

# *Chapter 5*

## **Competition**



*2014 Contract Attorneys Deskbook*

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**CHAPTER 5**

**COMPETITION**

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## CHAPTER 5

### COMPETITION

#### I. INTRODUCTION

- A. Competition Promotes the Public Interest. “As every individual, therefore, endeavors as much he can both to employ his capital in the support of domestic industry, and so to direct that industry that its produce may be of the greatest value; every individual necessarily labors to render the annual revenue of the society as great as he can. He generally, indeed, neither intends to promote the public interest, nor knows how much he is promoting it. By preferring the support of domestic to that of foreign industry, he intends only his own security; and by directing that industry in such a manner as its produce may be of the greatest value, he intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention.” Adam Smith, *The Wealth of Nations*, (ed. Edwin Canaan, University of Chicago Press, 1976) pp. 477.
- B. Competition Yields Value. A competitive procurement process produces the best value for the government – it enables agencies to acquire high quality goods and services with the most favorable contract terms for the best possible price. See generally Professor Steven L. Schooner, *Desiderata: Objectives for a System of Government Contract Law*, 11 PUBLIC PROCUREMENT LAW REVIEW 103 (2002) (found at: [http://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=1101&context=faculty\\_publications](http://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=1101&context=faculty_publications)) (discussing competition as an overarching principle of government procurement).

#### II. COMPETITION REQUIREMENTS

- A. The [Competition in Contracting Act of 1984](#). Pub. L. No. 98-369, Division B, Title VII, §§ 2701-2753, 98 Stat. 1175 (July 18, 1984) [hereinafter CICA].
1. Beginning in 1983, Congress began to look for ways to increase the use of competition in government contracting. In 1984 Congress passed the Competition in Contracting Act (CICA) to increase competition in government contracting and to impose more stringent restrictions on the award of noncompetitive–sole-source–contracts. While the Senate originally proposed a marketplace standard of “effective competition” (whereby two or more contractors acting independent of each other, and the Government, submit bids or proposals), Congress ultimately adopted the more stringent “full and open competition” requirement. H.R. Rep. No. 98-369, at 1421, reprinted in 1984 U.S.C.C.A.N. (98 Stat.) 2109-2110. Ultimately, Congress decided to promote economy, efficiency, and effectiveness in the procurement of supplies and services by requiring agencies to

conduct acquisitions on the basis of full and open competition to the maximum extent practicable.

2. The Competition Pendulum. Following CICA, Congress periodically revisited the amount of competition applicable to government contracting in an effort to strike a balance between efficient, commercial-like contracting procedures and maximizing the use of full and open competition. In the 1990s, Congress significantly diminished the amount of competition required for certain acquisition methods and contract types, to include simplified acquisitions, commercial items, and indefinite delivery contracts, through passage of the Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243 (1994) [hereinafter FASA] and the Federal Acquisition Reform (Clinger-Cohen) Act of 1996, Pub. L. No. 104-106, §§ 4001-4402, 110 Stat. 186,642-79 (1996) [hereinafter FARA]. More recently, due in part to perceived excesses resulting from certain provisions of the FASA and FARA, Congress reinvigorated competition, in particular in the area of indefinite delivery contracting. *See, e.g.*, National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 843, 122 Stat. 3,236-39 (2008); Memorandum from Shay Assad, Director, Defense Procurement and Acquisition Policy, Improving Competition in Defense Procurements – Amplifying Guidance (Apr. 27, 2011), <http://www.acq.osd.mil/dpap/policy/policyvault/USA002080-11-DPAP.pdf>; Memorandum from Richard Ginman, Director, Defense Procurement and Acquisition Policy, Contingency Competition Goals and Competition Reviews of Certain Omnibus Contracts, (Feb. 17, 2012), <http://www.acq.osd.mil/dpap/policy/policyvault/USA000907-12-DPAP.pdf>. Notwithstanding these pendulum swings, the fundamental, general rule of the CICA has remained unchanged: **Agencies must conduct acquisitions on the basis of full and open competition to the maximum extent practicable.**
3. The CICA, as amended by the FASA, FARA and other acts, is located in several titles of the United States Code, including:
  - a. Various sections of 10 U.S.C. §§ 2202, 2301-2314, 2381, and 2383 detail the competition requirements that apply to the Department of Defense (DOD), the individual military departments (i.e., Departments of Army, Air Force, and Navy), the Department of Homeland Security (DHS) (i.e., the Coast Guard), and the National Aeronautics and Space Administration (NASA).
  - b. Various sections of title 41 of the U.S. Code, including §§ 1101-1102, 1121-1131, 1301-1304, 1311-1312, 1701-1713, 3101-3106, 3301-3311.

- (1) 41 U.S.C. § 1101 establishes the Office of Federal Procurement Policy (OFPP) within the Office of Management and Budget to provide leadership and guidance in the development of procurement policies and systems.
  - (2) 41 U.S.C. § 1708 requires agencies to publicize procurement actions by publishing or posting procurement notices.
  - (3) 41 U.S.C. § 1705 requires agencies to appoint competition advocates.
4. The following sections of the Federal Acquisition Regulation (FAR) – and the corresponding sections of the Defense Federal Acquisition Regulation Supplement (DFARS) and individual service supplements (e.g., the Army Federal Acquisition Regulation Supplement (AFARS), the Air Force Federal Acquisition Regulation Supplement (AFFARS)) – implement the statutory requirements:
- a. FAR Part 5 – Publicizing Contract Actions;
  - b. FAR Part 6 – Competition Requirements;
  - c. FAR Part 7 – Acquisition Planning;
  - d. FAR Part 8 – Requires Sources of Supplies or Services;
  - e. FAR Part 10 – Market Research;
  - f. FAR Part 11 – Describing Agency Needs;
  - g. FAR Part 12 – Acquisition of Commercial Items;
  - h. FAR Part 13 – Simplified Acquisition Procedures; and
  - i. FAR Subpart 16.5 – Indefinite Delivery Contracts.

B. Congressional Scheme

1. The overarching goal of CICA is to achieve competition to the maximum extent practicable by opening the procurement process to all capable contractors who want to do business with the Government.
2. There are three possible levels of competition in the acquisition process.
  - a. Full and Open Competition. FAR Subpart 6.1.

- b. Full and Open Competition After Exclusion of Sources. FAR Subpart 6.2.
    - c. Other Than Full and Open Competition. FAR Subpart 6.3.
  - 3. Agencies must achieve competition to the maximum extent practicable within each level of competition.
- C. Full and Open Competition. 10 U.S.C. § 2304(a)(1); 41 U.S.C. § 3301(a)(1); FAR Subpart 6.1.
  - 1. Definition. 41 U.S.C. § 107 and FAR 2.101.
    - a. “Full and open competition” refers to a contract action in which all responsible sources are permitted to compete.
    - b. Full and open competition does not require agencies to achieve actual competition. The standard is that interested parties are afforded the opportunity to submit bids or proposals – agencies are not required to receive more than one bid or proposal.
  - 2. Policy. FAR 6.101.
    - a. Contracting officers shall provide for full and open competition by using competitive procedures to solicit offers and award contracts unless they can justify using full and open competition after exclusion of sources (FAR Subpart 6.2), or other than full and open competition (FAR Subpart 6.3).
    - b. Contracting officers must use the competitive procedure that is best suited to the particular contract action.
  - 3. Examples of competitive procedures that promote full and open competition include (FAR 6.102):
    - a. Sealed bids. FAR Part 14.
    - b. Competitive proposals (i.e., negotiation). FAR Part 15.
    - c. Combination of competitive procedures (e.g., two-step sealed bidding).
    - d. Other competitive procedures (i.e., the Federal Supply Schedule).
  - 4. Unfair Competitive Advantage. Competition must be conducted on an equal basis. The Eloret Corp., [B-402696.2](#), Jul. 16, 2010, 2010 CPD ¶ 182 (stating a fundamental principle of government procurement is

that competitions are held on an equal basis – meaning offerors are treated equally and are provided a common basis to prepare proposals). An “unfair competitive advantage” or organizational conflict of interest, can arise in a variety of different factual contexts. See 2014 Contract Attorney’s Deskbook, Chapter 34, Responsibility, Timeliness, and Organizational Conflicts of Interest for more information.

D. Full and Open Competition After Exclusion of Sources. 10 U.S.C. § 2304(b); 41 U.S.C. § 3303(b); FAR Subpart 6.2; DFARS Subpart 206.2.

1. In the CICA, Congress recognized that there were certain situations where the field of competition should be limited to certain groups.
  - a. The CICA allows an agency to “provide for the procurement of property or services covered by this section using competitive procedures but excluding a particular source in order to establish or maintain any alternative source or sources of supply for that property or service” as long as the agency head made the determination. The CICA, § 303(b)(1), codified at 10 U.S.C. § 2304(b)(1) and 41 U.S.C. § 3303(b)(1).
  - b. Congress also recognized that an agency may limit competition in order to fulfill the statutory requirements relating to small business concerns and socially and economically disadvantaged small business concerns. The CICA, § 303(2), codified at 10 U.S.C. § 2304(b)(2) and 41 U.S.C. § 3303(b)(2).
2. This policy is enacted through FAR Subpart 6.2 which prescribes the policies and procedures for full and open competition after excluding one or more source.
  - a. The policy allows contracting officers, under limited circumstances, to exclude one or more sources from a particular contract action.
  - b. After excluding these sources, a contracting officer must use competitive (e.g. sealed bids, competitive proposals, or combination of competitive procedures) to promote full and open competition among non-excluded offerors. See FAR Sections 6.201 and 6.102.
3. A contracting officer may generally exclude one or more sources under two circumstances.
  - a. Establishing or maintaining alternative sources for supplies or services. FAR 6.202; DFARS 206.202.

- (1) The agency head must determine that the exclusion of one or more sources will serve one of six purposes.
  - (a) Increase or maintain competition and likely result in reduced overall costs for the acquisition, or for any anticipated acquisition.
  - (b) Be in the interest of national defense in having facilities, producers, manufacturers, or other suppliers available to furnish necessary supplies and services in the event of a national emergency or industrial mobilization. Hawker Eternacell, Inc., [Comp. Gen. B-283586](#), 1999 U.S. Comp. Gen. LEXIS 202 (Nov. 23, 1999); Martin Elecs. Inc., [Comp. Gen. B-219803](#), Nov. 1, 1985, 85-2 CPD ¶ 504.
  - (c) Be in the interest of national defense in establishing or maintaining an essential engineering, research, or development capability to be provided by an educational or nonprofit institution, or federally funded research and development center.
  - (d) Ensure the continuous availability of a reliable source of supply or services. E.g. PWC Logistics Servs. Corp., [B-400660](#), Jan. 6, 2009, 2009 CPD ¶ 167 (rejecting a challenge to a DOD decision to split the logistics support contract for the Iraq AOR into two contracts and reserve the right under FAR 6.202(a) to deny both contracts to a single contractor).
  - (e) Satisfy projected needs based on history of high demand.
  - (f) Satisfy a critical need for medical, safety, or emergency supplies.
- (2) The agency head must support the decision to exclude one or more sources with written determinations and findings (D&F). FAR 6.202(b)(1). The D&F is a special form of written approval by an authorized official that is required by statute or regulation as a prerequisite to taking certain governmental action. It consists of a determination (a conclusion) that is supported by the findings (statements of fact or

rationale). See FAR Subpart 1.7; see also DFARS 206.202(b); DFARS PGI 206.202(b) (providing sample format and listing required contents).

- (a) The agency head or his designee must sign the D&F.
  - (b) The agency head cannot create a blanket D&F for similar classes of procurements.
- (3) In DOD, agencies may use this exception to totally or partially exclude a particular source from a contract action. DFARS 206.202(a).
- b. Set-asides for small businesses. FAR 6.203; DFARS 206.203.
- (1) A contracting officer may limit competition to small business concerns to satisfy statutory or regulatory requirements. A “set aside for small business” is the reserving of an acquisition exclusively for participation by small business concerns. See FAR Subpart 19.5.
  - (2) The contracting officer is not required to support the determination to set aside a contract action with a separate written justification or D&F.
  - (3) Competition under FAR 6.203 cannot be restricted to only *certain* small businesses. Department of the Army Request for Modification of Recommendation, Comp. Gen. B-290682.2, Jan. 9, 2003, 2003 CPD ¶ 23 (stating that while the CICA allows for the exclusion of non-small business concerns to further the Small Business Act, it still requires “full and open competition among eligible small business concerns.” Such procedures must allow all responsible eligible business concerns [i.e., small business concerns] to submit offers.).
  - (4) FAR Subpart 6.2 contains similar additional set-aside guidance for other small business concerns as follows:
    - (a) FAR 6.204—Set-asides for Section 8(a) competitions;
    - (b) FAR 6.205—Set-asides for HUBZone small business concerns;
    - (c) FAR 6.206—Set-asides for service-disabled veteran-owned small business concerns;

(d) FAR 6.207—Set-asides for local firms during a major disaster or emergency.

E. Other Than Full and Open Competition. 10 U.S.C. § 2304(c); 41 U.S.C. § 3304; FAR Subpart 6.3; DFARS Subpart 206.3; AFARS Subpart 6.3.

1. Policy. FAR 6.301.

a. Executive agencies cannot contract without providing for full and open competition unless one of the statutory exceptions listed in FAR 6.302 applies.

b. A contract awarded without full and open competition must reference the applicable statutory exception.

c. Agencies cannot justify non-competitive procurements based on:

(1) A lack of advance planning. 10 U.S.C. § 2304(f)(4)(A); FAR 6.301(c)(1).

(a) Noncompetitive procedures may not be justified on an agency's failure to conduct advanced planning. RBC Bearings, Inc., Comp. Gen. B-401661, Oct. 27, 2009, 2009 CPD ¶ 207 (finding Army's failure to qualify a source for 10 years amply established a failure to conduct adequate and reasonable advanced planning); VSE Corp., Comp. Gen. B-290452.3, May 23, 2005, 2005 CPD ¶ 103 (disapproving award of sole source bridge contract in part due to agency's failure to conduct advanced planning); Worldwide Language Resources, Inc., Comp. Gen. B-296984, Nov. 14, 2005, 2005 CPD ¶ 206 (determining that a justification and approval for sole source award of bilingual-bicultural advisors contract revealed lack of advance planning and not unusual and compelling circumstances).

(b) Advanced planning must be reasonable, not completely error free. Pegasus Global Strategic Solutions, LLC, Comp. Gen. B 400422.3, Mar. 24, 2009, 2009 CPD ¶ 73 (upholding sole source based on unusual and compelling urgency notwithstanding errors in agency planning); Bannum, Inc., Comp. Gen. B-289707, Mar. 14, 2002, 2002 CPD ¶ 61 (finding

that while the agency's planning ultimately was unsuccessful, this was due to unanticipated events, not a lack of planning); Diversified Tech. & Servs. of Virginia, Inc., [B-282497](#), July 19, 1999, 99-2 CPD ¶ 16 (refusing to fault the Department of Agriculture where the procurement was delayed by the agency's efforts to implement a long-term acquisition plan).

- (c) To avoid a finding of "lack of advanced planning" agencies must make reasonable efforts to obtain competition. Heros, Inc., Comp. Gen. B-292043, June 9, 2003, 2003 CPD ¶ 111 (stating agencies "must act affirmatively to obtain and safeguard competition; they cannot take a passive approach and remain in a sole source situation when they could reasonably take steps to enhance competition."); see also Raytheon Co. - Integrated Defense Sys., Comp. Gen. B-400610, Dec. 22, 2008, 2009 CPD ¶ 8 (finding Navy's follow-on, sole source award of three contracts to modernize automated portions of the Aegis Combat System and make the software commercial-off-the-shelf (COTS) compatible promoted competition and did not constitute a lack of advanced planning).

- (2) Concerns related to the amount of funds. 10 U.S.C. § 2304(f)(4)(A); FAR 6.301(c)(2). Cf. AAI ACL Tech., Inc., [B-258679.4](#), Nov. 28, 1995, 95-2 CPD ¶ 243 (distinguishing the expiration of funds from the unavailability of funds).

- (a) The contracting officer must solicit offers from as many potential sources as is practicable under the circumstances. FAR 6.301(d); Bausch & Lomb, Inc., [Comp. Gen. B-298444](#), Sept. 21, 2006, 2006 CPD ¶ 135 (rejecting sole source award despite presence of unusual and compelling urgency where agency failed to consider other available sources that expressed an interest); Kahn Indus., Inc., [B-251777](#), May 3, 1993, 93-1 CPD ¶ 356 (holding that it was unreasonable to deliberately exclude a known source simply because other agency personnel

failed to provide the source's telephone number).

- (b) If possible, the contracting officer should use competitive procedures that promote full and open competition.

2. There are seven statutory exceptions to the requirement to provide for full and open competition.

a. Only One Responsible Source and No Other Supplies or Services Will Satisfy Agency Requirements. 10 U.S.C. § 2304(c)(1); 41 U.S.C. § 3304(a)(1); FAR 6.302-1; DFARS 206.302-1; AFARS 5106.302-1.

(1) DOD, NASA, and the Coast Guard.

(a) The agency is not required to provide for full and open competition if:

(i) There is only one or a limited number of responsible sources; and

(ii) No other supplies or services will satisfy the agency's requirements.

(b) Smith and Wesson, Inc., [B-400479](#), Nov., 20, 2008, 2008 CPD ¶ 215 (upholding the rationality of the agency's decision to purchase Glock firearms for the Pakistani military as the Pakistanis already had a logistics system to support the weapons and supporting a new firearm would be overly burdensome); Cubic Defense Sys., Inc. v. United States, [45 Fed. Cl. 239](#) (1999); Metric Sys. Corp. v. United States, 42 Fed. Cl. 306 (1998); Datacom, Inc., Comp. Gen. [B-274175](#), Nov. 25, 1996, 96-2 CPD ¶ 199; But see Lockheed Martin Sys. Integration—Owego, [Comp. Gen. B-287190.2](#), May 25, 2001, 2001 CPD ¶ 110 (when an agency relies on this exception, the agency must give other sources "notice of its intentions, and an opportunity to respond to the agency's requirements." The agency must "adequately apprise" prospective sources of its needs so that those sources have a "meaningful opportunity to demonstrate their ability" to satisfy the agency's needs. When the agency gave "misleading

guidance” which prejudiced the protestor, GAO invalidated the sole source award); National Aerospace Group, Inc., Comp. Gen. B-282843, Aug. 30, 1999, 99-2 CPD ¶ 43 (sustaining protest where the Defense Logistics Agency’s documentation failed to show that only the specific product would satisfy the agency’s need).

- (2) Other Agencies.
  - (a) The agency is not required to provide for full and open competition if:
    - (i) There is only one responsible source (as opposed to “a limited number”); and
    - (ii) No other supplies or services will satisfy the agency’s requirements.
- (3) Unsolicited, unique and innovate proposals may form the basis for a sole source award. See FAR 6.302-1(a)(2)(i). But see, DFARS 206.302-1.
- (4) Follow-On Contracts. Supplies (and highly specialized services for the DOD, NASA, and Coast Guard, FAR 6.302-1(a)(2)(iii)) may be deemed available only from the original source in follow-on contracts for the continued development or production of a major weapon system or highly specialized equipment, including major components thereof, when it is likely that award to any other source would result in:
  - (a) Substantial duplication of cost to the Government that is not expected to be recovered through competition, or
  - (b) Unacceptable delays in fulfilling agency requirements. FAR 6.302-1(a)(2)(ii); Raytheon Co. - Integrated Defense Sys., Comp. Gen. B-400610, Dec. 22, 2008, 2009 CPD ¶ 8 (upholding follow-on sole source award to incumbent contractor of Aegis Combat System because award to any other offeror would lead to unacceptable delay).

- (5) Use in preference to the public interest exception. Do not use if any other exception to full and open competition applies. FAR 6.302-1(b).
  - (6) Limitations. FAR 6.302-1(d).
    - (a) Must be supported by a written justification and approval (J&A). J&A must be posted on fbo.gov, along with a synopsis (if required), within 14 days after award, and remain up for 30 days. FAR 6.303 thru 6.305. McAfee, Inc. v. United States, [111 Fed. Cl. 696](#) (2013) (sustaining protest where the Air Force's discrete procurement actions consisting of in-scope modifications and brand name solicitations implemented a broader scheme of standardization that evidenced a predicate decision to adopt a sole source system *without* the required J&A).
    - (b) Must publish notices required by FAR 5.201 and consider any bids, proposals, quotations, or capability statements received.
- b. Unusual or Compelling Urgency. 10 U.S.C. § 2304(a)(2); 41 U.S.C. § 3304(c)(2); FAR 6.302-2; DFARS 206.302-2; AFARS 5106.302-2.
- (1) An agency is not required to provide for full and open competition if:
    - (a) Its needs are of unusual and compelling urgency; and
    - (b) The government will be seriously injured, financially or otherwise, unless the agency can limit the number of sources from which it solicits offers.
  - (2) The DFARS Procedures, Guidance, and Information (PGI) 206.302-2 provide circumstances under which unusual and compelling urgency may be appropriate. They include, but are not limited to:
    - (a) Supplies, services or construction needed at once because of fire, flood, explosion, or other disaster.

- (b) Essential equipment or repair needed at once to—
    - (i) Comply with orders for a ship
    - (ii) Perform the operational mission of an aircraft, or
    - (iii) Preclude impairment of launch capabilities or mission performance of missiles or missile support equipment.
  - (c) Construction needed at once to preserve a structure or its contents from damage.
  - (d) Purchase requests citing an issue priority designator under DOD 4140.1-R, DOD Materiel Management Regulation, of 4 or higher, or citing “Electronic Warfare QRC Priority.”
- (3) Limitations.
- (a) Must be supported by a J&A which may be made and approved after contract award. The J&A must be published to fbo.gov within 30 days of contract award, and remain posted for 30 days. FAR 6.302-2(c)(1) and 6.305(b).
  - (b) Agencies must request offers from as many sources as practicable under the circumstances. FAR 6.302-2(c)(2); Pegasus Global Strategic Solutions, Inc., Comp. Gen. B-400422.3, Mar. 24, 2009, 2009 CPD ¶ 73 (holding that although the agency must request offers from as many as sources as practicable, the agency may properly not consider offers from those firms that it reasonably believes cannot perform the work in a combat environment); Bausch & Lomb, Inc., Comp. Gen. B-298444, Sept. 21, 2006, 2006 CPD ¶ 135 (sustaining protest where the agency could not explain why there was not time to open the competition to a limited number of offerors on an expedited basis).
  - (c) Period of Performance. FAR 6.302-2(d). For acquisitions greater than the simplified acquisition threshold, the period of performance:

- (i) May not exceed the time necessary:
    - a. To meet the unusual and compelling requirements of the work to be performed under the contract; and
    - b. For the agency to enter into another contract for the required goods and services through the use of competitive procedures.
  - (ii) May not exceed one year unless the head of an agency entering into the contract determines that exceptional circumstances apply.
- (4) Common situations. Camden Shipping Corp., [B-406171, B-406323](#), Feb. 27, 2012, 2012 CPD ¶ 76 (allowing a “bridge contract” where only the incumbent could ensure uninterrupted operation of the vessel); Pegasus Global Strategic Solutions, LLC, [Comp. Gen. B 400422.3](#), Mar. 24, 2009, 2009 CPD ¶ 73 (upholding out-of-scope modification of counter improvised explosive device electronic warfare system contract on the basis of an unusual and compelling urgency); T-L-C Sys., [Comp. Gen. B-400369](#), Oct. 23, 2008, 2008 CPD ¶ 195 (finding that failure of fire alarm system justified sole source award of contract limited to only those fire alarms which malfunctioned); J&J Colombia Serv., [Comp. Gen. B-299595.3](#), June 26, 2007, 2007 CPD ¶ 126 (upholding award of sole-source bridge contract where award of a long-term contract was delayed by litigation and agency reasonably determined that only the incumbent contractor could perform the urgently required services).
- (5) Common Problems. RBC Bearings, Inc., [Comp. Gen. B-401661](#), Oct. 27, 2009, 2009 CPD ¶ 207 (disapproving agency’s actions where an agency failure to approve an alternative source caused the lack of advanced planning and created the unusual and compelling urgency); Bausch & Lomb, Inc., [Comp. Gen. B-298444](#), Sept. 21, 2006, 2006 CPD ¶ 135 (sustaining protest where the agency could not explain why there was not time to open the competition to a *limited number of offerors* on an expedited basis);

Signals and Sys., Inc., Comp. Gen. [B-288107](#), Sept., 21, 2001, 2001 CPD ¶168 (stating that an “urgency justification cannot support the procurement of more than the minimum quantity needed to satisfy the immediate urgent requirement.” Since the Army did not know how many items it needed to replace, the Army also could not know what “minimum quantity” it needed. Further, the Army made no reasonable effort to discover how many items would have to be replaced. Therefore, GAO sustained the protest that the Army purchased more units than were necessary); National Aerospace Group, Inc., [Comp. Gen. B-282843](#), Aug. 30, 1999, 99-2 CPD ¶ 43 (finding that agency documentation failed to show that need was of an unusual and compelling urgency).

- c. Industrial Mobilization; Engineering, Developmental, or Research Capability; or Expert Services. 10 U.S.C. § 2304(c)(3); 41 U.S.C. § 3304(a)(3); FAR 6.302-3; AFARS 5106.302-3.
  - (1) An agency is not required to provide for full and open competition if it must limit competition to:
    - (a) Maintain facilities, producers, manufacturers, or suppliers to furnish supplies or services in the event of a national emergency or industrial mobilization. Ridgeline Ind., Inc., [B-402105](#), Jan. 7, 2010, 2010 CPD ¶ 22 (approving of DLA’s use of FAR 6.302-3 to purchase tents from one vendor, who was one of only six military specification tent vendors in the nation, to ensure the companies continued viability); Coulson Aviation (USA) Inc., [Comp. Gen. B-409356.2-6](#), Mar. 31, 2014 (finding that a sole source award for industrial mobilization lacked adequate justification when the J&A was devoid of evidence that the awardee required a contract to remain a viable source of supply).
    - (b) To establish or maintain an essential engineering, research or development capability to be provided by an educational institution, nonprofit institution, or federally funded research and development center, or

- (c) Acquire the services of an expert or neutral person for any current or anticipated litigation or dispute. See SEMCOR, Inc., B-279794, July 23, 1998, 98-2 CPD ¶ 43 (defining “expert”).
  - (2) Limitations. Must be supported by a written J&A posted to fbo.gov within 14 days of the award, and remain for 30 days. FAR 6.302-3(c).
- d. International Agreement. 10 U.S.C. § 2304(c)(4); 41 U.S.C. § 3304(a)(4); FAR 6.302-4.
  - (1) An agency is not required to provide for full and open competition if it is precluded by:
    - (a) An international agreement or treaty (e.g., a status of forces agreement (SOFA)); or
    - (b) The written direction of a foreign government that will reimburse the agency for its acquisition costs (e.g., pursuant to a Foreign Military Sales agreement). See Electro Design Mfg., Inc., Comp. Gen. B-280953, Dec. 11, 1998, 98-2 CPD ¶ 142 (upholding agency’s decision to combine system requirements into single procurement at foreign customer’s request); Goddard Indus., Inc., Comp. Gen. B-275643, Mar. 11, 1997, 97-1 CPD ¶ 104 (involving the purchase for space parts at the direction of the Republic of the Philippines); Pilkington Aerospace, Inc., Comp. Gen. B-260397, June 19, 1995, 95-2 CPD ¶ 122.
  - (2) Limitations. Except for DOD, NASA, and the Coast Guard, must be supported by a written J&A posted to the GPE for 30 days. FAR 6.302-4(c). For DOD, the head of the contracting activity must prepare a document describing the terms of an agreement, treaty, or written directions, such as a Letter of Offer and Acceptance in a Foreign Military Sales case, that have the effect of requiring the use of other than competitive procedures. DFARS 206.302-4.
- e. Authorized or required by statute. 10 U.S.C. § 2304(c)(5); 41 U.S.C. § 3304(a)(5); FAR 6.302-5; DFARS 206.302-5.
  - (1) An agency is not required to provide for full and open competition if:

- (a) A statute authorizes or requires the agency to procure the supplies or services from another agency or a specified source<sup>1</sup> OR
  - (i) Federal Prison Industries 18 U.S.C. § 4124; FAR Subpart 8.6;
  - (ii) Qualified Non-profit Agencies for the Blind or other severely disabled. 41 U.S.C. §§ 8501-8506; FAR Subpart 8.7.
  - (iii) Government Printing and Binding. 44 U.S.C. §§ 501-504, FAR Subpart 8.8.
  - (iv) Sole source awards under Section 8(a). 15 U.S.C. 637; FAR Subpart 19.8.
  - (v) Sole source awards under the HUBZone Act. 15 U.S.C. 657a; FAR 19.1306.
  - (vi) Sole source awards under the Veterans Benefits Act of 2003. 15 U.S.C. 657f.
- (b) The agency needs a brand name commercial item for authorized resale by a commissary or similar facilities. FAR 6.302-5(a)(2) and (c)(3).
- (2) Limitations: Contracts awarded using this authority must be supported by a J&A posted to the GPE for 30 days except:
  - (a) Brand name commercial items for authorized resale (e.g., commissary);
  - (b) Qualified Non-profit Agencies for the Blind or other severely disabled. 41 U.S.C. §§ 8501-8506; FAR Subpart 8.7.
  - (c) Sole source awards under the 8(a) Program. 15 U.S.C. § 637; FAR Subpart 19.8. But see FAR 6.303-1(b) (requiring a J&A for sole source

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<sup>1</sup> DFARS 206.302-5 generally permits agencies to use this authority to acquire: (1) supplies and services from military exchange stores outside the United States for use by Armed Forces stationed outside the United States pursuant to 10 U.S.C. § 2424(a) but subject to the limitations of 10 U.S.C. § 2424(b); and (2) police, fire protection, airfield operation, or other community services from local governments at certain military installations that are being closed. However, DFARS 206.302-5 also limits the ability of agencies to use this authority to award certain research and development contracts to colleges and universities.

procurements in excess of \$20 million under the 8(a) program).

- (d) Situations where a statute expressly requires the procurement be made from a specified source. If a statute only authorizes the procurement, a J&A must be prepared. FAR 6.302-5(c)(2).
- (3) Contingency Contracting Authorities. To bolster operations Afghanistan, Congress created statutory exceptions to the use of full and open competition in certain well-defined circumstances. These exceptions to competition do not fit neatly within the FAR Part 6 framework, often intermixing set-asides (FAR Subpart 6.2) with other than full and open competition (FAR Subpart 6.3). Primary authorities include:
- (a) Afghanistan First Program.
    - (i) Authority. National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 886, 122 Stat. 3, 266 (Jan. 28, 2008) as amended by the National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, §842, 126 Stat. 1632 (Jan. 2, 2013) (striking Iraq).
    - (ii) Authorizes a preference or set-aside for goods or services from Afghanistan as well as the use of other than competitive procedures to award a contract to a particular source or sources from Iraq or Afghanistan.
    - (iii) Requires written determinations as set forth in DFARS 225.7703-2. A J&A is not required. 225.7703-1(b).
    - (iv) See Kuwait Leaders Gen. Trading & Contracting Co., Comp. Gen. B-401015.2, May 21, 2009, 2009 CPD ¶ 113 (finding that agency properly excluded non-Iraqi business from a competition while the preference for Iraq was still in effect).

- (v) But see National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 892, 122 Stat. 3, 270, codified at 10 U.S.C. § 2304 note (requiring the use of full and open competition for the acquisition of small arms supplied to Afghanistan).
- (b) Temporary Authority to Acquire Products and Services Produced in Countries Along a Major Route of Supply to Afghanistan.
- (i) Authority. National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 801, 123 Stat. 2 as amended by the National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, §841, 126 Stat. 1845 (Jan. 2, 2013). Implemented at DFARS 225.7704 and 225.7799
  - (ii) Authorizes limiting competition to or establishing a preference for products and services that are from one or more countries along a major route of supply to Afghanistan.
  - (iii) Requires a written determination (as opposed to a J&A.)
  - (iv) Covered countries include Georgia, Kyrgyzstan, Pakistan, Armenia, Azerbaijan, Kazakhstan, Tajikistan, Uzbekistan, and Turkmenistan
  - (v) Authority expires on December 31, 2015. National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, §832, 127 Stat. 814 (Jan. 2, 2013).
  - (vi) This authority is in addition to the authority for the Afghanistan First Program.
- f. National Security. 10 U.S.C. § 2304(c)(6); 41 U.S.C. § 3304(a)(6); FAR 6.302-6. An agency is not required to provide for full and open competition if disclosure of the government's

needs would compromise national security (e.g., would violate security requirements). However, the mere fact that an acquisition is classified, or requires contractors to access classified data to submit offers or perform the contract, does not justify limiting competition. Contracts awarded under this exception require a written Justification and Approval as described in subpart 6.303. Agencies are still required to request offers from as many potential sources as practicable under the circumstances.

- g. Public Interest. 10 U.S.C. § 2304(c)(7); 41 U.S.C. § 3304(a)(7); FAR 6.302-7; DFARS 206.302-7. An agency is not required to provide for full and open competition if the agency head determines that full and open competition is not in the public interest.
  - (1) The agency head must support the determination to use this authority with a written D&F. The D&F must be made on an individual basis, not a class basis.
  - (2) The agency must notify Congress at least 30 days before contract award. Northrop Grumman Corp. v. United States, 46 Fed. Cl. 622 (2000) (holding that NASA's use of the public interest exception required Congressional **notice**, and not Congressional **consent**). See also Spherix, Inc. v. United States, 58 Fed. Cl. 351 (2003).
  - (3) May not be used if any other authority in FAR 6.302 applies. But see, Sikorsky Aircraft Corp, B-403471.3, Nov. 5, 2010, 2010 CPD ¶ 271 (finding agency decision to purchase M-17 aircraft for the Afghani Army using FAR 6.302-7 over 6.302-1 reasonable and therefore unobjectionable).
- 3. The use of Other than Full and Open Competition requires written documentation to explicitly state why one of the exceptions applies. Exceptions one (one source) through six (national interest) require J&As for Other Than Full and Open Competition except as expressly provided in FAR 6.302 and discussed supra in Section II.E.2.(e) See FAR 6.303; FAR 6.304; DFARS 206.303; DFARS 206.304; AFARS 5106.303; AFARS 5106.304. Exception seven (public interest) requires a determination and finding as previously described supra in Section II.E.2.g.
  - a. Basic Requirements. The contracting officer must prepare a written justification, certify its accuracy and completeness, and

obtain all required approvals before negotiating or awarding a contract using other than full and open competitive procedures. FAR 6.303-1(a).

- (1) Individual v. Class Justification. FAR 6.303-1(d); AFARS 5106.303-1(c). The contracting officer must prepare the justification on an individual basis for contracts awarded pursuant to the “public interest” exception (FAR 6.302-7). Otherwise, the contracting officer may prepare the justification on either an individual or class basis.
- (2) Ex Post Facto Justification. FAR 6.303-1(e). The contracting officer may prepare the written justification within a reasonable time after contract award if:<sup>2</sup>
  - (a) The contract is awarded pursuant to the “unusual and compelling urgency” exception (FAR 6.302-2); and
  - (b) Preparing the written justification before award would unreasonably delay the acquisition.

b. Contents. FAR 6.303-2; DFARS 206.303-2; AFARS 5106.303-2 and 5106.303-2-90.

- (1) Format. AFARS 5153.9005.<sup>3</sup>
- (2) The J&A should be a stand-alone document. FAR 6.303-2; Sabreliner Corp., [Comp. Gen. B-288030](#), Sep. 13, 2001, 2001 CPD ¶ 170 (holding that inaccuracies and inconsistencies in the J&A and between the J&A and other documentation invalidated the sole source award). But see, Argon ST, Inc., [B-402908.2](#), Aug. 11, 2010, 2011 CPD ¶ 4 (rejecting a challenge to a J&A despite a clear error of fact, as the rest of the J&A supports the use of 6.302-2).
  - (a) Each justification must contain sufficient information to justify the use of the cited exception. FAR 6.303-2(a).

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<sup>2</sup> If the contract exceeds \$85.5 million, the agency must forward the justification to the approval authority no later than 7 calendar days after contract award. AFARS 5106.303-1(d).

<sup>3</sup> The format specified in AFARS 5153.9005 is mandatory for contract actions greater than \$78.5 million. Note that as of 1 May 2012, the AFARS has not been updated to reflect the statutorily required inflation adjustment to \$85.5 million.

- (b) The J&A must document and adequately address all relevant issues.
- (3) At a minimum, under FAR 6.303-2(b), the justification must:
- (a) Identify the agency, contracting activity, and document;
  - (b) Describe the action being approved;
  - (c) Describe the required supplies or services and state their estimated value;
  - (d) Identify the applicable statutory exception;
  - (e) Demonstrate why the proposed contractor's unique qualifications and/or the nature of the acquisition requires the use of the cited exception;
  - (f) Describe the efforts made to solicit offers from as many potential sources as practicable, including whether a notice was or will be published as required by FAR Subpart 5.2, and if not, which exception under FAR 5.202 applies;
  - (g) Include a contracting officer's determination that the anticipated cost to the government will be fair and reasonable;
  - (h) Describe any market research conducted (see FAR Part 10), or state why no market research was conducted;
  - (i) Include any other facts that justify the use of other than full and open competitive procedures, such as:
    - (i) An explanation of why the government has not developed or made available technical data packages, specifications, engineering descriptions, statements of work, or purchase descriptions suitable for full and open competition, and a description of any planned remedial actions;

- (ii) An estimate of any duplicative cost to the government and how the estimate was derived if the cited exception is the “sole source” follow-on contract exception (FAR 6.302-1);
- (iii) Data, estimated costs, or other rationale to explain the nature and extent of the potential injury to the government if the cited exception is the “unusual and compelling urgency” exception (FAR 6.302-2).<sup>4</sup>
- (j) List any sources that expressed an interest in the acquisition in writing;<sup>5</sup>
- (k) State any actions the agency may take to remove or overcome barriers to competition for future acquisitions; and
- (l) Include a certification that the justification is accurate and complete to the best of the contracting officer’s knowledge and belief. FAR 6.303-1(b); DFARS 206.303-1(b).
- (4) Each justification must also include a certificate that any supporting data provided by technical or requirements personnel is accurate and complete to the best of their knowledge and belief. FAR 6.303-2(b).
- c. Approval. FAR 6.304(a); DFARS 206.304; AFARS 5106.304.
  - (1) The appropriate official must approve the justification in writing.
  - (2) Approving officials.

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<sup>4</sup> The justification should include a description of the procurement history and the government’s plan to ensure that the prime contractor obtains as much competition as possible at the subcontractor level in single source acquisitions. AFARS 5153.9005.

<sup>5</sup> If applicable, state: “To date, no other sources have written to express an interest.” In sole source acquisitions, if other sources expressed an interest, explain why the other sources were rejected. AFARS 5153.9005. See Centre Mfg. Co., Comp. Gen. B-255347.2, Mar. 2, 1994, 94-1 CPD ¶ 162 (denying protest where agency’s failure to list interested sources did not prejudice protester).

- (a) The approval official for proposed contract actions not exceeding \$650,000 is the contracting officer.
  - (b) The approval official for proposed contract actions greater than \$650,000, but not exceeding \$12,500,000, is normally the competition advocate.
  - (c) The approval official for proposed contract actions greater than \$12,500,000, but not exceeding \$62,500,000 (most agencies) or \$85,500,000 (DOD, NASA, Coast Guard) is the head of the contracting activity or his designee.<sup>6</sup>
  - (d) The approval official for proposed contract actions greater than \$62,500,000 (most agencies) or \$85,500,000 (DOD, NASA, Coast Guard) is the agency's senior procurement executive.<sup>7</sup>
- (3) The justification for a contract awarded pursuant to the "public interest" exception (FAR 6.302-7) is considered approved when the D&F is signed. FAR 6.304(b).
  - (4) The agency must determine the appropriate approval official for a class justification based on the total estimated value of the class. FAR 6.304(c).
  - (5) The agency must include the estimated dollar value of all options in determining the appropriate approval level. FAR 6.304(d).
- d. Requirement to Amend the Justification. AFARS 5106.303-1-90. Prior to contract award, the contracting officer must prepare an amended J&A if:

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<sup>6</sup> The designee must be a general officer, a flag officer, or in a grade above GS15. FAR 6.304(a)(3).

<sup>7</sup> "Senior Procurement Executive" means: Under Secretary of Defense (Acquisition, Technology, and Logistics); Assistant Secretary of the Army (Acquisition, Technology, and Logistics); Assistant Secretary of the Navy (Research, Development and Acquisition); Assistant Secretary of the Air Force (Acquisition). DFARS 202.101. The directors of the defense agencies have been delegated authority to act as senior procurement executives for their respective agencies. (The list of agencies is found in DFARS 202.101.) See also DFARS 206.304.

- (1) An increase in the estimated dollar value of the contract causes the agency to exceed the approval authority of the previous approval official;
- (2) A change in the agency's competitive strategy further reduces competition; or
- (3) A change in the agency's requirements affects the basis for the justification.

### III. IMPLEMENTATION OF COMPETITION REQUIREMENTS

- A. Competition Advocates. 41 U.S.C. § 1705; FAR Subpart 6.5; [AFARS Subpart 5106.5](#); [U.S. Dep't of Army, Reg. 715-31](#), Army Competition Advocacy Program (9 Jun2 1989) [hereinafter AR 715-31].
  1. Requirement. [FAR 6.501](#); [AFARS 5106.501](#). The head of each agency must designate a competition advocate for the agency itself, and for each procuring activity within the agency.<sup>8</sup> The designated officer or employee must:
    - a. Not be the agency's senior procurement executive;
    - b. Not be assigned duties or responsibilities that are inconsistent with the duties and responsibilities of a competition advocate; and
    - c. Be provided with whatever staff or assistance is necessary to carry out the duties and responsibilities of a competition advocate (e.g., specialists in engineering, technical operations, contract administration, financial management, supply management, and utilization of small business concerns).
  2. Duties and Responsibilities. [FAR 6.502](#). Competition advocates generally must promote the acquisition of commercial items and the use of full and open competition as well as challenge barriers to

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<sup>8</sup> The Assistant Secretary of the Army (Acquisition, Logistics and Technology) (ASA(ALT)) appoints the Army Competition Advocate General. The Deputy Assistant Secretary of the Army for Procurement (SAAL-ZP) is the Army Competition Advocate General (ACAG). The ACAG has delegated to HCAs the authority to appoint the Special Competition Advocates (SCAs) at Army procuring activities and their alternates. This authority shall not be redelegated. Designation of competition advocates at contracting offices subordinate to contracting activities must depend on the nature of the contracting mission of the office, the volume of significant contracting actions, the complexity of acquisition planning and other responsibilities of such local advocates. Competition advocates may be appointed on a part-time basis. AFARS 5106.501.

competition. For example, competition advocates must challenge unnecessarily restrictive statements of work, unnecessarily detailed specifications, and unnecessarily burdensome contract clauses.

- a. Agency Competition Advocate. [FAR 6.502\(b\)](#). The agency competition advocates must:
    - (1) Review the agency's contracting operations and identify conditions or actions that unnecessarily restrict the acquisition of commercial items and the use of full and open competitive procedures;
    - (2) Prepare and submit an annual report to the agency senior procurement executive; and
    - (3) Recommend goals and plans for increasing competition.
  - b. Special Competition Advocates. [AFARS 5106.502](#); [AR 715-31](#), para. 1.13. In the Army, HCAs appoint Special Competition Advocates at procuring activities. Their duties include, but are not necessarily limited to, the duties set forth in FAR 6.502 and AFARS 5106.502.
  - c. Local Competition Advocates. [AFARS 5105.501](#); [AR 715-31](#), para. 1.14.
3. A competition advocate's "review" of an agency's procurement is not a substitute for normal bid protest procedures. See [Allied-Signal, Inc.](#), Comp. Gen. [B-243555](#), May 14, 1991, 91-1 CPD ¶ 468 (holding that a contractor's decision to pursue its protest with the agency's competition advocate did not toll the bid protest timeliness requirements). But see [Liebert Corp.](#), [Comp. Gen. B-232234.5](#), Apr. 29, 1991, 91-1 CPD ¶ 413 (holding that a contractor's reasonable reliance on the competition advocate's representations may extend the time for filing a bid protest).
- B. Acquisition Planning. 10 U.S.C. § 2305; 10 U.S.C. § 2377; 41 U.S.C. § 3306; 41 U.S.C. § 3307; [FAR Part 7](#); [DFARS Part 207](#).
1. "Acquisition planning" is the process of coordinating and integrating the efforts of the agency's acquisition personnel through a comprehensive plan that provides an overall strategy for managing the acquisition and fulfilling the agency's need in a timely and cost effective manner. [FAR 2.101](#).
  2. Proper acquisition planning should include communications with industry. See Memorandum from Office of Federal Procurement

Policy, “Myth-Busting”: Addressing Misconceptions To Improve Communication With Industry During the Acquisition Process, (February 2, 2011), available at <http://www.whitehouse.gov/sites/default/files/omb/procurement/memo/Myth-Busting.pdf>; Memorandum from Office of Federal Procurement Policy, “Myth-Busting 2”: Addressing Misconceptions To Improve Communication With Industry During the Acquisition Process, (May 2, 2012), available at <http://www.whitehouse.gov/sites/default/files/omb/procurement/memo/myth-busting-2-addressing-misconceptions-and-further-improving-communication-during-the-acquisition-process.pdf>.

3. In accordance with FAR 7.102(a), agencies must perform acquisition planning and conduct market research (see FAR Part 10) for all acquisitions to promote ([FAR 7.102\(a\)](#)):
  - a. The acquisition of commercial or nondevelopmental items to the maximum extent practicable (10 U.S.C. § 2377; 41 U.S.C. § 3307(d)); and
  - b. Full and open competition (or competition to the maximum extent practicable). 10 U.S.C. § 2305(a)(1)(A); 41 U.S.C. § 3306(a)(1) ); 41 U.S.C. § 3307(b).
4. Agencies must integrate the efforts of all personnel for significant aspects of the procurement in order to meet the Government’s needs in the most effective, economical, and timely manner. FAR 7.102(b).
5. Acquisition planning should begin as soon as the agency identifies its needs. Wherever possible, agency personnel should avoid issuing requirements on an urgent basis, or with unrealistic delivery or performance schedules, as these generally restrict competition and increase prices. [FAR 7.104](#).
6. Written acquisition plans are not required for every acquisition. [FAR 7.103\(d\)](#). However the DFARS requires a written acquisition plan for ([DFARS 207.103\(d\)\(i\)](#)):
  - a. Development acquisitions (as defined in FAR 35.001— Research and Development Contracting) when the total cost of all contracts for the acquisition program is estimated at \$10 million or more;
  - b. Production and service acquisitions when the total cost of all contracts for the acquisition program will be \$50 million or more for all years or \$25 million or more for any fiscal year; and

- c. Other acquisitions that the agency considers appropriate.
  - d. The specific contents of a written acquisition plan will vary; however, it must identify decision milestones and address all the technical, business, management, and other significant considerations that will control the acquisition. [FAR 7.105](#); DFARS 207.105. In general it addresses the acquisition background (statement of need) and the plan of action.
- C. Market Research. 10 U.S.C. § 2305; 10 U.S.C. § 2377; 41 U.S.C. §3306; 41 U.S.C. § 3307; [FAR Part 10](#).
- 1. “Market research” refers to the process of collecting and analyzing information about the ability of the market to satisfy the agency’s needs. FAR 2.101.
  - 2. The process begins with a description of the Government’s needs stated in terms sufficient to allow contracting personnel to conduct market research. [FAR 10.002\(a\)](#).
  - 3. When conducting market research, agencies should not request potential sources to submit more than the minimum information necessary. FAR 10.001(b)
  - 4. Policy. [FAR 10.001](#). Agencies must conduct market research “appropriate to the circumstances” before:
    - a. Developing new requirements documents by the agency;
    - b. Soliciting offers for acquisitions with an estimated value that exceeds the simplified acquisition threshold;
    - c. Soliciting offers for acquisitions with an estimated value of less than the simplified acquisition threshold if adequate information is not available and the circumstances justify the cost;
    - d. Soliciting offers for acquisitions that could lead to a bundled contract (15 U.S.C. § 644(e)(2));
    - e. Awarding a task or delivery order under an indefinite-delivery/indefinite-quantity (ID/IQ) contract (*e.g.*, GWACs, MACs) for a noncommercial item in excess of the simplified acquisition threshold; and

- f. On an ongoing basis, take advantage (to the maximum extent practicable) of commercially available market research methods in order to effectively identify the capabilities of small businesses and new entrants into Federal contracting that are available in the marketplace for meeting the requirements of the agency in furtherance of-
- (1) A contingency operation or defense against or recovery from nuclear, biological, chemical, or radiological attack; and
  - (2) Disaster relief to include debris removal, distribution of supplies, reconstruction, and other disaster or emergency relief activities.
  - (3) See DNO Inc., Comp. Gen. B-406256, Mar. 22, 2012, 2012 CPD ¶ 136 (protest challenging the agency's decision not to set aside for small business concerns was sustained when the agency failed to perform adequate market research to ascertain whether two responsible small businesses would submit offers).
- g. Agencies must use the results of market research to determine:
- (1) If sources exist to satisfy the agency's needs;
  - (2) If commercial (or nondevelopmental) items are available that meet (or could be modified to meet) the agency's needs;
  - (3) The extent to which commercial (or nondevelopmental) items can be incorporated at the component level;
  - (4) The practice(s) of firms engaged in producing, distributing, and supporting commercial items;
  - (5) Ensure maximum practicable use of recovered materials (see Subpart 23.4) and promote energy conservation and efficiency;
  - (6) Whether bundling is necessary and justified (see 15 U.S.C. 644(e)(2); FAR 7.107); and
  - (7) Assess the availability of electronic and information technology that meets all or part of the applicable accessibility standards issued by the Architectural and Transportation Barriers Compliance Board at 36 CFR Part 1194 (see Subpart 39.2).

5. Procedures. [FAR 10.002](#). The extent of market research will vary, but involves obtaining information specific to the item being acquired. It should include:
  - a. Whether the Government needs can be met by:
  - b. Items customarily available in the commercial marketplace. See [Verizon Wireless, Comp. Gen. B-406854](#), Sept. 17, 2012, 2012 CPD ¶ 260 (sustaining a protest where the agency failed to perform adequate market research in support of the terms of a solicitation for commercial products and services).
  - c. Commercial Items that may be modified.
  - d. Items used exclusively for governmental purposes.
  - e. Customary practices regarding customizing, modifying, or tailoring items to meet customer needs.
  - f. Customary practices for things like warranty, buyer financing, discounts, contract type considering the nature and risk associated with the requirement etc. under which commercial sales of the product or services are made.
  - g. Requirements of any laws and regulations unique to the item being acquired.
  - h. Availability of items that contain recovered materials and items that are energy efficient.
  - i. Distribution and support capabilities of potential suppliers, including alternative arrangements and cost estimates.
  - j. Size and status of potential sources.
6. Acceptable market research techniques include:
  - a. Contacting knowledgeable government and/or industry personnel;
  - b. Reviewing the results of market research for the same or similar supplies or services;
  - c. Publishing formal requests for information;
  - d. Querying government data bases;
  - e. Participating in interactive, on-line communications with government and/or industry personnel;

- f. Obtaining source lists from other sources (e.g., contracting activities, trade associations, etc.);
  - g. Reviewing catalogs and other product literature;
  - h. Conducting interchange meetings; and/or
  - i. Holding presolicitation conferences with potential offerors.
- D. Developing Specifications. 10 U.S.C. § 2305; 41 U.S.C. § 3306(a); [FAR Part 11](#); [DFARS Part 211](#).
- 1. Types of Specifications.
    - a. Design specifications. Specifications that set forth precise measurements, tolerances, materials, in-process and finished product tests, quality control measures, inspection requirements, and other specific information. Ralph C. Nash et al., *The Government Contracts Reference Book* 196 (3d Ed. 2007).
    - b. Performance specifications. Technical requirements that set forth the operational characteristics of an item. They indicate what the final product must be capable of accomplishing rather than how the product is to be built or what its measurements, tolerances, or other design characteristics must be. Ralph C. Nash et al., *The Government Contracts Reference Book* 432 (3d Ed. 2007).
    - c. Purchase descriptions. A description of the essential physical characteristics and functions required to meet the government's requirements. Ralph C. Nash et al., *The Government Contracts Reference Book* 468 (3d Ed. 2007). E.g., Brand Name or Equal Purchase Description identifies a product by its brand name and model or part number or other appropriate nomenclature by which it is offered for sale and permits offers on products essentially equal to the specified brand name product. FAR 11.104
    - d. Mixed specifications.
  - 2. Policy. Agencies are required to develop specifications that (FAR 11.002(a)):
    - a. Permit full and open competition;
    - b. State the agency's minimum needs; and

- c. Only include restrictive provisions or conditions to the extent they satisfy the agency's needs or are authorized by law. See 10 USC § 2305(a)(1)(B). See, e.g., [Cryo Technologies, B-406003](#), Jan. 18, 2012, 2012 CPD ¶ 29 (holding the solicitation requirement to be reasonably necessary to meet the agency's needs); [CESC Skyline, LLC, Comp. Gen. B-402520](#), May 3, 2010, 2010 CPD ¶ 101 (rejecting protestor's contention that accelerated occupancy deadlines for leased space in a solicitation was unduly restrictive of competition).
  - d. To the maximum extent practicable, acquisition officials shall:
    - (1) State requirements for supplies and services in terms of functions to be performed, performance required; or essential physical characteristics.
    - (2) Define requirements in terms that encourage offerors to supply commercial and non-developmental items.
3. Compliance with statutory and regulatory competition policy.
- a. Specifications must provide a common basis for competition.
  - b. Competitors must be able to price the same requirement. See [Deknatel Div., Pfizer Hosp. Prod. Grp., Inc., Comp. Gen. B-243408](#), July 29, 1991, 91-2 CPD ¶ 97 (finding that the agency violated the FAR by failing to provide the same specification to all offerors); see also [Valenzuela Eng'g, Inc., Comp. Gen. B-277979](#), Jan. 26, 1998, 98-1 CPD ¶ 51 (chastising the Army because its "impermissibly broad" statement of work failed to give potential offerors reasonable notice of the scope of the proposed contract).
4. Common Pre-Award Problems Relating to Specifications.
- a. Brand Name or Equal Purchase Descriptions.
    - (1) While the use of performance specifications is preferred to encourage offerors to propose innovative solutions, the use of brand name or equal purchase descriptions may be advantageous under certain circumstances. [FAR 11.104\(a\)](#).
    - (2) Brand name or equal purchase descriptions must include, in addition to the brand name, a general description of those *salient* physical, functional, or performance characteristics of the brand name item that an "equal" item must meet to be acceptable for award.

Use brand name or equal descriptions when the salient characteristics are firm requirements. [FAR 11.104\(b\)](#).

- (3) Failure of a solicitation to list an item's salient characteristics improperly restricts competition by precluding potential offerors of equal products from determining what characteristics are considered essential for its item to be accepted, and cancellation of the solicitation is required. [California Industrial Facilities Resources, Inc., d/b/a CAMSS Shelters, B-403397.3](#), Mar., 21, 2011, 2011 CPD ¶ 71; [Critical Process Filtration, Inc., Comp. Gen. B-400750](#), Jan. 22, 2009, 2009 CPD ¶ 25; [T-L-C Sys, Comp. Gen. B-227470](#), Sept. 21, 1987, 87-2 CPD ¶ 283; [But see MediaNow., Inc, B-405067](#), Jun. 28, 2011, 2011 CPD ¶ 133 (upholding a rejection of "equal" products when their "equal" did not meet all of the salient characteristics).
- (4) November 28, 2007 and December 19, 2007 memoranda from the Office of Federal Procurement Policy restricting the use of "brand name or equal" unless advantageous or necessary to meet agency needs, available at [www.whitehouse.gov/omb/procurement\\_index\\_memo](http://www.whitehouse.gov/omb/procurement_index_memo)

b. Items Peculiar to one Manufacturer. Agency requirements shall not be written so as to require a particular brand-name, product, or a feature of a product, peculiar to one manufacturer, thereby precluding consideration of a product manufactured by another company, unless --

- (1) The particular brand name, product, or feature is essential to the Government's requirements, and market research indicates other companies' similar products, or products lacking the particular feature, do not meet, or cannot be modified to meet, the agency's needs;
- (2) The authority to contract without providing for full and open competition is supported by the required justifications and approvals ([see 6.302-1](#)); and
- (3) The basis for not providing for maximum practicable competition is documented in the file when the acquisition is awarded using simplified acquisition procedures. [FAR 11.105](#).

c. Unduly Restrictive Specifications.

(1) Specifications must promote full and open competition. Agencies may only include restrictive provisions to meet their minimum needs. 10 U.S.C § 2305(a)(1)(B); 41 U.S.C. § 3306(a)(2)(B). See Bristol Group, Inc.- Union Station Venture, [Comp. Gen B-298110](#), Jun. 2, 2006, 2006 CPD ¶ 89 (finding a requirement that office space be within 2500 walkable linear feet of amenities was reasonable given the employees only had 30 minutes for lunch); Paramount Group, Inc., [Comp. Gen. B-298082](#), Jun. 15, 2006, 2006 CPD ¶ 98 (requirement for preexisting individual offices to be torn down to create a large open spaced office for the agency to configure its offices reasonable given that it provided the agency flexibility and it allowed the agency to more easily compare the offers); and Northwest Airport Management, LP, [B-404098.2](#), Jan. 5, 2011, 2011 CPD ¶ 1 (finding the restrictive specifications concerning “unique and special lease requirements” reasonably relate to the agency’s need).

(2) Common examples of restrictive specifications:

(a) Specifications written around a specific product. MadahCom, Inc., [Comp. Gen. B-298277](#), Aug. 7, 2006, 2006 CPD ¶ 119 (declaring a requirement for APCO 25 standard for radio transmissions as unduly restrictive for a mass notification system since they agency was unable to articulate how the requirement was reasonably related to the system); Ressler Assoc., [Comp. Gen. B-244110](#), Sept. 9, 1991, 91-2 CPD ¶ 230; and Desktop Alert, Inc., [B-408196](#), Jul., 22, 2013 (finding a requirement for AtHoc software as unduly restrictive for a mass notification system since they agency was unable to articulate how the requirement was reasonably related to the system).

(b) Geographical restrictions that limit competition to a single source and do not further a federal policy. But see, e.g., Marlen C. Robb & Son Boatyard & Marina, Inc., [Comp. Gen. B-256316](#), June 6, 1994, 94-1 CPD ¶ 351 (denying the protest and providing “an agency properly may restrict a procurement to offerors within a

specified area if the restriction is reasonably necessary for the agency to meet its needs. The determination of the proper scope of a geographic restriction is a matter of the agency's judgment which we will review in order to assure that it has a reasonable basis."); and H & F Enterprises, [Comp. Gen. B-251581.2](#), July 13, 1993, 93-2 CPD ¶ 16.

- (c) Specifications that exceed the agency's minimum needs. Total Health Resources, [B-403209](#), Oct. 4, 2010, 2010 CPD ¶ 226 (finding a requirement for the prime contractor, and not a subcontractor, to possess the requisite counseling experience as unduly restrictive); Iyabak Construction, LLC, [B-409196](#), Feb. 6, 2014 (finding the refusal to consider affiliate experience, even when offerors demonstrate the affiliate will participate meaningfully, unduly restrictive when the agency fails to provide a reasonable basis); But see Emax Financial, [B-408260](#), Jul. 25, 2013, (denying a protest where the Navy more favorably rated offerors with program specific experience because the restrictive specification reasonable related to the agency's need).
- (d) Requiring approval by a testing laboratory (e.g., Underwriters Laboratory (UL)) without recognizing equivalents. HazStor Co., [Comp. Gen. B-251248](#), Mar. 18, 1993, 93-1 CPD ¶ 242. But see G.H. Harlow Co., [Comp. Gen. B-254839](#), Jan 21, 1994, 94-1 CPD ¶ 29 (upholding requirement for approval by testing laboratory for fire alarm and computer-aided dispatch system).
- (e) Improperly bundled specifications. Vantex Serv. Corp., [Comp. Gen. B-290415](#), Aug. 15, 2002, 2002 CPD ¶ 131; EDP Enterprises, Inc., [Comp. Gen. B-284533.6](#), May 19, 2003, 2003 CPD ¶ 93 (bundling food services, with the "unrelated base, vehicle and aircraft maintenance services," restricted competition; because the agency bundled the requirements for administrative convenience, the specification violated the CICA). But see AirTrak Travel,

[Comp. Gen. B-292101](#), June 30, 2003, 2003 CPD ¶ 117; and [USA Info. Sys., Inc., Comp. Gen. B-291417](#), Dec. 30, 2002, 2002 CPD ¶ 224 (denying in both decisions allegations that bundled specifications violated CICA, because the agencies convinced GAO that mission-related reasons justified bundling requirements).

d. Ambiguous Specifications.

- (1) Specifications or purchase descriptions that are subject to two or more reasonable interpretations are ambiguous and require the amendment or cancellation of the solicitation. [Guzar Mirbachakot Transportation v. US, No. 11-519C \(COFC\)](#) Mar. 29, 2012 (holding that the solicitation that required the documents to be turned in as MS Word files, or Adobe PDF files was ambiguous as to whether a zipped file of MS Word and Adobe PDF files was acceptable) [CWTSatoTravel, B-404479.2](#), Apr. 22, 2011, 2011 CPD ¶ 87 (stating a contracting agency must provide offerors with sufficient detail in a solicitation to enable them to compete intelligently and on a relatively equal basis); and [Aurora Group, Inc., Comp. Gen. B-288127](#), Sep. 14, 2001, 2001 CPD ¶ 154. There is no requirement that a competition be based on specifications drafted in such detail as to eliminate completely any risk or remove every uncertainty from the mind of every prospective offeror. [RMS Indus., B-248678](#), Aug. 14, 1992, 92-2 CPD 109.
- (2) Issues raised by ambiguous (defective) specifications:
  - (a) Adequacy of competition.
  - (b) Contract interpretation.
  - (c) Constructive change.

E. Publicizing Contract Actions. 41 U.S.C. § 1708; [FAR Part 5](#); [DFARS Subpart 205](#).

1. Policy. [FAR 5.002](#). Publicizing contract actions increases competition. FAR 5.002(a). But see [Interproperty Investments, Inc., Comp. Gen. B-281600](#), Mar. 8, 1999, 99-1 CPD ¶ 55 (holding that an agency's diligent good-faith effort to comply with publicizing requirements was sufficient); and [Aluminum Specialties, Inc. t/a Hercules Fence Co., Comp. Gen. B-281024](#), Nov. 20, 1998, 98-2 CPD

¶ 116 (holding that there was no requirement for the agency to exceed publicizing requirements, even if it had done so in the past).

2. See 2014 Contract Attorney's Deskbook, Chapter 34, Responsibility, Timeliness, and Organizational Conflicts of Interest for more information.

#### **IV. WHEN FAR PART 6 DOES NOT APPLY**

- A. The provisions of FAR Part 6 do not apply to certain types of procurements. FAR 6.001. The FAR provisions that govern these types of procurements set forth the applicable competition requirements:
  1. Simplified acquisitions.
    - a. Acquisitions made using simplified acquisition procedures are exempt from the competition requirements of FAR Part 6. FAR 6.001(a); FAR Part 13. FAR Part 13 details the reduced competition requirements applicable to simplified acquisitions, to include the limited determinations the contracting officer must make to solicit from a single source. FAR 13.106-1(b).
    - b. An agency may neither improperly fragment its requirements in order to use simplified acquisition procedures nor may it use simplified acquisition procedures for requirements that should reasonably be valued above the simplified acquisition threshold to avoid the requirement for full and open competition. Critical Process Filtration, Inc., Comp. Gen. B-400750, Jan. 22, 2009, 2009 CPD ¶ 25.
  2. Contracts awarded using contracting procedures (other than those addressed in FAR Part 6) authorized by statute. FAR 6.001(b).
    - a. For example, personal service contracts for health care, as authorized by 10 U.S.C. § 1091, fall within this exception. See DFARS 206.001(b) and 237.104(b)(ii).
    - b. This specific exemption does not address 18 U.S.C. §§ 4121-4128 and FAR Subpart 8.6 (acquisitions from Federal Prison Industries); 41 U.S.C. § 259(b)(3) and FAR Subpart 8.4 (Federal Supply Schedules); or 41 U.S.C. §§ 46-48c and FAR Subpart 8.7 (acquisitions from nonprofit agencies employing people who are blind or severely disabled), which were discussed in Section II.E.2(e) of this deskbook.
  3. Contract modifications within the scope and under the terms of an existing contract, to include the exercise of priced options that were

evaluated as part of the initial competition. FAR 6.001(c) and 17.207(f).

a. Rationale. The existing contract against which a modification is made was awarded in accordance with FAR Part 6. Since an in-scope modification lies within the scope and terms of the existing contract, it is not again subject to FAR Part 6. Overseas Lease Group, Inc., Comp. Gen. B-402111, Jan. 19, 2010, 2010 CPD ¶ 34 (finding that a lease for non-tactical and up-armored vehicles included within its terms unarmed vehicles and stating that contract modifications are beyond GAO's bid protest jurisdiction unless the modification is outside the scope of the original contract). See AT&T Communications, Inc. v. Wiltel, Inc., 1 F.3d 1201 (Fed. Cir. 1993) (asking "whether the changed contract is materially different from the competed contract?" and holding that a modification adding T3 circuits was within the scope of a comprehensive contract for telecommunication services). See also Ceradyne, Inc. v. United States, 103 Fed. Cl. 1, 2 (Fed. Cl. 2012).

b. Out-of-Scope Modifications. Contract modifications beyond the scope of an existing contract must be awarded in accordance with FAR Part 6. Pegasus Global Strategic Solutions, Inc., Comp. Gen. B-400422.3, Mar. 24, 2009, 2009 CPD ¶ 73 (approving FAR Part 6 sole source, out-of-scope modification to an existing contract on the basis of an unusual and compelling urgency following agency's prior failed attempt to characterize the modification as an in-scope change to the existing contract).

(1) Options.

(a) To fall within this exception to FAR Part 6, options must have been evaluated as part of the initial competition and be exercisable at an amount specified in or reasonably determinable from the terms of the basic contract. FAR 6.001(c) and 17.207(f); see Magnum Opus Techs., Inc. v. United States, 94 Fed.Cl. 512 (2010) (enjoining Air Force from exercising future options under multiple award ID/IQ contract and directing a future competition under FAR Part 6 where "not to exceed pricing" was removed from options after contract award resulting in an undeterminable price for the options in violation of FAR 17.207(f)).

- (b) If the option was not evaluated as part of the initial competition, to include an option to extend services under FAR Clause 52.217-8, then exercise of the option is subject to the competition requirements of FAR Part 6 as opposed to the more limited determinations contained in FAR 17.207. See Major Contracting Serv., Inc., Comp. Gen. B-401472, Sept. 14, 2009, 2009 CPD ¶ 170, aff'd upon reconsideration Dep't of Army—Reconsideration, Comp. Gen. B-401472.2, Dec. 7, 2009, 2009 CPD ¶ 250 (determining that an unpriced option to extend services under FAR Clause 52.217-8 was not evaluated as part of the initial competition and therefore was subject to the competition requirements of FAR Part 6). For a discussion of the determinations required before exercise of a properly evaluated option, see FAR 17.207; Nutriom, LLC, Comp. Gen. B-402511, May 11, 2010, 2010 WL 1915264.
- 4. Orders placed under requirements, definite-quantity contracts, and indefinite quantity contracts, and orders placed against task order and delivery order contracts entered into pursuant to FAR 16.5.
  - a. Requirement and definite quantity contracts. FAR 6.001(d); FAR 16.502 to 16.503.
  - b. Orders placed under indefinite quantity contracts that were entered into pursuant to FAR Part 6 when:
    - (1) The contract was awarded under FAR 6.1 (Full and Open Competition) or 6.2 (Full and Open Competition After Exclusion of Sources) and all responsible sources were realistically permitted to compete for the requirements contained in the order; or
    - (2) The contract was awarded under FAR 6.3 (Other than Full and Open Competition) and the required justification adequately covers the requirements contained in the order. FAR 6.001(e); FAR 16.504.
  - c. Orders placed against task order and delivery order contracts entered into pursuant to FAR 16.5. Note that while not subject to FAR Part 6, orders placed under multiple award contracts (or MACs) pursuant to FAR Subpart 16.5 have some competition-like requirements based upon the dollar amount of

the order. These competition-like requirements are referred to as a “fair opportunity to be considered.”

- (1) Orders over \$3,000 up to \$150,000 require the contracting officer to provide each awardee a relatively minimal “fair opportunity to be considered.” See FAR 16.505(b)(1)(i).
- (2) Fair opportunity procedures for orders exceeding \$150,000 up to \$5 million placed by or on behalf of DOD (except architecture engineering services – see FAR Subpart 36.6) require the placement of orders on a “competitive basis.” FAR 16.505(b)(1)(iii); DFARS 216.505-70(b). This means that the contracting officer shall provide fair notice of intent to make the purchase, including a description of the supplies or services and the basis on which the contracting officer will make the selection, and afford all contractors responding to the notice a fair opportunity to submit an offer and have that offer fairly considered. FAR 16.505(b)(1)(iii)(B); DFARS 216.505-70.
- (3) Fair Opportunity procedures for orders exceeding \$5,000,000 include “Enhanced Competition” under FAR 16.505(b)(1)(iv):
  - (a) A notice of the task or delivery order that includes a clear statement of the agency’s requirement;
  - (b) A reasonable period of time to provide a proposal in response to the notice;
  - (c) Disclosure of the significant factors and subfactors, including cost and price, that the agency expects to consider in evaluating such proposals and their relative importance;
  - (d) In the case of an award that is to be made on a best value basis, a written statement documenting the basis for the award and the relative importance of quality and price or cost factors; and
  - (e) An opportunity for a post-award debriefing. FAR 16.505(b)(1)(iii).

- (4) FAR 16.505(b)(2) exceptions to the fair opportunity standard include:
  - (a) Urgency;
  - (b) Only one awardee capable of providing the requirement;
  - (c) Efficiency or logical follow on;
  - (d) Necessary to achieve the minimum guarantee;
  - (e) For greater than simplified acquisition threshold, a statute expressly authorizes or requires a specific source;
  - (f) Contracting officers, at their discretion, set aside an order for a small business concern identified in FAR 19.000(a)(3).
  - (g) Exceptions are properly justified under FAR 16.505(b)(2)(ii).

d. Rationale. The overarching contract against which the task or delivery order is placed was subject to a FAR Part 6 competition. Since the future issuance of a task and delivery order was necessarily evaluated as part of the original competition, the issuance is not subject to a second round of competition (except as noted above for MACs).

- (1) If an order increases the scope, period, or maximum value of the contract under which the order is issued, then the order is subject to FAR Part 6. See FAR 16.505a(10)(i)(A); *Datamill, Inc. v. United States*, 91 Fed. Cl. 740 (Mar. 23, 2010); *DynCorp Int'l, LLC*, B-402349, Mar. 15, 2010, 2010 CPD ¶ 39 (holding task order for general law enforcement and counter insurgency training improperly exceeded the scope of a counter drug task order contract);
- (2) Note that GAO now has protest jurisdiction over any order valued in excess of \$10 million placed against a contract, in addition to the scope-based jurisdiction referenced in subparagraph (1) immediately above. See Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383 § 825; FAR 16.505(a)(10)(i)(B), National Defense Authorization

Act for Fiscal Year 2012, Pub. L. No. 112-81 § 813.  
Both extensions are set to sunset September 30, 2016.

- e. Federal Supply Schedule (FSS). Directed and managed by the General Services Administration (GSA), the FSS or Multiple Award Schedule (MAS) Program consists of numerous indefinite delivery contracts to provide supplies and services at stated prices for a given period of time. FAR 8.402. Agencies obtain goods and services by placing orders with a schedule contractor utilizing the procedures set forth in FAR Subpart 8.4. Orders placed under the Federal Supply Schedules, utilizing the procedures provided at FAR Subpart 8.4, are considered to be issued using full and open competition. FAR 6.102(d)(3); FAR 8.404(a).
- B. The provisions of FAR Part 6 do not apply to reprocurement contracts. FAR 49.402-6.
- 1. When supplies or services are still required after termination, the contracting officer shall repurchase the same or similar supplies or services at a reasonable price and against the contractor's account as soon as practicable.
  - 2. If the repurchase quantity is less than or equal to the terminated quantity, the contracting officer can use any acquisition method the contracting officer deems appropriate; however, the contracting officer must obtain competition to the maximum extent practicable.
    - a. The GAO will review the reasonableness of an agency's acquisition method against the standard specified in FAR 49.402-6(b). See Derm-Buro, Inc., [B- 400558](#), Dec. 11, 2008, 2008 CPD ¶ 226 (“[T]he statutes and regulations governing federal procurements are not strictly applicable to reprocurements of defaulted requirements.”).
    - b. If there is a relatively short period of time between the original competition and the termination for default, it is reasonable to award the subsequent contract to the second or third lowest offeror of the original solicitation at its original price. Vereinigte Gebäudereinigungsgesellschaft, [Comp. Gen. B- 280805](#), Nov. 23, 1998, 98-2 CPD ¶ 117 (holding that an agency could modify the contract requirements in its reprocurement without resolicitation); Bud Mahas Constr., [B- 235261](#), Aug 21, 1989, 89-2 CPD ¶ 160 (allowing the agency, on reprocurement after T4D to change from a small business set aside to unrestricted).

3. If the repurchase quantity is greater than the terminated quantity, the contracting officer must treat the entire quantity as a new acquisition subject to the normal competition requirements.
  4. Contracting officers may, but are not required to, solicit the defaulted contractor. Colonial Press Int'l, Inc., [B-403632](#), Oct. 18, 2010, 2010 CPD ¶ 241 (holding that the agency may properly exclude a defaulted contractor from a reprocurement regardless of whether the T4D is under challenge).
- C. The Competition in Contracting Act (and therefore FAR Part 6) does not apply to all federal agencies. CICA does not apply to the U.S. Postal Service, United States v. Elec. Data Sys. Fed. Corp., [857 F.2d 1444](#), 1446 (Fed. Cir. 1988), or to the Federal Aviation Administration, 49 U.S.C. 40110(d).

## V. CONCLUSION

The Competition in Contracting Act establishes a statutory preference for competition that shapes government procurement from acquisition planning, through market research, to developing specifications and publicizing. FAR Part 6 implements this competition preference by establishing three levels of competition: full and open competition; full and open competition after the exclusion of sources; and other than full and open competition.