Hello.

After all the hectic stuff, things calmed down and I went on vacation. Now I'm back.

Thanks for your patience. It's gratifying to see activity on this site even when the new blog posts pause for a while. (One of the benefits of having more than 1,100 articles in the archive, I guess.)

Today I want to talk about competition.

The data published by DOD have shown clearly that competition leads to better contract outcomes. (See our **blog article** on the 2013 Defense Acquisition Performance Report, where we reported the official conclusion that "… cost and price growth are statistically lower on competed contracts.") Thus, people who read have known for years that competition is where it's at. Despite that knowledge, the majority of DOD contract actions are not competitive.

There's a reason for that counter-intuitive situation. The reason is that most contract actions are modifications to existing contracts. Something has changed—such as quantity of items to be acquired—and the contract needs to be "equitably adjusted" as a result. Those Requests for Equitable Adjustment (REAs) are not competed and thus have to be recorded in the databases as non-competitive contract actions.

Even for other (non-REA) contract actions, often there is only one known source. For example, if your IT system is based on Apple stuff, you are probably going to go back to Apple for new stuff and new licenses. You are not likely to change providers mid-stream, such that half your hardware and software is Apple-based, and the other half is Windows or Android-based. (Look, it was an *example*, all right? I don't want a lot of emails telling me how it could be done or that it happens all the time. Mutter to yourself all you want; but leave me out of it.)

To impart some learning: "competition" and "price competition" are two different things, found in two different Parts of the FAR. Competition is, essentially, when the contract award opportunity is made available to more than one bidder—although there are several types or gradations of competition. (See FAR Part 6.) "Adequate price competition" is a term of art found in FAR 15.403-1(c). Adequate price competition is defined as:

1. Two or more responsible offerors, competing independently, submit priced offers that satisfy the Government's expressed requirement;
2. Award will be made to the offeror whose proposal represents the best value … where price is a substantial factor in source selection; and
3. There is no finding that the price of the otherwise successful offeror is unreasonable. Any finding that the price is unreasonable must be supported by a statement of the facts and approved at a level above the contracting officer.

But (of course) if you are modifying an existing contract, then you have neither competition nor adequate price competition, because only the price of the modification to the existing contract held by the existing contractor is being evaluated.

Recently, the FAR was revised to make it harder for DOD agencies to achieve "adequate price competition." For civilian agencies –

… a price is also based on adequate price competition when–

(A) There was a reasonable expectation … that two or more responsible offerors, competing independently, would submit priced offers in response to the solicitation's expressed requirement, even though only one offer is received from a responsible offeror and if-

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

(i) The offeror believed that at least one other offeror was capable of submitting a meaningful

offer; and

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

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

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

On the other hand, for DOD agencies and other components subject to NDAA language, the FAR (at 15.403-1(1)(ii)), is clear that the foregoing language is no longer applicable. Instead, contracting officers and buyers at those agencies must comply only with the three "traditional" criteria listed above. If only one offer was received, then adequate price competition has not been achieved and therefore certified cost or pricing data must be obtained to support cost analysis.

We **told** readers this was coming. Of course, we analyzed the proposed rule as a DFARS revision and not as a FAR revision. But still … our readers had some measure of advance notice on this one.

The FAR rule revision comes a few years after the DFARS **was revised** . One is tempted to think DOD leaders (and law-makers) want to make it harder to award contracts where only one

bid is received.

Now, in related news, let's talk about TransDigm. We wrote about the TransDigm issue **here** . If you are unfamiliar with the TransDigm profit story, you might want to read that backgrounder first. If you are too lazy to click that link, suffice to say that, in the view of the DOD OIG and law-makers, TransDigm made too much profit on its sale of spare parts to DOD. Basically, TransDigm said, "Here's my price. Take it or leave it." And the DOD contracting officers had to take the price, because there was no other contractor with the spare parts. And even though there were no other bidders, TransDigm often refused to provide cost or pricing data, because it could. There was no other game in town.

That business approach—which was free market capitalism at its finest—didn't sit well with auditors or with Congresspeople. There were **hearings** . While every Congressperson loves the free market while campaigning, many don't seem to love it after election. TransDigm was accused of "price-gouging" (which was, in our view, inaccurate) and was "urged" to reimburse taxpayers for some $16 million in "extreme" profits reaped based on "unethical business practices."

FederalNewsNetwork **reported** that, a couple of weeks after the hearings, TransDigm did agree to pay back $16.1 million. We are sure that was a reluctant business decision, perhaps driven by the fact that the DOD was one of its largest customers.

But that wasn't the end of the story.

A couple of weeks later, the Acting Principal Director, Defense Pricing and Contracting (APD, DPC, OUSD, A&S) **issued a memo** aimed directly at TransDigm. The new policy was based on (unproven) allegations that TransDigm had "rigged" competitions because it was the only source for spare parts.

From the memo—

The IG report found that TransDigm is the only manufacturer of the majority of the spare parts

the IG included in its review, putting TransDigm either in a sole source position or in a situation where it had the opportunity to set the market prices even for competitively awarded parts. ….

Therefore, for all procurement actions not yet awarded as of the date of this memorandum, unless the prices agreed upon are based on adequate price competition or are set by law or regulation, contracting officers are directed to require the submission of uncertified cost or pricing data to support prices proposed by TransDigm and its subsidiaries.

Notice what's missing from the above. Even if the items are found to be commercial items, TransDigm must still submit uncertified cost or pricing data to support cost analysis.

Okay. TransDigm is now paying a steep price for its attempt to use market forces against the DOD. But what will that mean? We don't know, but if it were us, we would take the costs of providing the information—and perhaps the costs of modifying our accounting system to record that information—and pass it right back to the DOD customers. Only this time, it wouldn't be "profit"—it would be legitimate overhead, to which profit would be applied.

So … competition. Always a good thing. And when it cannot be achieved, then sometimes it can be forced.