gen. B-289305, Feb. 8, 2002, 2002 CPD ¶ 51, at 7.

<sup>247</sup> FAR, *supra* note 2, at 15.3, 8.405-2.

<sup>248</sup> *Id.* at pt. 15.

<sup>249</sup> *Id.* at 15.002 (relying on definitions contained in FAR 2.101).

<sup>250</sup> *Id.* at subpt. 15.1.

obtaining the best value for the government.<sup>251</sup> This allows the government to select other than the lowest cost proposal in return for a better commercial supply or service.<sup>252</sup> The second source selection process is the “lowest price technically acceptable” option.<sup>253</sup> This option sets out evaluation criteria that the government agency requires for the product or service.<sup>254</sup> The contracting officer then selects the lowest priced contractor whose requirements meet the evaluation criteria listed in the solicitation.<sup>255</sup> The last source selection process is oral presentations.<sup>256</sup> Here the government agency requests in their solicitation that the offerors submit part or all of the proposal through oral presentation.<sup>257</sup> The contracting officer then uses FAR subpart 15.3, Source Selection, “to select the proposal that represents the best value.”<sup>258</sup> The decision to award is based on “evaluation [of] factors and significant subfactors that are [relevant and] tailored to the acquisition.”<sup>259</sup>

#### B. Protests on FSS Buys Using Negotiation-Like Procedures

The majority of protests on FSS buys occur when contracting officers use negotiation-like procedures for large purchases.<sup>260</sup> When these protests arise, the GAO will determine whether the protest meets the requirements of FAR part 15 in order to determine if the agency’s actions “were reasonable and consistent with the terms of the solicitation.”<sup>261</sup>

*COMARK Federal Systems* (COMARK) illustrates how competition is limited when contracting officers use the FSS for negotiation-like competition for large purchases, rather than using FAR part 15

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<sup>251</sup> *Id.* at 15.101-1.

<sup>252</sup> *Id.*

<sup>253</sup> *Id.* at 15.101-2.

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> *Id.* at 15.102.

<sup>257</sup> *Id.*

<sup>258</sup> *Id.* at 15.302.

<sup>259</sup> *Id.* at 15.304.

<sup>260</sup> Nash & Cibinic, *supra* note 133, ¶ 9.

<sup>261</sup> Nash & Cibinic, *supra* note 29, ¶ 26 (2002) (citing Digital Sys. Group, Inc., Comp. Gen. B-286931, B-286931.2, Mar. 7, 2001, 2001 CPD ¶ 50 at 6).

procedures to solicit all possible vendors.<sup>262</sup> In *COMARK*, the Department of Health and Human Services (DHHS) issued a request for quotes (RFQ)<sup>263</sup> for computer desktop workstations to six FSS vendors.<sup>264</sup> These vendors received packages that included a sample specification for a personal computer, the “BPA Evaluation Requirements Criteria,” and other requirements of the BPA for review.<sup>265</sup> The DHHS initially chose *COMARK* as part of its BPA, but DHHS later issued another RFQ under the BPA and did not select *COMARK* due to a pricing error in the evaluation.<sup>266</sup>

*COMARK* protested the DHHS decision not to award the BPA based upon the faulty evaluation, arguing that the RFQ did not contain any evaluation criteria the agency would use in its best value determination.<sup>267</sup> The GAO determined that even though the provisions of FAR subpart 8.4 applied in this RFQ, “the agency must provide some guidance about the selection criteria, in order to allow vendors to compete intelligently” when the agency shifts the burden of what item to offer to the vendor.<sup>268</sup> The GAO went further and held, that:

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<sup>262</sup> *COMARK Fed. Sys.*, B-278343; B-278343.2, 1998 U.S. Comp. Gen. LEXIS 26 (Jan. 20, 1998).

<sup>263</sup> The request for quotation (RFQ) is a contracting procedure used in negotiation-like FSS purchases where the ordering agency included the statement of work and evaluation criteria such as past performance and management in the request for quotation posted on “GSA’s electronic RFQ system e-Buy.” FAR, *supra* note 2, at 8.405-2(c).

<sup>264</sup> *COMARK Fed. Sys.*, 1998 U.S. Comp. Gen. LEXIS 26, at \*1.

<sup>265</sup> *Id.* at \*2.

<sup>266</sup> *Id.* at \*2-\*5.

<sup>267</sup> *Id.* at \*5.

<sup>268</sup> *Id.* at \*8. Specifically, the court held:

The RFQ specifically referred to the BPA, which, in turn, stated that it was issued pursuant to the GSA FSS. Accordingly, the provisions of Federal Acquisition Regulation (FAR) [s]ubpart 8.4 apply. Those provisions anticipate agencies reviewing vendors’ federal supply schedules -- in effect, their catalogs -- and then placing an order directly with the schedule contractor that can provide the supply (or service) that represents the best value and meets the agency’s needs at the lowest overall cost. When agencies review competing vendors’ schedule offerings, they are permitted to make a best-value determination that takes into account “special features of one item not provided by comparable items which are required in effective program performance.” When agencies take this approach, there is no requirement that vendors receive any advance notice, regarding either the agency’s needs or the selection criteria. Agencies, however, may shift the responsibility for selecting items from schedule offerings to the vendors, by issuing solicitations

Where the agency intends to use the vendors' responses as the basis of a detailed technical evaluation and cost/technical trade-off, the agency has elected to use an approach that is more like a competition in a negotiated procurement than a simple FSS buy, and the RFQ is therefore required to provide for a fair and equitable competition.<sup>269</sup>

*COMARK* illustrates that using the FSS for a negotiation-like procurement limits competition due to the limited number of vendors selected to compete and that competition is further inhibited when contracting officers do not evaluate solicitations properly. The purpose of the FSS is to allow government agencies to obtain needed commercial supplies and services quickly with little administrative burden.<sup>270</sup> The streamlined process of the FSS normally would not require a contracting officer to "conduct a full-scale competition to select the winning" vendor; rather the contracting officer would select the vendor or vendors that met the needs of the government.<sup>271</sup> By having the FSS vendors compete for an award, the contracting officer ignores the possibility that a vendor outside the FSS could offer the same commercial supply or service at a better price than that of the FSS vendors.

In another example, the Department of Justice (DOJ) limited competition in a negotiation-like procurement for a financial system by

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(typically in the form of RFQs) that call on the vendors to select, from among the hundreds (or thousands) of possible configurations of the items on their schedules, a particular configuration on which to submit a quotation. It is certainly understandable that an agency would prefer for the vendors to construct these configurations; particularly in the area of information technology, the large number of possible combinations might make it difficult for agency personnel unfamiliar with the particular equipment or related technical issues to select one configuration by reviewing vendors' schedule offerings. Yet once an agency decides, by issuing an RFQ.... to shift to the vendors the burden of selecting items on which to quote, the agency must provide some guidance about the selection criteria, in order to allow vendors to compete intelligently.

*Id.* at \*5-\*8 (internal citations and footnotes omitted).

<sup>269</sup> *Id.* at \*8.

<sup>270</sup> KEYES, *supra* note 3, at 881.

<sup>271</sup> Nash & Cibinic, *supra* note 29, ¶ 26.

selecting seven FSS vendors to compete for an FSS contract.<sup>272</sup> In this instance, the DOJ limited competition by pre-selecting seven vendors to compete in a complex mini-competition prior to issuing an RFQ, rather than using market research to determine all possible vendors who could compete in the mini-competition or conducting a FAR part 15 competition outside the FSS.<sup>273</sup> In *Savantage Financial Services, Inc.* (Savantage), the DOJ wanted to replace its seven different financial management systems with one unified financial management system.<sup>274</sup> The DOJ wanted to use the FSS to purchase “a commercial off-the-shelf (COTS) product certified by the Joint Financial Management Improvement Program (JFMIP) as meeting core federal accounting and systems security requirements.”<sup>275</sup> There were seven JFMIP-certified financial management software vendors in one schedule on the FSS with a maximum order threshold of \$500,000, which the DOJ planned to exceed.<sup>276</sup> The DOJ asked the seven certified vendors to complete a 100-page market survey describing their products and put the vendors on notice that the DOJ wanted a COTS system that required little customization to support the DOJ’s business process.<sup>277</sup>

After receiving the market surveys and client lists from the vendors, the DOJ then asked each vendor to provide a demonstration of its software system.<sup>278</sup> The request for demonstrations stated the DOJ’s criteria for the understanding and ease of use of each vendor’s system.<sup>279</sup> The DOJ indicated that the information obtained from the demonstration would not be used to “target a particular solution or narrow the potential field of products for future acquisition activities.”<sup>280</sup>

Of the seven potential vendors, six, including Savantage, completed the market survey and provided a product demonstration.<sup>281</sup> After reviewing the market surveys and the product demonstrations, the DOJ

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<sup>272</sup> *Savantage Fin. Serv., Inc., Comp. Gen. B-292046, B-292046.2, June 11, 2003, 2003 CPD ¶ 113.*

<sup>273</sup> *Id.*

<sup>274</sup> *Id.* at 2.

<sup>275</sup> *Id.*

<sup>276</sup> *Id.* at 3, 8.

<sup>277</sup> *Id.*

<sup>278</sup> *Id.* at 4.

<sup>279</sup> *Id.*

<sup>280</sup> *Id.*

<sup>281</sup> *Id.* at 5.

decided to solicit quotes from only four of the vendors, excluding Savantage.<sup>282</sup> The DOJ informed Savantage that:

Based on its evaluation, the Department has concluded that [Savantage] would have no reasonable chance of being selected for award over other schedule vendors offering JFMIP-certified software. Accordingly, [the DOJ has] concluded that it would not serve the interests of the Department, or be in Savantage's interest, for you to undergo the expense and effort of responding to an RFQ.<sup>283</sup>

Savantage protested the DOJ's opinion, arguing that the DOJ violated FAR section 8.404(b)(3) which provides that before an agency places and order that exceeds the maximum order threshold, it must:

- (i) Review additional schedule contractors' catalogs or pricelists, or use the GSA Advantage! on-line shopping service;
- (ii) Based upon the initial evaluation, generally seek price reductions from the schedule contractor(s) appearing to provide the best value (considering price and other factors); and
- (iii) After seeking price reductions, place the order with the schedule contractor that provides the best value and results in the lowest overall cost alternative. If further price reductions are not offered, an order may still be placed, if the ordering office determines that it is appropriate.<sup>284</sup>

The DOJ argued that the "market research" conducted was not a competition, and therefore is not reviewable by the GAO.<sup>285</sup> The DOJ maintained that the information the vendor provided was only to inform the DOJ about products available to meet the DOJ's procurement needs and was consistent with FAR section 8.404(b)(3) requirements to review

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<sup>282</sup> *Id.*

<sup>283</sup> *Id.* at 6.

<sup>284</sup> *Id.* at 7-8 (internal citations omitted).

<sup>285</sup> *Id.* at 8.



additional schedule contractors when placing an order above the maximum threshold.<sup>286</sup>

The GAO disagreed and determined that Savantage had a valid basis for protest, stating that the DOJ failed to follow FAR subpart 8.4 procedures, ensuring competition by reviewing catalogs and pricelists of at least three other FSS vendors.<sup>287</sup> The GAO determined:

Use of the FSS in lieu of conducting a full and open competition is thus premised on following the Subpart 8.4 procedures to reach a determination regarding what the agency's needs are and which FSS vendor meets those needs at the lowest overall cost. DOJ concedes that an agency's failure to follow the procedures in Subpart 8.4 by, for example, failing to review the catalogs or pricelists of three FSS vendors, is reviewable in a bid protest. Moreover, where an FSS vendor protests the agency's decision not to solicit from the protester for an FSS purchase the agency is making, we will review the agency's action for compliance with applicable law.<sup>288</sup>

The GAO further determined that it would review the DOJ's best value determination for reasonableness since the DOJ removed Savantage from consideration when the DOJ stated in its letter to Savantage that there was "no reasonable chance" that Savantage would be selected for award.<sup>289</sup> The GAO cited that "[t]he agency conducted a comparative evaluation of the relative merits of the vendor's products and abilities, through its market survey, in order to determine which vendors appeared to offer the best value. It was the best value determination that led to the letter" to Savantage.<sup>290</sup> While the GAO found that it could review the DOJ's determination of best value for reasonableness, the GAO did not sustain Savantage's protest based upon the GAO's determination that the DOJ's elimination of Savantage from competition was reasonable.<sup>291</sup>

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<sup>286</sup> *Id.*

<sup>287</sup> *Id.* at 10.

<sup>288</sup> *Id.* at 12 (citing Delta Int'l, Inc., Comp. Gen. B-284364.2, May 11, 2000, 2000 CPD ¶ 78, at 6) (additional internal citations omitted).

<sup>289</sup> *Id.* at 15.

<sup>290</sup> *Id.*

<sup>291</sup> *Id.* at 27.

Even though the GAO determined that the DOJ's evaluation was reasonable, this case demonstrates how competition can be limited through legitimate, negotiation-like competition procedures. By conducting a complex mini-competition with pre-selected vendors, the DOJ eliminated other possible vendors available in the commercial market place and other FSS schedules. Requiring contracting officers to use market research and document their decision to either use the FSS or to solicit all possible vendors would maximize competition and truly result in best value to the government. This would be particularly true in instances such as *Savantage*, where the DOJ had specific requirements for the RFQ and used a complex selection process on the limited number of FSS vendors to determine the winning vendor.

### C. Analysis

Reviewing *COMARK* and *Savantage*, it would appear that true full and open competition using FAR part 15 would have been more beneficial to both government agencies as they were purchasing items over the simplified acquisition threshold of \$100,000, and they could conceivably cost the government millions of dollars. When government agencies make large FSS purchases using negotiation-like procedures, they should be required to conduct their competition under FAR part 15 and not be exempt under FAR subpart 8.4. Requiring contracting officers to conduct FSS competitions under FAR part 15 will force them to evaluate each vendor equally and to state the relevance of the evaluation criteria in the RFQ.<sup>292</sup> Applying FAR part 15 procedures to FSS negotiation-like competitions, is also likely to result in contracting officers considering more vendors for procurements, in order to determine best value, consequently increasing competition.<sup>293</sup>

In addition to eliminating the exemption of FAR part 15 procedures from FAR subpart 8.4, the FAR should add provisions from *DFAR Supplement 208.404-70* to increase competition. The DOD currently requires contracting officers to use market research and document contracting decisions on purchases over the simplified acquisition threshold of \$100,000 through requirements in *DFAR Supplement 208.404-70*.<sup>294</sup> Requiring contracting officers to document market

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<sup>292</sup> Nash & Cibinic, *supra* note 29, ¶ 26.

<sup>293</sup> See Nash & Cibinic, *supra* note 133, ¶ 9.

<sup>294</sup> DFAR, *supra* note 113, at 208.404-70.

research and their decision to use negotiation-like procedures for an FSS purchase rather than soliciting the requirement to all potential vendors on purchases over the simplified acquisition threshold, will force contracting officers to consider other options to increase competition resulting in best value to the government. Conducting market research would not be overly onerous to contracting officers. They would merely need to call local vendors to check prices on the needed commercial supplies or services or conduct a short internet search to determine whether the market price is less than that which the FSS vendors are offering.<sup>295</sup> Amending the FAR to require FAR part 15 procedures in negotiation-like FSS purchases and requiring documentation of market research would increase competition under the FSS resulting in best value for the government.

D. *DOD DFAR Supplement 208.404-70* Competition Requirements

When a contracting officer contracts for the DOD, section 803 of the FY 2002 National Defense Authorization Act (NDAA) must be met by awarding contracts for services “on a competitive basis.”<sup>296</sup> *DFAR Supplement 208.404-70* implements FY 2002 NDAA by requiring:

- (c) An order for services exceeding \$100,000 is placed on a competitive basis only if the contracting officer provides a fair notice of the intent to make the purchase, including a description of the work the contractor shall perform and the basis upon which the contacting officer will make the selection, to –
  - (1) As many schedule contractors as practicable, consistent with market research appropriate to the circumstances, to reasonably ensure that offers will be received from at least three contractors that can fulfill the work requirements, and the contracting officer –
    - (i)(A) Receives offers from at least three contractors that can fulfill the work requirements; or
    - (B) Determines in writing that no additional contractors that can fulfill the work requirements could be identified despite reasonable efforts to do so (documentation

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<sup>295</sup> Ralph C. Nash & John Cibinic, *Postscript IV: Multiple Award Schedules*, 14 NASH & CIBINIC REP. 9 ¶ 46 (2000).

<sup>296</sup> Pub. L. No. 107-107, 115 Stat. 1012 (2001).

should clearly explain efforts made to obtain offers from at least three contractors); and

(ii) Ensures all offers received are fairly considered; or  
(2) All contractors offering the required services under the applicable multiple award schedule, and affords all contractors responding to the notice a fair opportunity to submit an offer and have that offer fairly considered. Posting of a request for quotations on the General Services Administration's electronic quote system "e-Buy" (<http://www.gsaAdvantage.gov>), is one medium for providing fair notice to all contractors as required by this paragraph (c).<sup>297</sup>

While the DOD appears to require full and open competition through these DFAR procedures, the requirement lacks enforcement. The July 2004 GAO report showed that even though contracting officers must meet *DFAR 208.404-70* competition requirements, a majority of the officers failed to meet these requirements when soliciting contracts under the FSS.<sup>298</sup> Adding an enforcement mechanism and requiring approval by someone above the contracting officer would increase competition among vendors. When billions of dollars of commercial supplies and services are purchased by government agencies each year, some enforcement and oversight is needed to ensure competition and, ultimately, that the government is getting the best value.<sup>299</sup> Amending FAR subpart 8.4 to include FAR part 15 competition negotiations and *DFAR Supplement 208.404-70*, along with enforcement and oversight provisions would truly make the FSS a full and open competition system.

## VI. Conclusion

Congress established the FSS program to give government agencies a convenient way to purchase commercial supplies and services.<sup>300</sup> However, the FSS program is limited in use through the restrictive

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<sup>297</sup> Nash & Cibinic, *supra* note 133, ¶ 9 (citing DFAR 208.404-70).

<sup>298</sup> GAO Report No. GAO-04-874, *supra* note 111, at 3. The GAO randomly selected 74 orders over the simplified acquisition threshold from five DoD buying organizations to determine the level of competition. *Id.* at 5. Of the 74 orders reviewed, competition was waived in 34 of them without proper justification. *Id.* at 6.

<sup>299</sup> *Id.*

<sup>300</sup> FAR, *supra* note 2, at subpt. 8.4.

definition of commercial items and procurement procedures.<sup>301</sup> In an effort to streamline government acquisition of commercial items, Congress passed the FASA and the Clinger-Cohen Act, making FSS purchases worth billions of dollars more convenient.<sup>302</sup> The change was an effort to make government contracting more like commercial acquisitions, thereby saving the government time and money.<sup>303</sup> While these changes made FSS purchases more convenient, competition has been lost.<sup>304</sup> Congress did not intend to limit competition through streamlined acquisition methods, but rather Congress intended streamlined acquisition methods to create competition and let the market give the government the best price.<sup>305</sup>

While it appears that Congress has gone too far with acquisition streamlining, the procurement system should not take a step backwards with the introduction of legislation to restrict contracting officers from making sound business judgment. Instead, minor changes in the FAR to force contracting officers to show that they complied with the rules on purchases over the simplified acquisition threshold would still allow for a streamlined process and full and open competition. The “Get It Right” program and the *DFAR Supplement 208.404-70* are a step in the right direction to increase competition; however, creating another requirement for contracting officers without an enforcement mechanism and oversight does not provide for guaranteed success. Adding enforcement mechanisms and oversight to FAR subpart 8.4 would ensure competition for large purchases under the FSS without eliminating the purpose of the FSS as a convenient means of purchasing commercial supplies and services.

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<sup>301</sup> NAGLE, *supra* note 34, at 498.

<sup>302</sup> *Id.* at 511-17.

<sup>303</sup> Stafford & Yank, *supra* note 7, at 2.

<sup>304</sup> Nash & Cibinic, *supra* note 29, ¶ 26.

<sup>305</sup> Nash & Cibinic, *supra* note 133, ¶ 9; Stafford & Yank, *supra* note 7, at 2.