We do not know **Shay Assad** , Director of Defense Procurement and Acquisition Policy (DPAP) and Assistant Secretary of Defense for Acquisition (ASD(A)). We don't know him, but we've written about him—mostly with approval. We've talked to people who *do* know him and they all have nice things to say. Apparently, Mr. Assad is an intelligent, knowledgeable, thoughtful person and has done well over the past couple of years in the bureaucratic infighting we've termed "The DOD Oversight War".

So why is he playing the "Yes Man" by issuing guidance that implements one of Dr. Ash Carter's (Undersecretary of Defense, Acquisition, Technology & Logistics) less wonderful **acquisition improvement initiatives** without any push-back?

Or—as we intend to show you—did DCAA just pull a fast one and take away yet another tool of the DCMA Contracting Officers?

In fairness, we don't know that Mr. Assad *didn't* put up a strong fight before acquiescing to issue his November 24, 2010 **memo** entitled, "Improving Competition in Defense Procurements". We don't know whether he went to bat against DCAA and its Director. But there's no evidence he did so and, regardless of any efforts he may have made, the results speak for themselves. The DOD repudiated the FAR definition of adequate competition, and it did so via a memo from Mr. Assad.

Effective "immediately," the memo informs DCMA Contracting Officers of the following—

To maximize the savings that are obtained by competition, contracting officers will no longer use the standard at FAR 15.403-1(c)(1)(ii) or (iii) to determine that the offered price is based on adequate competition when only one offer is received.

We are *dismayed* that Mr. Assad, who has such a strong reputation amongst the contractor community, would stoop to sign his name to the memo—even if his boss ordered him to do so.

What are we talking about? Here's some background.

In our previous article on Dr. Carter's September 2010 17-page memo (link above) we noted that one of his "principal actions" was to ignore the efficiency offered by the Federal Acquisition Regulation (FAR). He wrote—

When only one bid or offer is received by the DOD, require Contracting Officers to obtain non-certified cost or pricing data, even if the FAR definition of 'adequate competition' has been met.

We were not the only critic of Dr. Carter's initiatives and his memo describing them. On an internet public discussion forum, **Vern Edwards** had some choice observations. He wrote—

There is not one thing in that memo that has not been tried already, except for the goofy taxonomy of services. There is not one new idea. … This is one of the dumbest things I have ever seen from DOD.

The biggest problem with the memo is that it does not take into account the political, economic, institutional, and cultural sources of the problems we have experienced for so long: inter-service rivalry, excessive technical optimism, short-term program management assignments among military personnel, the uncertainty arising from the appropriations process, requirements creep, and on and on, all of which have been well documented since the late 1950s. The memo reflects the apparent belief that we can circumvent those sources of difficulty by adopting certain processes, like should cost analysis. We can't. We have tried before, and we cannot do it.

Without getting overmuch into the technical details, let's summarize the situation (as we see it).

1.

The policy of the United States, as expressed at 48 C.F.R. § 15.402(a) is as follows:

"Contracting officers shall purchase supplies and services from responsible sources at fair and reasonable prices."

2.

The FAR provides the Contracting Officer with two primary methods to determine whether a proposed price is fair and reasonable: (1) price analysis (discussed at § 15.404-1(b)), and (2) cost analysis (discussed at § 15.404-1(c)).

3.

Price analysis is simply the examination and evaluation of proposed bottom-line prices without examination of individual cost elements and proposed profit. In contrast, cost analysis is the review and evaluation of separate cost elements and profit or fee in a bidder's proposal, and includes "the application of judgment to determine how well the proposed costs represent what the cost of the contract should be, assuming reasonable economy and efficiency."

4.

Given the foregoing, it should be obvious that price analysis is much quicker and less costly than cost analysis. If you've got two bids from responsible bidders competing independently, then the one that's lower is, by definition, fair and reasonable. Done and done. Performing cost analysis, on the other hand, requires in-depth analysis. But the real kicker in performing cost analysis is that DCAA will likely be called in to perform an audit of the bidder's cost data. Those readers who've followed our articles on recent DCAA audit guidance dealing with such audits (see, for example, **this one**) will understand the reluctance on the parts of both buying command and DCMA Contracting Officer to involve DCAA in the process—unless absolutely necessary. Indeed, it should be crystal clear that if price analysis is available, it is the preferred approach.

5.

The overarching prerequisite for the use of price analysis is there must be "adequate competition". FAR § 15.403-1(c)(1) defines when adequate competition has been achieved. If there is no adequate price competition, then the Contracting Officer is forced to use cost analysis.

6.

Importantly, if there is not adequate competition, then the bidder(s) will likely be asked to submit "certified cost or pricing data" (*i.e.*, what used to be called simply "cost or pricing data"),

in accordance with the format and requirements of FAR Table 15-2. In addition, the requirements of the Truth-in-Negotiations Act (TINA) will be invoked, subjecting the successful bidder to the risk of "defective pricing" if it is later shown that it inaccurately certified that it had submitted "accurate, current, and complete" information to the Contracting Officer to support the cost analysis and subsequent negotiations. In sum, not only is the Contracting Officer motivated to determine that adequate competition has been achieved, but so are the contractors.

To establish the record, here is the current definition of "adequate competition" as set forth at 48 C.F.R. § 15.403-1(c)(1).

(1) Adequate price competition. A price is based on adequate price competition if—

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

(A) Award will be made to the offeror whose proposal represents the best value (see 2.101) where price is a substantial factor in source selection; and

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

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

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

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

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

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

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

Let's all notice that there are three means of determining whether or not there is adequate competition. The second standard permits the Contracting Officer to determine that there has

been adequate competition even if only one bid is received, so long as "there was a reasonable expectation … that two or more responsible offerors, competing independently, would submit priced offers…." In **testimony** before the Commission on Wartime Contracting, DCAA Director Pat Fitzgerald expressed his agency's concerns with this regulatory "loophole". He told the Commissioners that—

DCAA has taken exceptions to several subcontract pricing actions where the prime contractor asserted a fair and reasonable subcontract price based on 'adequate competition' where in fact only one bid was received by the prime contractor. DCAA is concerned about the risks created by current regulations permitting awards to subcontractors using competitive pricing procedures when only one bid is actually received. Again, in these cases, we believe it would be beneficial for the prime contractor and contracting officer to have access to subcontractor cost data to determine fair and reasonable contract prices. The Adequate Pricing Subcommittee under Mr. Assad's Panel on Contracting Integrity is taking a look into this area. They are ascertaining the need to revise this 'loophole' in the regulation that we believe leads to subcontract prices being awarded at unreasonable prices. *I will continue to work this issue as the Chair of this Subcommittee.*
(Emphasis added.)

Apparently, Mr. Fitzgerald's Subcommittee recommended that the "loophole" be closed and that recommendation made its way into Dr. Carter's contractor affordability initiatives. But closing that "loophole" would mean revising the FAR, and that would mean following the official rule-making process, including publishing the proposed revision(s) for public comment. Somebody at DOD found a more clever way of achieving their objective: Mr. Assad simply directed DCMA's Contracting Officers to ignore the FAR. Mr. Assad's memo directs that, even when the FAR would permit a Contacting Officer to use price analysis and not involve DCAA in auditing a bidder's costs, the Contacting Officer may not avail himself (or herself) of the opportunity. The receipt of one bid now leads inexorably to the Contracting Officer entering into negotiations based on "either certified cost or pricing data or other than certified cost or pricing data, as appropriate."

But there's more to this story.

Mr. Assad's memo also directs that, if only one bid is received in response to a solicitation, then the competition may need to be re-opened and re-advertised in order to attempt to generate more bids. That's not going to help meet the schedule needs of the buying commands.

Moreover, the memo reminds its recipients that when a DCMA Contracting Officer negotiates with a bidder in a situation where only one bid has been received (despite all efforts to generate more offers), then—

Contracting officers shall document the results of the negotiations in the Business Clearance/Pricing Negotiation Memorandum in accordance with FAR 15.406-3 and DFARS PGI 215.406-3 in the same manner as any negotiated procurement. Contract Review Boards or other similar review mechanisms should be used to ensure the Business Clearance/Pricing Negotiation Memorandum documents the process and supports the negotiated price as being fair and reasonable. The Peer Reviews conducted post award will be the mechanism for assessing the application of this process.

In our view, Mr. Assad's memo describes a process designed by bureaucrats to avoid achieving any process efficiency whatsoever. The situation was bad enough before Mr. Fitzgerald, Dr. Carter and Mr. Assad got involved; it is now worse for their involvement.

Let's wrap this up.

More than a year ago (in August 2009) we published an article entitled, "DOD Is Too Bureaucratic to Meet Needs of Warfighter, Defense Science Board Tells SecDef." (Here's **a link** to that article.) We posted some telling quotes from the DSB report to SECDEF Gates. Here are a few of them—

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"Current long standing [DOD] business practices and regulations are poorly suited" to the "dynamics of a rapidly shifting threat environment."

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"Today, the DOD is saddled with processes and oversight built up over decades, and managers leading them who are often rewarded for risk aversion."

We look at Mr. Assad's memo in light of the Defense Science Board's concerns with a risk averse bureaucracy, and with Secretary of Defense Gates' **concerns** with "overhead" and the multiple layers of management that inhibit agile decision-making. To refresh your memory, SECDEF Gates said in a speech (link above)—

Another category ripe for scrutiny should be overhead – all the activity and bureaucracy that supports the military mission. According to an estimate by the Defense Business Board, overhead, broadly defined, makes up roughly 40 percent of the Department's budget. … Almost a decade ago, Secretary Rumsfeld lamented that there were 17 levels of staff between him and a line officer. The Defense Business Board recently estimated that in some cases the gap between me and an action officer may be as high as 30 layers. …

We look at Mr. Assad's memo in light of those touchstones, and we don't like what we see. There is nothing about this memo—from the bureaucratic maneuvering to avoid the transparency of the public rule-making process, to the willful blindness to existing regulatory flexibility within a regulatory schema not known for flexibility—that we think has any merit.

We don't like the misleading title of the memo, which implies that the existing process is being "improved". Nor do we like the glib rationale, which states that the new policy will lead to "more effective use of the Department's resources and savings for the taxpayer." We are *dismayed* that Mr. Assad affixed his name to this memo.

We don't like the memo and we don't like what is portends for the Defense acquisition environment. We don't like it at all.