

Response and Comment of the

Aerospace Industries Association
Contract Services Association
Government Electronics & Information
Technology Association
Information Technology Association of America
National Defense Industrial Association
Professional Services Council

To the preliminary recommendations on
Commercial Practices by the

Acquisition Advisory Panel

Provided via email on
August 9, 2006



INTRODUCTION

The multi-association coalition (“Coalition”) has grave concerns with many of the Acquisition Advisory Panel’s recommendations adopted from its Commercial Products Working Group (“CPWG”) and is alarmed at the manner at which they were arrived.

The Panel was created by Section 1423 of the 2003 Services Acquisition Reform Act to review acquisition laws and regulations “...for the effective, efficient and fair award and administration of contracts for the acquisition by the federal government of goods and services.” In our view, collectively, the commercial products recommendations adopted by the Panel to date do not fulfill that mandate, and in many cases are actually counterproductive. Furthermore, these recommendations are based on incomplete, unsupported or inaccurate findings.

These recommendations threaten to roll back a decade of procurement reforms that have considerably improved the federal government’s ability to serve its citizens. The Panel recommendations would limit the government’s access to cutting-edge solutions; encourage frivolous post-award protests, and restrict the government’s ability to use common commercial contracting tools such as time and materials agreements. The net result of its recommendations would be to impose a procurement process that is less efficient, less effective and less fair for all stakeholders involved. If adopted as final, they would support a return to an era when federal procurements for services took too long, where procurements were competed only by firms that specialized in federal work, and the solutions sought to be acquired were obsolete before work even began. Such an environment does not serve the best interest of the federal government, its industry partners or, most importantly, the American taxpayers.

The coalition therefore submits the following discussion and responses to the Panel’s preliminary commercial products recommendations. Should the panel’s recommendations stand as final, the Coalition would oppose the Panel’s report on these matters.

R-1. Definition of Commercial Services [Adopted 24 July, 2006]

Recommendation: The definition of stand-alone commercial services in FAR 2.101 should be amended to delete the phrase “of a type” in the first sentence of the definition. Only those services that are actually sold in substantial quantities in the commercial marketplace should be deemed “commercial.” The government should acquire all other services under traditional contracting methods, e.g., FAR Part 15. [Adopted 24 Jul].

Multi-Association Comment:

We strongly oppose limiting the government’s ability to use flexibilities now provided to obtain commercial services by deleting the phrase “of a type” in the first sentence of the definition of “stand alone” commercial services at 41 U.S.C. § 403(12)(F). Our rationale is identical to the concerns we expressed in our January 31, 2006 comments to the Panel: “We hope that the goal is not to eliminate any commercial items that are “of a type”, further limiting the government’s access to the latest cutting edge products that are evolving from commercial items.”

The Panel makes no case for removing the “of a type” provision. It was not discussed in the preliminary recommendations published by the CPWG on December 19, 2005, nor had it been discussed in the preliminary working draft of Parts I and II of the CPWG’s report. The related CPWG finding does not offer any clear statement of the problem or the circumstance that would justify the Panel adopting such a profound change to the definition of commercial item. By removing the phrase “of a type”, the Federal Government will limit its access to the myriad of commercial services available in the marketplace to only those that are precisely the same as that required by the Government. As pointed out in detail in Aalco Forwarding (e.g., Aalco Forwarding, Inc, B-277241.8, October 1997), there is a great benefit to the Government having access to the market place even when it is not buying exactly the same service as commercial buyers.

The FAR does not separately define “stand-alone commercial services.” We believe that this confusion is related to the Working Group’s misunderstandings of the legislative history and background we documented in the July 19, 2006 Multi-Association Comments on Working Draft of Parts I & II from the Commercial Practices Working Group, (particularly pp.33, 35, 36), available on the Panel’s website at <http://www.acquisition.gov/comp/aap/psr.html>.

We point out again that our industry associations were working with the Department of Defense to develop a more workable approach to the definition of commercial item. Our recommendation, which was made to the Panel in our January 31, 2006 presentation, was to strike the references to “ancillary” and “professional and technical” services at 41 U.S.C. § 403(12)(E) and (F) and revise 41 U.S.C. § 403(12)(A) to read as follows:

Commercial item means - (1) Any item, **including any supply or service**, other than real property, that is of a type customarily used by the general public or by

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non-Governmental entities for the purposes other than Governmental purposes

...

The purpose was to eliminate the confusing and far too restrictive language in the current definition and to treat commercial services in the same manner as the current definition treats "items."

R-2. Improving the Requirements Process [Adopted 24 July, 2006]

Recommendation: Current policies mandating acquisition planning should be better enforced. Agencies must place greater emphasis on defining requirements, structuring solicitations to facilitate competition and fixed-price bidding, and monitoring contract performance. Agencies should support requirements development by establishing centers of expertise in requirements analysis and development. Agencies should then ensure that no acquisition of complex services (e.g., information technology or management) occurs without express advance approval of the statement of requirements by the program manager or user and the contracting officer, regardless of which type of acquisition vehicle is used. [Adopted 24 Jul, note that “statement of requirements” is not a term of art]

Multi-Association Comment:

While the Coalition can support some aspects of this recommendation, like enforcing existing policies for acquisition planning and emphasizing using better requirements definitions and better structuring of solicitations, we must oppose the principle element of this recommendation. We do not believe that passing another law or inserting another approval layer is necessary to achieve these goals. Instead agencies need to better manage these processes internally to meet existing policies and goals. Without better management, not even new laws or rules will yield real process improvements.

With respect to the Panel’s goal to increase the use of FAR Part 14 processes through its reference to encouraging more “fixed price bidding,” we do not find anything in the Panel’s public record to suggest that FAR Part 14 is used too infrequently by federal agencies.

Finally, the recommendation is unduly vague in failing to define key terms including “complex services” and “statement of requirements.” It also sets no limits on how this new approval process is to apply to acquisition of supplies, i.e. all supplies, complex supplies, commercial supplies.

R-3. Improving Competition [Adopted 24 July, 2006]

(a) Recommendation: The requirements of Section 803 of the FY 2002 Defense Authorization Act regarding orders for services over \$100,000 placed against multiple award contracts, including Federal Supply Service schedules, should apply uniformly government-wide to all orders valued over the Simplified Acquisition Threshold. Further, the requirements of Section 803 should apply to all orders, not just orders for services. [Adopted 24 Jul, Harmonize with small business recommendations]

(b) Recommendation: The Panel recommends that in policy, procedures, training, and application, competitive procedures should be strengthened. For services orders over \$5 million requiring a statement of work under any multiple award contract, in addition to "fair opportunity," the following competition requirements as a minimum should be used: (1) a clear statement of the agency's requirements; (2) a reasonable response period; (3) disclosure of the significant factors and subfactors that the agency expects to consider in evaluating proposals, including cost or price, and their relative importance; (4) where award is made on a best value basis, a written statement documenting the basis for award and the trade-off of quality versus cost or price. The requirements of FAR 15.3 shall not apply. There is no requirement to synopsize the requirement or solicit or accept proposals from vendors other than those holding contracts. [Adopted 24 Jul]

Multi-Association Comment:

(a) We support this recommendation with the suggestion that the Panel take the additional step of requiring civilian agencies to implement procedures that parallel those developed by the DOD in response to the requirements of Section 803. The DOD has developed procedures that meet the intent of Section 803 while providing the acquisition activities some operational flexibility in meeting the competition requirements. These procedures have withstood the test of use and have been found to be operationally sound and effective. The Panel's call for uniform application will be impaired if individual agencies and bureaus are left to their own to interpret and institutionalize compliant procedures.

The Panel's call that the Section 803 requirements apply to all orders might be better understood by field personnel if the recommendation stated more explicitly that orders for both products and services were subject to the competition requirements.

(b) The Panel's identification of the specific activities that should be strengthened to support competitive procedures is well considered.

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However, the Panel's recommendation that FAR 15.3 requirements not apply is itself ambiguous and requires clarification. The referenced Part itself makes reference to other Parts, most particularly those associated with debriefings. While the Panel's recommendation speaks to these matters it would provide clarity if a more specific reference to the requirements of FAR 15.5 were made. It would also be beneficial if the exceptions for synopsis in FAR Part 5 were noted as well.

Independent of our support for these recommendations we want to point out that implementation of these recommendations mitigates the need for Recommendations R-4. Establishing a disciplined environment within which competition can be achieved and maximized mitigates the concerns expressed in the findings associated with R-4.

R-4. New Competitive Services Schedule [Adopted 24 July, 2006]

Recommendation: The Panel recommends that GSA be authorized to establish a new information technology schedule for professional services under which prices for each order are established by and **not** based on posted rates.

Multi-Association Comment:

The Coalition opposes this recommendation because GSA already has the necessary authority to establish new schedules so that no new authorization is required. Moreover, the current FAR rules for ordering require the use of competition. See FAR 8.405-1 & 8.405.2. Thus, the new schedule would only differ from the existing schedule by allowing offerors to obtain a Schedule contract without agreeing to specific pricing that a contracting officer determines is fair and reasonable. The Panel's CPWG discussion following this Recommendation in its Proposed Findings and Recommendations fails to address the existing FAR ordering procedures at all. The key to successful schedule contracting is focusing on the buying agency's processes, as FAR Part 8.4 does, not by providing less structure in which those negotiations take place, such as by eliminating hourly rates in the base contract.

R-5: Improving Transparency and Openness [Adopted 24 July 2006]

(a) Recommendation: Adopt the following synopsis requirements.

Amend the FAR to establish a requirement to publish, for information purposes only, at FedBizOpps notice of all sole source orders (task or delivery) in excess of the simplified acquisition threshold (SAT) placed against multiple award contracts.

Amend the FAR to establish a requirement to publish, for information purposes only, at FedBizOpps notice of all sole source orders (task or delivery) in excess of the Simplified Acquisition Threshold (SAT) placed against multiple award Blanket Purchase Agreements (BPAs).

Such notice shall be made within ten business days after award.

(b) Recommendation: For any order under a multiple award contract over \$5 million where a statement of work and evaluation criteria were used in making the selection, the agency whose requirement is being filled should provide the opportunity for a post-award debriefing consistent with the requirements of FAR 15.506.

Multi-Association Comment:

The Panel adopted a recommendation with two parts to improve the transparency and openness of multiple award contracts.

(a) The first part provides for a FAR amendment to require agencies to publish on FedBizOpps an information notice of all sole source orders in excess of the simplified acquisition threshold that are placed against multiple award contracts or multiple award BPAs. This notice must be published within ten business days after award.

We share the Panel's goal of achieving transparency in federal procurement and support the core of the recommendation for timely post-award notice of sole source awards made against multi-award contracts or BPAs. However, the Panel has not provided any flexibility from the mandatory publication for specialized circumstances such as for classified orders or when publishing such awards would affect an agency's mission (such as in contingency contracting) or when timing of the notice is impracticable (such as during the initial emergency response to Hurricane Katrina).

Therefore, we recommend that the Panel modify its recommendations to permit exceptions to the mandatory posting to align with the exceptions for posting already provided for in FAR 15.202. We also recommend that the Panel provide authority for reasonable delay in the publication of such notices based on unusual circumstances.

(b) The second part of the recommendation establishes a requirement for agencies to provide for a debriefing ("consistent with the requirements of FAR 15.603") for any order in excess of \$5 million placed against multiple award contracts "where a statement of work and evaluation criteria were used in the selection process."

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We support providing meaningful debriefing opportunities for bidders, even for orders against multiple award contracts. However, because of our opposition to the Panel's recommendation # R-7 to permit protests for certain orders under multiple award contracts, we are concerned that this recommendation, combined with that protest provision, would be implemented in a purely mechanical manner by agencies to avoid conveying any information that could be used against the agency in a subsequent protest. By minimizing the value of the information obtained by offerors in the debriefing, the primary benefit of debriefings - improved future competition - may be lost.

R-6 Time and Materials Contracts [Adopted 25 July 2006]

Recommendation: The Panel makes the following recommendations with respect to time & materials contracts. (1) Current policies limiting the use of time & materials contracts and providing for the competitive award of such contracts should be enforced. (2) Whenever practicable, procedures should be established to convert work being done on a time & materials basis to a performance-based effort. (3) The government should not award a time & materials contract unless the overall scope of the effort, including the objectives, has been sufficiently described to allow efficient use of the time & materials resources and to provide for effective government oversight of the effort.

Multi-Association Comment:

Our comments to the three points are as follows:

- 1) Since industry recommended that the current restriction in FAR Part 12 regarding the requirement for competition when using T&M contracts be removed (once a sole source justification has been made, then the appropriate contract type should be used – including T&M if appropriate), we are obviously disappointed in and do not agree with this recommendation. We agree with the current FAR priority that T&M is the least favorable of the type contracts available to the contracting officer, but don't agree with the restriction regarding competition.
- 2) While we support this conceptually, we would remind the panel that performance-based does not necessarily equate to a firm-fixed price contract, which we presume is inherent in the recommendation. In addition, the use of performance-based contracts assumes that the offerors understand the associated risks and are willing to accept those risks. It is often the case that where T&M is used, neither the Government nor the offerors fully understands the scope of the work that will be required. In such cases, conversion from T&M to performance-based may increase prices to value the risks, or bring about less satisfactory performance because of a mutual lack of understanding of the scope of the requirement.
- 3) We are confused by this recommendation. We do not know what the Panel means by "efficient use" of time and materials resources. We also note that the Panel's recommendation for a definitive scope and objective definition to be in place before the award of any T&M contract is contrary to one of the primary reasons for the use of T&M contracts, which is to use this contract type in an environment that does not permit such a degree of specificity and finality.

R-7: Protests of Task and Delivery Orders [Adopted 25 July 2006]

Recommendation: Permit protests of task and delivery orders over \$5 million under multiple award contracts. The current statutory limitation on protests of task and delivery orders under multiple award contracts should be limited to acquisitions in which the total value of the anticipated award is less than or equal to \$5 million.

Multi-Association Comment:

Under current law and regulations (FAR 16.505(a)(9)), no protest may be filed against any order placed against a multiple-award/IDIQ contract except for a protest that asserts that the order increased the scope, period or maximum value of the contract. In addition, under limited circumstances, the Government Accountability Office has considered protests based on the narrow additional ground where an agency fails to follow its own procedures in the placement of an order.

This long-standing congressional decision to strictly limit the grounds for protest of task orders was an intentional act to carefully balance the desire for timely ordering with an appropriate check on arbitrary agency action that violates the formation of the underlying core contract. In our view, opening up protests for any additional reason at the task order level (even for seemingly large orders) significantly changes that balanced equation and creates a different market dynamic at both the contract formation and order placement phases. Unilateral action cannot be taken on only one side of the business/risk equation. We are not aware of any significant concerns raised by industry, contracting officials or procuring activities seeking to expand the protest right or about the limited circumstances now permitted for protests.

Furthermore, the expansion of protest rights would ultimately cost the taxpayer and it hurts the government's ability to get the contracted work accomplished on schedule. Protests cost the government because of the additional expense related to the preparation of protest responses, soliciting revised bids, and the reevaluation of offers. Since the government pays for protest costs through G&A expense reimbursement, it means the cost of selecting a contractor can go up significantly for the taxpayer. As such, we oppose this recommendation.

R-8: Pricing When No or Limited Competition Exists

Recommendation: For commercial items, provide for a more commercial-like approach to determine price reasonableness. Revise the current FAR provisions that permit the government to require “other than cost or pricing data” to conform to commercial practices by emphasizing that price reasonableness should be determined by competition, market research, and analysis of prices for similar commercial sales. Move the provisions for determining price reasonableness for commercial items to FAR Part 12 and de-link it from FAR Part 15.

Establish in FAR Part 12 a clear preference for market-based price analysis but, where the contracting officer cannot make a determination on that basis (e.g., when no offers are solicited, or the items or services are not sold in substantial quantities in the commercial marketplace), allow the contracting officer to request additional limited information in the following order:

- (i) Prices paid for the same or similar commercial items by government and commercial customers during a relevant period; or,
- (ii) If necessary available information regarding price or limited cost related information to support the price offered such as wages, subcontracts or material costs.

The contracting officer shall not require detailed cost breakdowns or profit, and shall rely on price analysis. The contracting officer may not require certification of this information, nor may it be the subject of a post award audit.

Multi-Association Comment

We strongly disagree with the Panel’s adopted recommendation to move the provisions for determining price reasonableness for commercial items to FAR Part 12 and de-link it from FAR Part 15. As the Commercial Item Drafting Team indicated when issuing the final rule on FAR Part 12 on September 18, 1995:

Commercial Item Pricing - Commentors suggested that Part 12 should discuss the techniques for pricing commercial items. The policies and procedures for determining the price reasonableness of commercial items are contained in Subpart 15.8 and the Team did not want to conflict with those policies. However, a brief summary of pricing considerations used when contracting by negotiation under Part 15 has been included in Part 12.

The Panel makes no case for moving the pricing rules for commercial items from Part 15 to Part 12 and we do not believe such a case exists. Nor does the Panel explain why the 1995 FAR Commercial Item Drafting Team was wrong, and we do not believe that it was. Nor is it apparent that the Panel has considered the possible unintended consequences from a bifurcated pricing policy. When the FAR was first published in 1984, one of its key improvements was the consolidation of related policy into a single

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section or subsection. With few exceptions, this continues today. Moving part of the pricing policy from Part 15 to Part 12 will disrupt this long-standing policy for no apparent reason or benefit.

Even more alarming is that the Panel appears to be encouraging government contracting officers to obtain any form of cost information, that is, "... available information regarding price or limited cost related information to support the price offered such as wages, subcontracts or material costs." This is not required in FAR Part 15 today. This recommendation reflects a belief that all contractors, those that do Federal Government business and those that do not, price in essentially the same way. This is incorrect. For example, the Federal Government typically pays for the development costs for items developed for the Federal Government; this is not true in the commercial markets and commercial pricing reflects that fact. If a contracting officer were to obtain data on a few elements of cost, such as subcontracts or material costs, they would be lacking a full understanding of the contractor's costs; if they were given visibility into greater cost details, they would be unequipped to use that data given the very structured paradigm typically used by USG contractors. The obvious thrust of this recommendation is to enable contracting officers to determine the proposed markup on labor and material costs and, perhaps, on time and material contracts. We believe this is a misdirected and dangerous initiative.

However, we strongly agree with the Panel on the prohibition on certifying information provided by the offeror and subjecting such information to post-award audit with regard to price reasonableness. We recommend that the Panel make it clear that post-award pricing audits should not be conducted at all.

R-9. Standardized Terms [Tabled 7/25/06]

Recommendation: Revise FAR Parts 12 and 52.212 to include standardized terms for the purchase of commercial items and services. Deviate from the standard terms only when it is in the government's best interest. Further, revise the FAR to encourage agencies to draft, publish and use industry or commodity specific terms for recurring requirements.

Multi-Association Comment:

We disagree with the recommendation to include standardized contract terms for the purchase of commercial items and services. FAR 12.201 states the purpose of FAR 12 is to "more closely resemble those customarily used in the commercial marketplace" for the acquisition of commercial items. The Part 12 drafting team reviewed the standard terms and conditions of over 50 companies and concluded that while terms may be more or less similar between companies in a particular market sector, there was little commonality across sectors. From a commercial item procurement perspective, the FAR suffers from trying to prescribe a single clause that would apply across the board for everything the Federal Government may procure, with little flexibility for contracting officers to change, if needed (consider the lengthy and administratively cumbersome deviation and class deviation process). The Drafting team quickly realized that there was no "standard" terms and conditions as suggested by Title VIII and no single set of terms and conditions could adequately and simply address all products, markets and circumstances the Federal Government may find itself faced with. For this reason, Part 12 does not discuss "standard" terms, but rather uses the more appropriate reference to "customary" terms. The Team created a general set of terms that most nearly represented customary commercial terms, and then contracting officers were authorized, with some limits, to make necessary adjustments.

The Panel's recommendation for imposing standardized terms and conditions defeats the spirit and intent of FAR 12.201. While commercial companies frequently use master contracts with standardized terms and conditions for *their own* purchasing, those "standardized" terms and conditions will often be company-specific and vary between companies, reflecting different products, services, contexts, and business plans. The FAR notes this at FAR 12.213 where it states "market research may indicate other commercial practices that are appropriate for the acquisition of the particular item." The use of the litany of U.S. government-specific standard clauses has been demonstrated to keep commercial firms out of the federal marketplace – a result that Congress specifically sought to reverse through the creation of the special authorities for commercial items.

The current FAR language is effective for the procurement of commercial items and services. FAR Subpart 12.3 and clause 52.212-4 currently reflect the use of terms and conditions that are "customary" in the market place. The FAR tells contracting officers to start with the clause at 52.212-4 and modify it as necessary to reflect the customary terms. The basic premise of Part 12 is that most commercial contracts have many

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similar terms and conditions and the 52.212-4 clause is intended to accommodate those typical terms. However, there are often unique commercial terms related to a particular item or service and therefore the contracting officer has been given the flexibility and authority to tailor the terms to that particular market. There are a handful of terms that are unique to a government contract and therefore the contracting officer must include them as written in 52.212-4.

The Request for Quotation/Proposals is in effect a master contract with common terms and conditions given to all bidders. Commercial companies often use master contracts with a set of clauses that cover general contracting much like the clauses used in the RFQ/RFP, supplemented by contract-specific terms and conditions included as attachments (much like tailored clauses included in the RFQ/RFP regarding packing, delivery, extended warranties, etc.). Commercial sellers often take issue with master-contract terms and conditions, and in commercial contracting, negotiations often ensue over those terms and conditions. Therefore the resulting commercial contract may differ substantially from the original master agreement. In government RFP/RFQ's, however, there is rarely an opportunity to negotiate terms and conditions, and contractors can take exception only at their own risk. In addition, the Panel should consider that some terms, such as warranty or packing, are price-affecting and have an impact on the commercial price.

R-10 Improving Government Market Research [Adopted 25 July, 2006]

Recommendation: GSA should establish a market research capability to monitor services acquisitions by government and commercial buyers, collect publicly available information, and maintain a database of information regarding transactions. This information will be available across the government to assist with acquisitions.

Multi-Association Comment:

The Coalition supports this recommendation with the following suggestions for clarification. The recommendation essentially frames GSA as a “center of excellence” for the establishment of a market research capability. It must be pointed out that a funding source for this activity would need to be established as this capability is above and beyond what GSA is staffed for today. The data should be prospectively collected and reporting requirements must not be imposed on the contractor community. Finally, every effort should be made to develop this capability internally so as to build consistency and knowledge from prior experiences.

R-11. Price as Evaluation Factor [Tabled for revisions 21 July 2006]

Recommendation: The panel recommends that the statutes addressing price as an evaluation factor, 41 U.S.C. §253a (P.L. 103-355 §1061(b)) and 10 U.S.C. §2305 (P.L. 103-355 §1011(b)), be amended to provide that non-price factors should rarely be “significantly more important” than price. Evaluation criteria could specify that non-price factors are equal to or more important than price. This approach means that price will still be a significant factor in the evaluation.

Multi-Association Comment:

We oppose this recommendation and request that public comment be solicited on any such significant revisions.

The Panel has adopted no findings that bear on this recommendation or pointed to any studies that demonstrate agencies have been giving “too much weight” to non-price evaluation factors. The Panel should be extremely cautious in statutorily limiting the discretion agencies have to establish the basis on which they will evaluate offers to meet the requirements they define. It is the procuring agency and the customer who are responsible for ensuring their needs are met economically. Selecting and ranking evaluation factors comes within the agency’s discretion (e.g., Augmentation, Inc., Comp. Gen. Dec. B-186614 (September 10, 1976), 76-2 CPD ¶235). Indeed, recognizing such competition as a legitimate, approved form of competition, on par with “formal advertising,” was one of the principle achievements of the Competition in Contracting Act of 1984. See Response and Comments of Aerospace Industries Association, Contract Services Association, Government Electronics and Information Technology Association, Information Technology Association of America, National Defense Association, and the Professional Services Council to the Preliminary Working Draft of the Commercial Practices Working Group of the Acquisition Advisory Panel, page 40 (July 13, 2006) (“Multi-Association Comments on Working Draft from Commercial Practices Working Group”). Furthermore, the Commercial Practices

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Working Group Preliminary Draft Report does not discuss weighing of price versus non-price factors.

Government and commercial buyers alike generally seek the best value, not simply minimally acceptable, lowest cost, as determined for specific agency needs. We strongly oppose making such a fundamental change in procurement philosophy as the Panel is considering by substituting the Panel's judgment of the proper evaluation methodology for the award evaluation decision of those making the procurement.