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STREAMLINING TASK AND DELIVERY ORDER COMPETITIONS WITHIN FEDERAL ACQUISITION REGULATION SUBPART 16.5 FLEXIBILITIES

June 2018

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FEDERAL ACQUISITION REGULATION SUBPART 16.5 FLEXIBILITIES**

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REGULATION SUBPART 16.5 FLEXIBILITIES**

ABSTRACT

The flexibilities offered in Federal Acquisition Regulation (FAR) 16.505 allow contracting officers (COs) to establish streamlined ordering procedures for the award of task orders and delivery orders (TOs/DOs) among existing qualified multiple award contract (MAC) awardees. However, because there is no specific guidance in the FAR or its supplements regarding less formal fair opportunity competition strategies, COs often default to the more familiar FAR Subpart 15.3 procedures. As a result, agencies expend valuable time and resources and potentially waste both in the process. For the Space and Naval Warfare Systems Command, the time and resource constraints associated with frequent competitive MAC orders have led to the desire to identify best practices and perhaps formalize a streamlined approach to award. As such, the purpose of this research is to identify best practices for streamlining local TO/DO awards and provide recommendations for standardized streamlining procedures and documentation. The researchers analyzed 169 sources related to case law and six local MACs as well as policy and regulation to test their hypothesis that local MAC competitions could benefit from streamlining. Their hypothesis was confirmed, and the researchers utilized case law rulings to develop recommendations such as streamlining intentional use of terminology, simplifying evaluations through means like the decision authority and ordering instructions, and simplifying documents such as the BCM.

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LIST OF ACRONYMS AND ABBREVIATIONS

AMT	Acquisition Milestone Tracker
BCM	Business Clearance Memorandum
CDS	Companion Data Services, LLC
CICA	Competition in Contracting Act
COFC	Court of Federal Claims
DFARS	Defense Federal Acquisition Regulation Supplement
DO	delivery order
DoD	Department of Defense
DoN	Department of Navy
FAR	Federal Acquisition Regulation
FASA	Federal Acquisition Streamlining Act of 1994
FODA	Fair Opportunity Decision Authority
FODD	Fair Opportunity Decision Document
FOPR	Fair Opportunity Proposal Request
FPR	final proposal revision
FSS	Federal Supply Schedule
FY	fiscal year
GAO	Government Accountability Office
HCA	Head of the Contracting Agency
HQ	headquarters
IDIQ	indefinite delivery, indefinite quantity
IGCE	independent government cost estimate
LPTA	lowest price technically acceptable

MAC	multiple award contract
MEP	Mission Essential Personnel, LLC
NMCARS	Navy/Marine Corps Acquisition Regulation Supplement
NDAA	National Defense Authorization Act
OCI	Organizational Conflict of Interest
OFPP	Office of Federal Procurement Policy
PALT	procurement action lead time
RFP	Request for Proposal
SCPPM	SPAWAR Contract Policy and Procedures Manual
SSA	source selection authority
SSDD	Source Selection Decision Document
SSP	source selection plan
SPAWAR	Space and Naval Warfare Systems Command
TO	task order

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To our kids: Mom is back!

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I. INTRODUCTION

A. BACKGROUND

Before 1994, when Congress authorized the Federal Acquisition Streamlining Act (FASA), the utilization of substantial single award indefinite-delivery, indefinite-quantity (IDIQ) contracts (i.e., umbrella contracts) was pervasive in federal procurement to avoid delays related to awarding individual contracts for each requirement, which would require recurrent recompetition. Federal agencies used such umbrella contracts to avoid the legal challenges associated with multiple award contracts (MACs). However, the use of these single award umbrella contracts precluded the government from obtaining competitive pricing because of the single award environment (Office of Federal Procurement Policy [OFPP], 1999).

In an effort to provide agencies with flexible contracting tools to achieve requirements, Congress enacted FASA in 1994. FASA codified the use of task order/delivery order (TO/DO) contracts, emphasized a preference for MACs in general, and established a requirement for MACs for certain service contracts exceeding \$10 million and three years of performance (OFPP, 1999). FASA provided additional flexibility related to MACs, including authorization for the use of broad statements of work, removal of the requirement for public notification when placing orders under a MAC, and limitations regarding protest. Finally, FASA implemented a mandate that all awardees have a fair opportunity to compete for orders over the micropurchase threshold (1999). All of these changes, as implemented in Federal Acquisition Regulation (FAR) Subpart 16.5, gave agencies the ability to benefit from continuous competition for similar requirements. The ability to award multiple TOs and DOs from the same basic contract for similar supplies or services results in more competitive (i.e., better) pricing, better contractor performance, and better quality products/services.

Multiple award TO/DO contracts, specifically multiple award IDIQ contracts, can be used when the government has a known requirement for supplies or services but does not know the exact timing or quantity needed. In accordance with FAR 16.504, an IDIQ

vehicle allows the government to purchase “an indefinite quantity, within stated limits, of supplies or services during a fixed period” (Federal Acquisition Regulation [FAR], 2018). The basic contract is awarded to multiple awardees in accordance with FAR Subpart 15.3 source selection procedures, and individual TOs (for services) and DOs (for supplies) are subsequently competed and awarded on an as-needed basis using the procedures identified in FAR 16.505. Specifically, MAC awardees must be provided a fair opportunity to be considered for each order exceeding the micropurchase threshold (unless one of the statutory exceptions identified in FAR 16.505(b)(2) exists). This process of awarding TOs/DOs using fair opportunity competition among existing MAC awardees can continue within a fixed period as long as the cumulative value of the TOs/DOs does not exceed the maximum, or ceiling, value of the basic contract.

In accordance with FAR 16.505(b)(1)(ii), for the award of a TO/DO under a MAC,

The contracting officer may exercise broad discretion in developing appropriate order placement procedures. The contracting officer should keep submission requirements to a minimum. Contracting officers may use streamlined procedures, including oral presentations. If the order does not exceed the simplified acquisition threshold, the contracting officer need not contact each of the multiple awardees under the contract before selecting an order awardee if the contracting officer has information available to ensure that each awardee is provided a fair opportunity to be considered for each order. The competition requirements in Part 6 and the policies in Subpart 15.3 do not apply to the ordering process. (FAR, 2018)

The flexibilities offered in FAR 16.505 allow contracting officers to establish streamlined ordering procedures for the award of TOs/DOs among existing qualified MAC awardees. However, because there is no specific guidance in the FAR or its supplements regarding less formal fair opportunity competition procedures, contracting officers often do not leverage the broad discretion offered to them. The contracting community is well-versed in the source selection procedures formally documented in FAR Subpart 15.3 such that those procedures are often the default method for awarding a TO/DO instead of exploring and implementing streamlined procedures as authorized in FAR Subpart 16.5 (Gines & Shields, 2016). The result is that a TO/DO competition under a MAC often follows the formalized competitive process of the more familiar FAR Subpart 15.3 source selection

procedures. As a result, agencies expend valuable time and resources and potentially waste both in the process.

For the contracting offices at the Space and Naval Warfare Systems Command (SPAWAR), the time and resource constraints associated with frequent MAC orders, specifically against IDIQ contracts, has generated the desire to identify best practices and perhaps formalize a streamlined approach to award. As such, the purposes of this research are to identify best practices for streamlining local TO/DO awards and to provide recommendations for standardized streamlining procedures and documentation.

B. WHY IS FAR SUBPART 16.5 IMPORTANT?

By way of analogy, consider the expression “don’t use a sledgehammer to crack a nut.” Exploring the flexibilities offered in FAR Subpart 16.5 is important because they are intended to simplify the award process for orders under MACs. There is an intentional difference between FAR Subparts 15.3 source selection procedures and 16.5 ordering procedures. As noted by the Office of Federal Procurement Policy (OFPP) in 1997, with the clarification provided in FASA, agencies can use IDIQ contracts to “realize the benefits of an ongoing competitive environment throughout the duration of the contract while minimizing the delays of conducting a separate procurement for each requirement” (OFPP, 1999). To further highlight the intent of FAR Subpart 16.5 to simplify the process, OFPP further stated that, “Congress recognized that without streamlined order placement, the quality benefits and cost savings made possible by continuous competition might be outweighed by excessive expenditures of time and administrative resources” (Ch. 4, para. 1).

Due to the lack of explicit guidance and standardized procedures defining streamlined approaches, contracting officers tend to adopt the procedures of FAR Subpart 15.3 for the issuance of orders more often than necessary. While such procedures are not wrong, they result in more work than necessary (Gines & Shields, 2016). For instance, FAR Subpart 16.5 gives contracting officers wide latitude in considering evaluation factors. Contracting officers are not required to obtain written proposals or hold discussions with all offerors, nor are formal evaluation plans or scoring of quotes required. The basis for award of a TO/DO must be documented to provide a record in the event of a protest,

but it need not be as formal as source selection documentation required for negotiated procurements under FAR Subpart 15.3. The Government Accountability Office (GAO) has stated in several cases that FAR Part 15 procedures do not apply to MAC ordering procedures; however, when an agency defaults to or explicitly follows FAR Subpart 15.3 procedures, GAO will apply them when reviewing a protest (Gines & Shields, 2016). That is, if an agency develops and documents a streamlined procedure for the award of an order, the standard applied to a protest is more likely to consider the flexibilities authorized in FAR Subpart 16.5. However, if the stated procedures for award are in accordance with the formalities of FAR Subpart 15.3, these stringent standards will be applied. Again, there is nothing particularly wrong with using FAR Subpart 15.3 procedures, but in the face of increased workloads and limited time and resources, why use a sledgehammer to crack a nut when a smaller, easier tool—a nutcracker—will suffice (Gines & Shields, 2016)?

If we can shed light on the differences between FAR Subparts 15.3 and 16.5 by providing examples of streamlined procedures and best practices, perhaps we can reduce SPAWAR’s time and resources spent on TO/DO awards.

C. LIMITATIONS OF THIS STUDY

This research project has two limitations worth noting. First, only SPAWAR Headquarters’ (HQ) multiple award IDIQ contracts (hereafter referred to as “local MACs”) were evaluated; neither Federal Supply Schedule (FSS) orders issued under FAR Part 8 nor any multi-agency or Navy-wide MACs (i.e., SeaPort-e) were included in the sample. This study does not seek to evaluate the strategies and procedures used by any other Navy acquisition command or Department of Defense (DoD) agency for the award of individual orders. Despite this fact, the evaluation and recommendations are in accordance with regulation that is applicable to all federal procurements; as such, an agency may properly extrapolate any best practices or recommendations provided herein for any procurement governed by the FAR. Finally, the researchers evaluated only local orders awarded between

September 29, 2016 and March 1, 2018. The researchers pulled these orders for evaluation from SPAWAR HQ's Acquisition Milestone Tracker (AMT) tool.¹

¹ AMT is a web-based tool providing SPAWAR contract managers access to contract workload via a color-coded milestone dashboard with ad-hoc queries. Users can filter milestones by an array of values, including contract/action type, branch, status, program office, dollar value and more. Microsoft Excel format is used to allow for detailed data analysis. The tool contains unclassified For Official Use Only information and is managed by SPAWAR Systems Command Contracts Directorate. As SPAWAR HQ contracting personnel, the researchers had access to this database; however, this paper contains ONLY non-source selection sensitive information.

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II. RESEARCH / PROJECT BACKGROUND

As stated previously, in the absence of specific guidance, contracting officers often default to familiar but more complex FAR Subpart 15.3 source selection procedures rather than use the FAR 16.505-authorized discretion to streamline fair opportunity competitions under multiple award IDIQs. As a result, both the government and industry firms potentially expend unnecessary resources in the form of time and money.

Procurement reform initiatives aimed at solving such issues like these are not new. The Competition in Contracting Act (CICA), for example, became law in 1984 as a foundation for the FAR aimed at increasing competition and reducing costs. Similarly, FASA and the National Defense Authorization Acts (NDAA) of fiscal year (FY) 2008 and FY 2017 further increased the competition requirements for TO/DO contracts.

A. CICA OF 1984

CICA governs competition in federal procurement. As noted by Kate Manuel in “Competition in Federal Contracting: An Overview of the Legal Requirements,” CICA mandates that contracts result from “full and open competition through the use of competitive procedures” unless certain circumstances² exist that would allow agencies to use noncompetitive procedures (Manuel, 2011, p. i).

As Manuel points out, award of orders under TO/DO contracts is not subject to CICA, but the award of the multiple award IDIQ basic contracts is. Manuel states that,

FASA supplemented CICA by (1) establishing a preference for multiple-award TO/DO contracts, (2) requiring that agencies provide contractors “a fair opportunity” to compete for orders in excess of the micropurchase threshold under multiple-award TO/DO contracts, and (3) authorizing GAO to hear protests challenging the issuance of TOs/DOs that increased the scope, period of performance, or maximum value of the base contract (Manuel, 2011, pp. 20–21).

² FAR 6.302.

B. FASA OF 1994

In its 1993 congressional report, the Acquisition Law Advisory Panel concluded that unless agencies had the flexibility to enter into TO/DO contracts, they would experience unnecessary program delays. Accordingly, the panel suggested to Congress that TO/DO contracts be allowed by statute. Congress understood that useful procurement reforms must include giving agencies adaptable contracting instruments. As such, Congress enacted FASA to give this adaptability by codifying agencies' current practices of utilizing TO/DO contracts. It also made the use of multiple award TO/DO contracts required in some cases, formalized the "general preference for the use of multiple awards," and mandated that "multiple awardees have a fair opportunity to be considered" for TO/DO awards (OFPP, 1999, Ch. 2, para 3). Finally, FASA granted the GAO jurisdiction over protests involving alleged increased scope, period of performance, and maximum value of the contract (Manuel, 2011).

C. FY 2008 NDAA

The FY 2008 NDAA further constrained the utilization of single-award TO/DO contracts. It constrained agencies' capacity to utilize such contracts by requiring a written determination by the agency head prior to award of a single-award TO/DO contract with an expected value over \$103 million (including options) (Manuel, 2011).³

It also specified what constituted a "fair opportunity to be considered" for orders exceeding \$5.5 million under MACs.⁴ Finally, the NDAA temporarily authorized GAO to hear protests claiming errors in an agency's issuance of TOs/DOs valued above \$10 million (Manuel, 2011).

D. FY 2017 NDAA

The FY 2017 NDAA maintained the GAO's jurisdiction over DoD TO/DO protests, but only for those in excess of \$25 million (Koprince Law LLC, 2016).

³ P.L. 110-181, § 843, 122 Stat. 236-39 (Oct. 14, 2008). Currently, FAR 16.504(c)(1)(ii)(D) reflects an expected value of \$112 million including options.

⁴ FAR 16.505(b)(1)(iv).

III. RESEARCH METHODOLOGY

This chapter articulates the methods for selecting and evaluating the sample data. First, the researchers collected topically relevant literature, which consisted of the following: GAO, Court of Federal Claims (COFC), and Court of Appeals cases regarding the topic of fair opportunity competition for individual TO/DO awards; reports from other government agencies, including best practices as promulgated by OFPP; applicable laws and regulations; and relevant industry studies. Second, the researchers identified TOs/DOs awarded locally at SPAWAR HQ under different multiple award IDIQ contracts and evaluated individual procedures related to the award of orders associated with those multiple award IDIQ contracts. Through this research, trends and themes were identified and used to characterize the current environment at SPAWAR HQ and to develop recommended best practices and proposed approaches to streamline the TO/DO award process.

A. METHOD FOR SELECTING AND EVALUATING THE LITERATURE SAMPLE

The researchers selected the literature sample and evaluated it using a structured approach, as depicted in Figure 1.

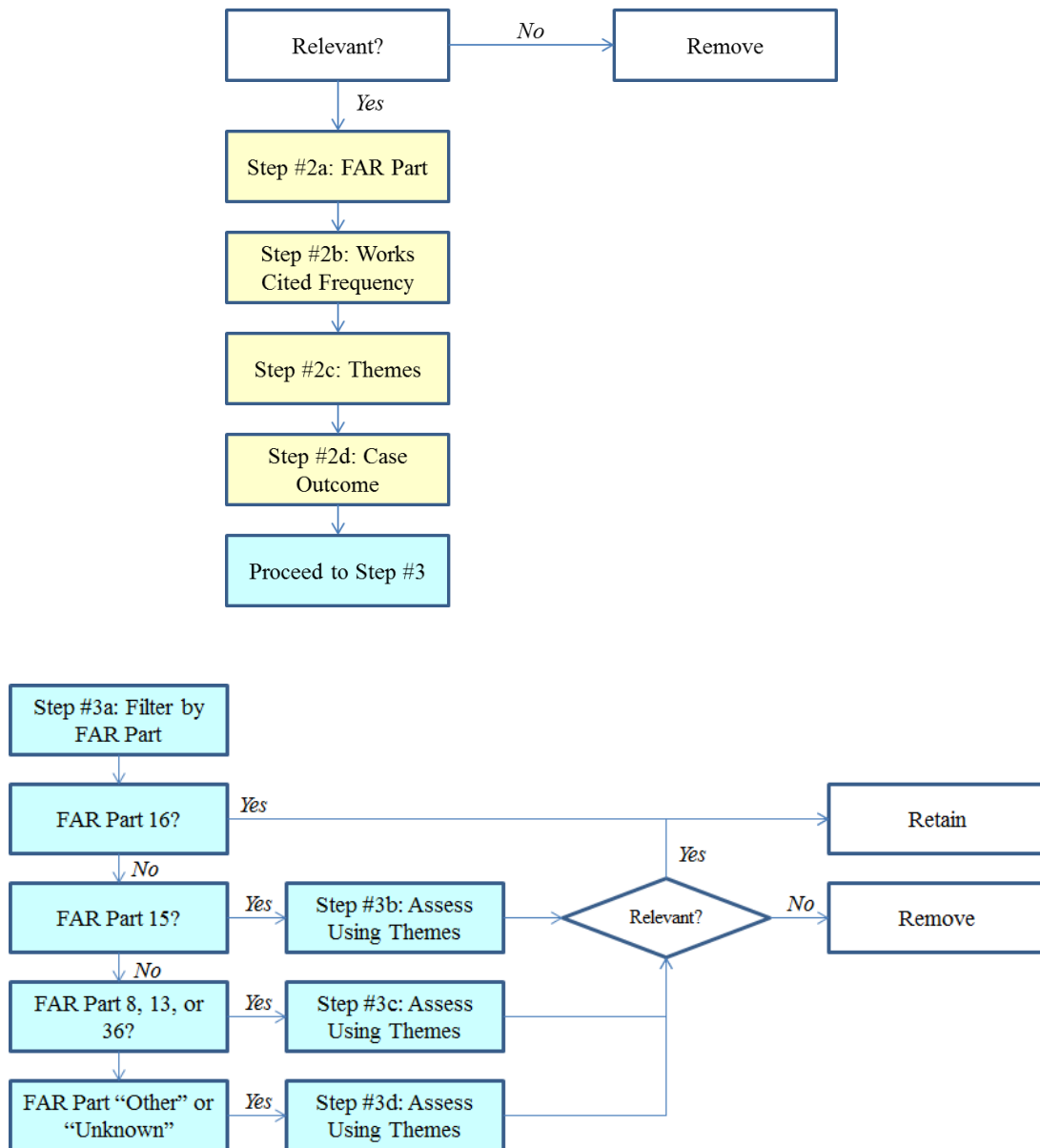


Figure 1. Process for Evaluating Sample

In Step #1, the researchers determined whether the source was relevant. Relevance was determined by reviewing the content for a correlation to the issue at hand. Specifically, the researchers examined the source to see whether it related to fair opportunity competitions. If the source was determined to be relevant, the researchers continued to Steps #2 and #3. If not, the researchers excluded the source from further analysis.

In Step #2, the researchers categorized the relevant sources to enable efficient analysis to select an appropriate sample. Specifically, in Step #2a, the researchers categorized the sources according to FAR Part where applicable; if the source did not directly relate to the FAR, or the FAR Part was unknown, the researchers categorized the source as “other/unknown.” For example, the GAO cases reviewed related to FAR Part 8, 13, 15, 16, or 36 procurements, and the researchers noted the applicable FAR Parts for each specific case. This particular attribute of the data is important in determining the degree of relevance to the issue at hand.

In Step #2b, the researchers categorized the sources according to the number of times the source was cited within other sources. Specifically, each time a particular source referenced another source, the researchers counted that citation. This aspect of the data provided the researchers with insight into which sources were the most prevalent regarding the issue.

In Step #2c, the researchers categorized the sources according to themes. As the researchers read the numerous sources, the following recurring themes arose:

- Cost realism
- Exchanges
- Inadequate source selection documentation
- Competitive prejudice
- Protester as an interested party
- Unstated evaluation criteria
- Improper award
- Improper evaluation
- Defective/inaccurate requirements
- Miscalculation of competitor’s proposal

- Unreasonable removal from the competitive range

The researchers recorded these themes in relation to each specific source. This aspect of the data is important since it allowed the researchers to distill the large sample down into consistent buckets of data. In other words, it provided for a form of normalization across the large sample. It also provided the researchers with themes to investigate when reviewing and analyzing the local MAC orders.

Finally, in Step #2d, for the GAO, COFC, and Court of Appeals cases, the outcome of the case was also captured. The noted outcomes were sustained, denied, dismissed, multiple findings, or not applicable. This became significant in devising proposed recommendations since the propensities of GAO and the COFC should inform the appropriate streamlining strategies.

Once the researchers properly categorized the relevant sources in accordance with Steps #1 and #2, the researchers had a sample size of 212 sources. In Step #3, the researchers filtered the sample by the various attributes described above to derive the final sample for the analysis. First, the researchers filtered the sources by sorting on the field noting the associated FAR Part. The researchers chose this as the primary attribute to sort by, since the FAR Part is the main indicator of relevance.

In Step #3a, the researchers first sorted on FAR Part 16. Since the issue at hand is concerned with FAR Part 16 procurements, the researchers decided to retain all FAR Part 16-related sources within the sample. For the remaining FAR Part-related sources, the theme related attributes determined whether the researchers retained or removed the source. The result of this step was that the researchers retained all 26 sources relating to FAR Part 16.

Next, in Step #3b, the researchers sorted on and rated the FAR Part 15-related sources. The researchers used theme related attributes to assess whether to retain or remove a FAR Part 15-related source. This attribute was used as the sole source of the researcher's determination because it is not believed that case outcome or number of times cited are attributes that are directly related to relevance. Rather, as discussed above, those attributes

inform the proposed recommendations and an understanding of which sources are the most relevant. The researchers rated the FAR Part 15-related sources as green, yellow or gray.

Green sources were highly relevant to the issue based on the identified themes.

Yellow sources were marginally relevant to the issue based on the identified themes.

Gray sources were not relevant to the issue based on the identified themes.

The researchers retained those sources rated green or yellow and removed the gray, or not relevant, sources. As shown in Figure 2, the researchers removed 15 sources but retained the remaining 103 sources relating to FAR Part 15.

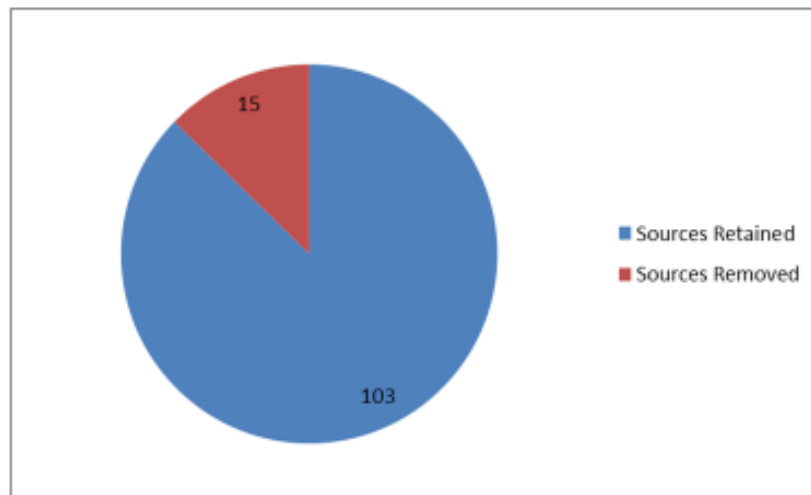


Figure 2. FAR Part 15 Sources

In Step #3c, the researchers did a similar sort and rating for the remaining FAR Part-related sources. In this case, the researchers only retained sources if their relevance to the issue was clear. Since FAR Parts 8, 13, and 36 procurements have unique requirements and circumstances, the researchers did not retain those sources unless the themes within the source were ones that were directly relatable to those under FAR Part 16. The result of this step was that the researchers removed 24 sources relating to these FAR Parts but retained the remaining 38 sources relating to these FAR Parts, as shown in Figure 3.

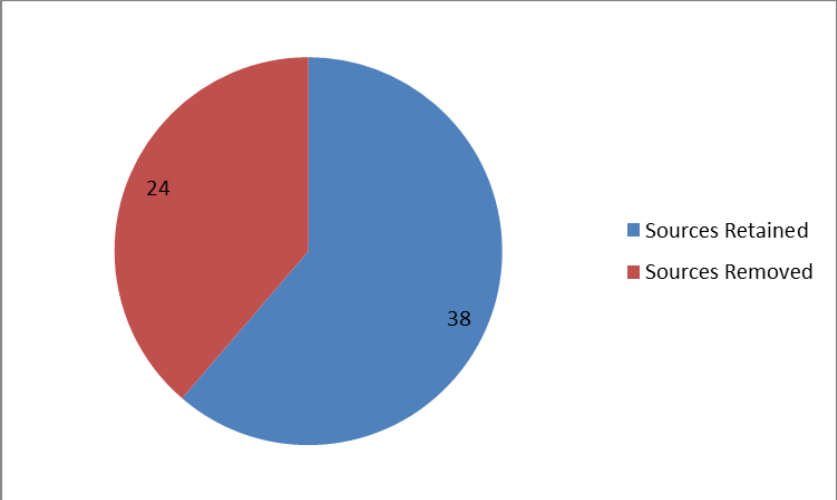


Figure 3. FAR Parts 8, 13, and 36 Sources

Finally, in Step #3d, those sources with a FAR Part marked as either “unknown” or “other” were sorted and rated in the same way as those related to FAR Parts 8, 13, and 36. The result of this step was that the researchers removed four sources but retained the remaining two sources, as shown in Figure 4.

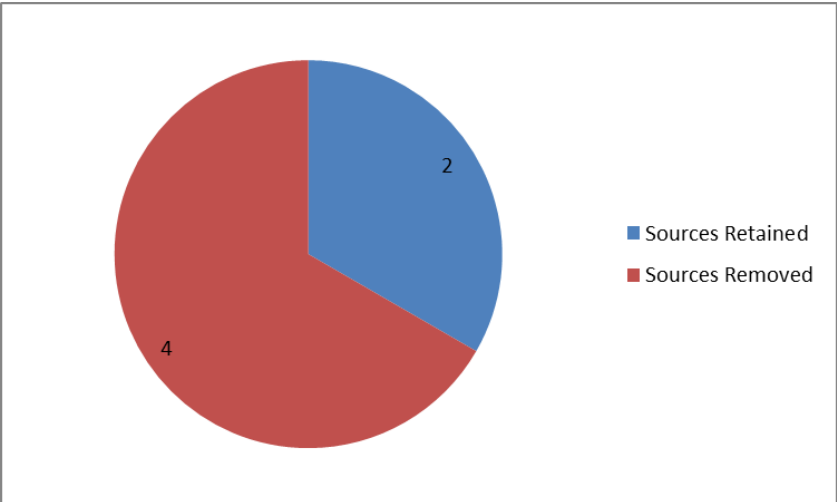


Figure 4. FAR Part “Unknown” or “Other” Sources

After applying Steps 1–3 above, the researchers had removed 43 sources, or 20% of the initial sample of 212 sources while retaining 169 sources, or 80% of the initial

sample. These 169 sources shown in Figure 5 formed the literature sample for the analysis presented in Chapter V.

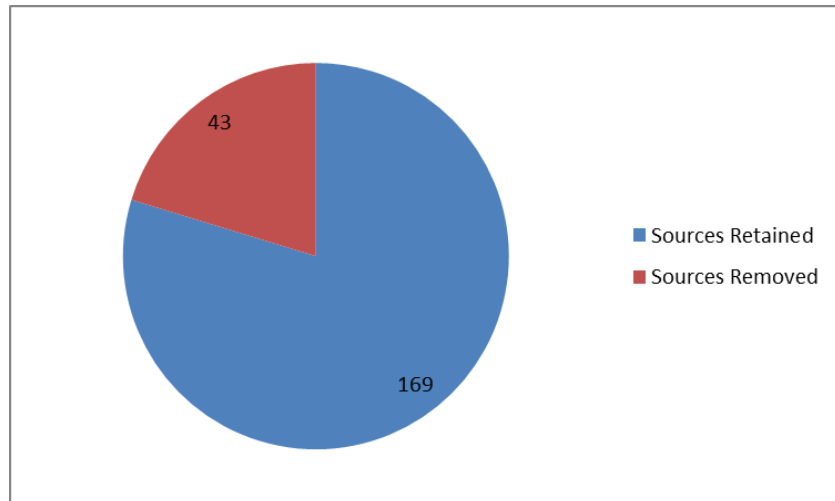


Figure 5. Disposition of Sources (#)

B. METHOD FOR SELECTING AND EVALUATING LOCAL MAC ORDERS

The method for selecting local MAC orders to evaluate was essentially a single step involving a query into the local AMT database. In this initial step, the researchers sought to identify a set of relevant local TO/DO actions to evaluate. First, the researchers did a query into SPAWAR HQ’s AMT tool to identify relevant contract actions. An initial query into the AMT tool identified a total of 296⁵ contract actions, including all types of actions tracked in the tool (e.g., full and open competitions, sole source efforts, negotiated TOs/DOs on a single award IDIQ, etc.). To limit the data to relevant TO/DO fair opportunity competition efforts, the AMT database of milestone schedules was filtered to provide a data set including only “Internal MAC Competitive Procurement” efforts, and an ad-hoc report was generated for the resulting 28 actions. After reviewing the 28 actions,

⁵ This count includes 103 “active” efforts and 193 “awarded” efforts. The count does not include Draft, On Hold, or Cancelled entries.

the researchers identified four actions that were not actually issued under local MACs,⁶ and one order that was awarded using a fair opportunity exemption; these five actions were removed. The remaining 23 relevant actions shown in Figure 6 constitute the sample set.

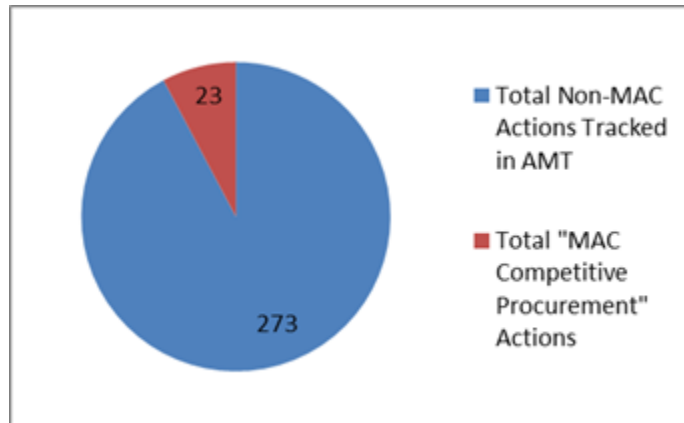


Figure 6. Actions in AMT

It is important to note that the 23 actions in the sample set identified through AMT do not constitute an exhaustive list of all local MAC TO/DO actions within SPAWAR HQ; the reason for this is that general guidance related to the input of an action into the AMT tool includes a minimum dollar threshold of \$1 million. In other words, SPAWAR HQ contract personnel are generally required to track all actions over \$1 million via a milestone report in AMT; however, there are some exceptions that would result in an action over \$1 million not being tracked. Similarly, there are exceptions that could result in an action for less than \$1 million having a milestone report in AMT. Furthermore, the AMT tool only includes milestone reports for efforts that were active beginning in October 2016, which is concurrent with AMT implementation. As such, the researchers limited the sample set to efforts that were/are both active and tracked between October 2016 and March 2018. For the purposes of this study, however, the data set pulled from AMT was determined to be sufficient for detailed analysis because it included recent and representative actions from six active local MACs.

⁶ These four non-local MAC orders were entered into AMT using the "Internal MAC Competitive Procurement" template but were actually determined to be orders issued under non-SPAWAR MAC vehicles.

Once the researchers identified a relevant sample set of actions, the researchers evaluated the selected actions in accordance with the following two-step process.

In Step #1, the researchers sorted and filtered the detailed ad-hoc report related to the 23 actions to allow for specific analysis related to various characteristics of the sample set. In Step #1a, the researchers sorted the actions to determine status. That is, Step #1a sought to determine how many of the reported actions had already been awarded versus how many were still active (i.e., not yet awarded). Next, in Step #1b the researchers sorted the actions by value to create data points related to the size of the action by dollar value. The researchers used this information later to determine whether there was any correlation between the size of an effort and the time and/or effort involved to get to an award. In Step #1c, the researchers sorted the actions by the “organization” field to determine the relevant SPAWAR program office or code the action supported and to assist with the identification of each separate MAC. This step also revealed the number of actions related to each MAC and identified the most active ones. Finally, in Step #1d, the procurement action lead time (PALT) of each action was evaluated to determine average lead times for each action.

In Step #2, the researchers used the information collected in Step #1 to identify individual contracting personnel to interview for additional details related to the specific procedures they followed to conduct TO/DO fair opportunity competitions. The MACs identified in Step #1c led the researchers to interview four individuals (representing both contracting officers and contract specialists) regarding their use of FAR Subpart 15.3 versus FAR Subpart 16.5 procedures for fair opportunity competitions. These four individuals represented all 23 actions in the sample set, as shown in Figure 7. The interviews with individual contracting personnel are specific to the 23 actions they represent, and the processes and procedures discussed are representative of all TOs/DOs issued under the applicable MAC. In other words, the contracting personnel discussed processes and procedures applicable to the specific TOs/DOs in the sample and indicated that the same/similar processes and procedures are generally followed for all orders issued under the respective local MAC.

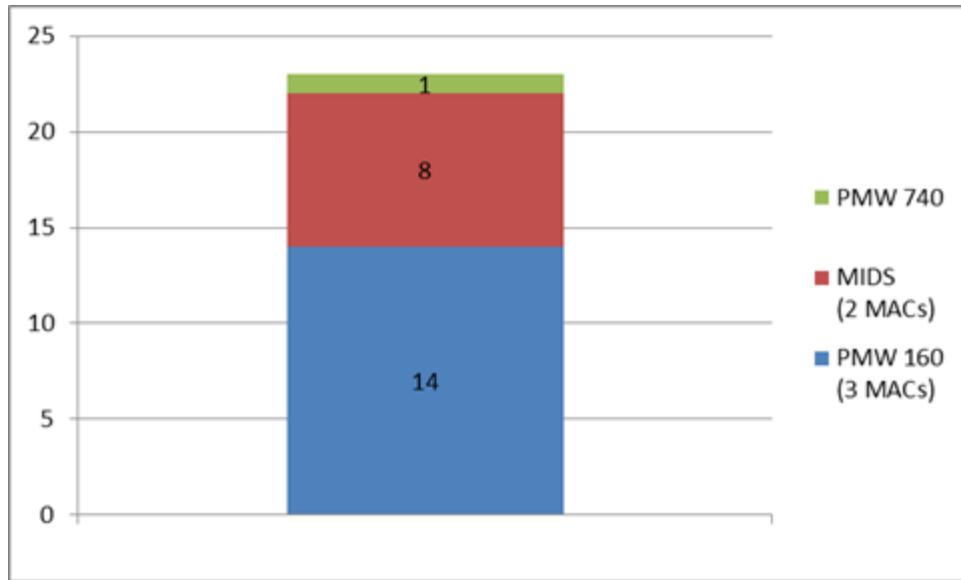


Figure 7. Total Number of Actions by Program Office/Code

The researchers interviewed each individual to understand the procedures used to compete TOs/DOs, and each interview was guided by a series of general questions. The questions assessed the extent to which the individual being interviewed actually utilized the flexibilities authorized in FAR Subpart 16.5.

- Are there specific ordering procedures identified in the basic IDIQ, or are they defined in the proposal request for each individual TO/DO?
- Do you develop a formal Source Selection Plan (SSP) for each individual TO/DO fair opportunity competition? If so, did you streamline the document in any way or did you develop a formal SSP in accordance with DoD Source Selection Procedures?⁷
- Are DoD Source Selection Procedures ratings definitions used, or are any evaluation methods streamlined (e.g., use of plus/minus vs. standard ratings; acceptable/unacceptable; immediate comparison of offerors)?

⁷ Defense Federal Acquisition Regulation Supplement Procedures, Guidance and Information Subpart 215.3 (31 March 2016).

- Regarding TO/DO proposal requirements, is the minimum amount of information necessary requested? Are oral proposals ever used?
- What evaluation factors are used? Considering cost is the only mandatory factor, are past performance and/or technical only used as necessary?
- Are discussions addressed in the TO/DO proposal request? If yes, must you conduct discussions in accordance with FAR Subpart 15.3 procedures (i.e., establish competitive range, discussions with all, request final proposal revisions (FPR))? Or do you conduct exchanges in accordance with FAR Subpart 16.5?
- Is a full Navy/Marine Corps Acquisition Regulation Supplement (NMCARS)-compliant Business Clearance Memorandum (BCM) prepared to document the award? If not, what sort of documentation is prepared?
- To date, have you had any orders get protested? If so, what was the issue and the outcome?

The researchers synthesized the information collected in Step #2 into general observations regarding SPAWAR HQ's use of the flexibilities authorized in FAR Subpart 16.5. These observations related to fair opportunity competitions are addressed in Chapter V, while the best practices and recommendations for improved efficiency are covered in Chapter VI.

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IV. THE DATA

This chapter lays out the quantifiable data points that resulted from the processes identified in Chapter III. The data presented in this chapter does not include analysis; Chapter V will present the relevant analysis and observations.

A. LITERATURE SOURCES

As discussed in section A of Chapter III, in Step #1, the researchers determined whether the sources were relevant by examining whether they related to fair opportunity competitions. If the source was determined to be relevant, the researchers continued the evaluation process and if not, the researchers no longer considered the source in the analysis. This step resulted in a starting sample size of 212 sources.

In Step #2, the researchers categorized the relevant sources to efficiently analyze the data and select an appropriate sample. First, in Step #2a, the researchers categorized the sources according to FAR Part, where applicable. Figure 8 shows that of the 212 sources: 53 were related to FAR Part 8, eight were related to FAR Part 13, 118 were related to FAR Part 15, 26 were related to FAR Part 16, one was related to FAR Part 36, and six were unknown or not stated. Figures 8 and 9 show the sources by FAR Part in both absolute terms and as a percentage of the total sources.

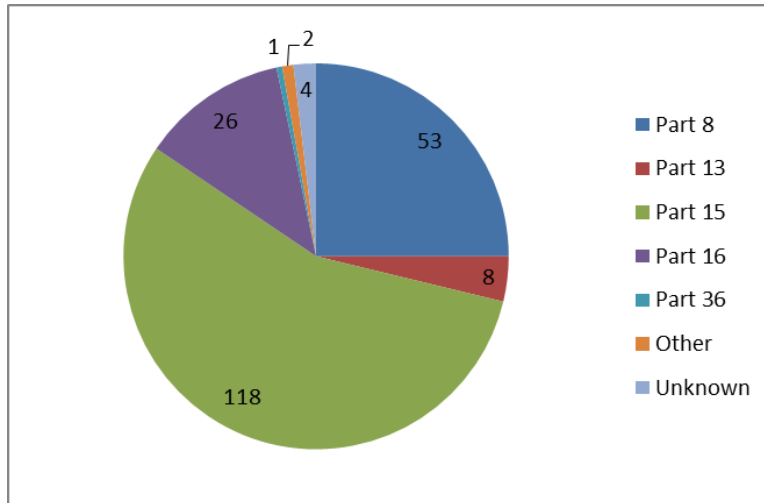


Figure 8. Sources by FAR Part (#)

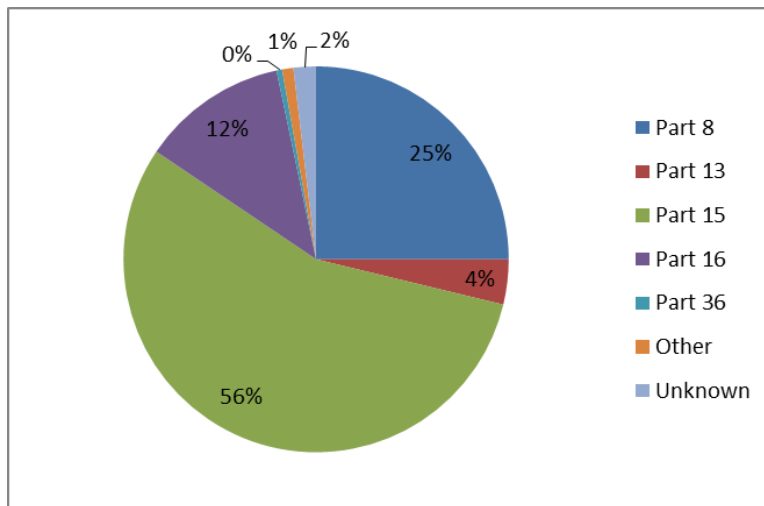


Figure 9. Sources by FAR Part (%)

Next, in Step #2b, the researchers categorized the sources according to the number of times cited within other sources. Specifically, each time a particular source cited another source, the researchers counted that citation. Figure 10 shows the number of times a source was cited within the total sample (horizontal axis) against the number of sources cited that many times (vertical axis). Those sources cited most frequently were analyzed extensively and are discussed at length in Chapter V.

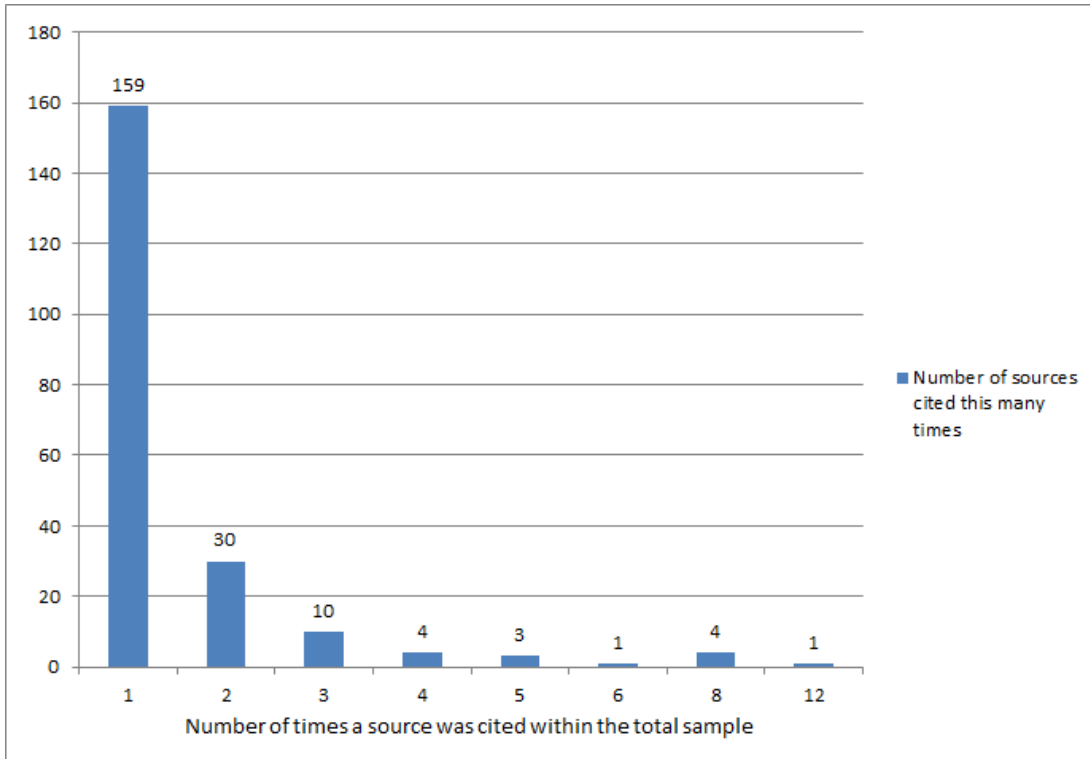


Figure 10. Number of Times Source Cited within Total Sample

Next in Step #2c, the researchers categorized the sources by themes. As the researchers read the numerous cases, articles, and studies, many recurring themes arose as discussed in Chapter III. The researchers recorded the themes in relation to the specific source. Figures 11 and 12 show the frequency of themes within the sources, both in absolute terms and as a percentage of the total number of sources.

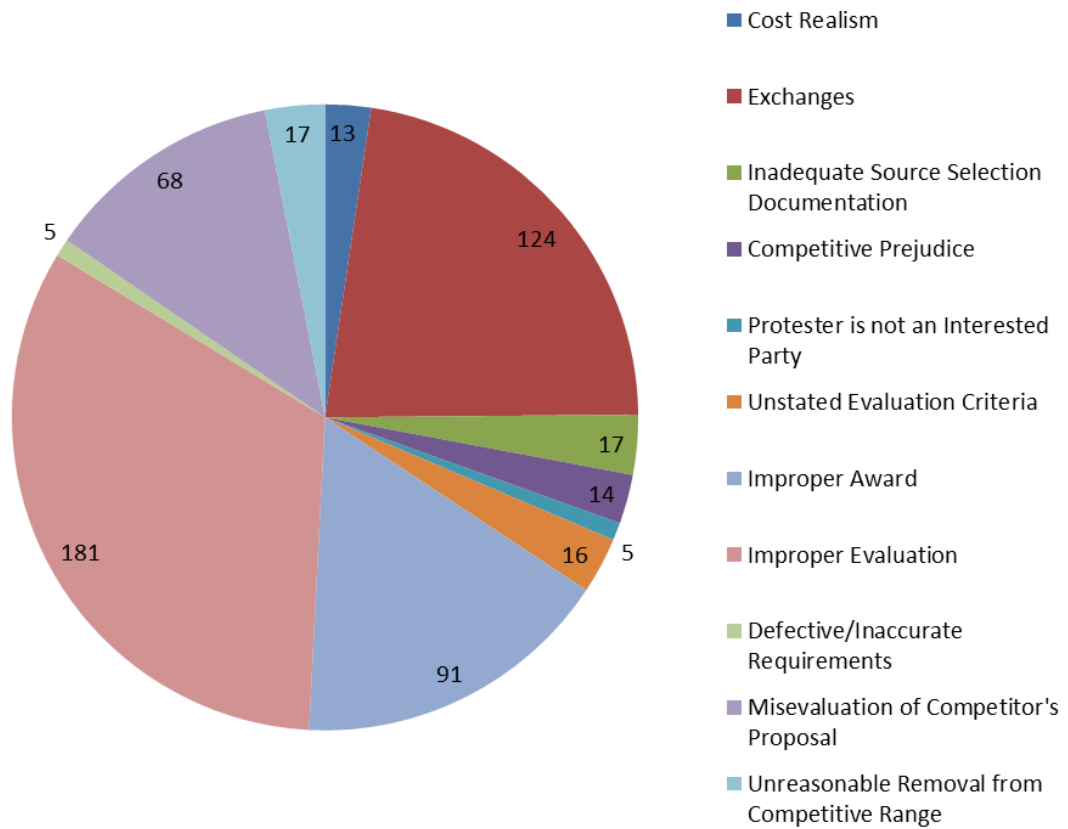


Figure 11. Sources by Themes (#)

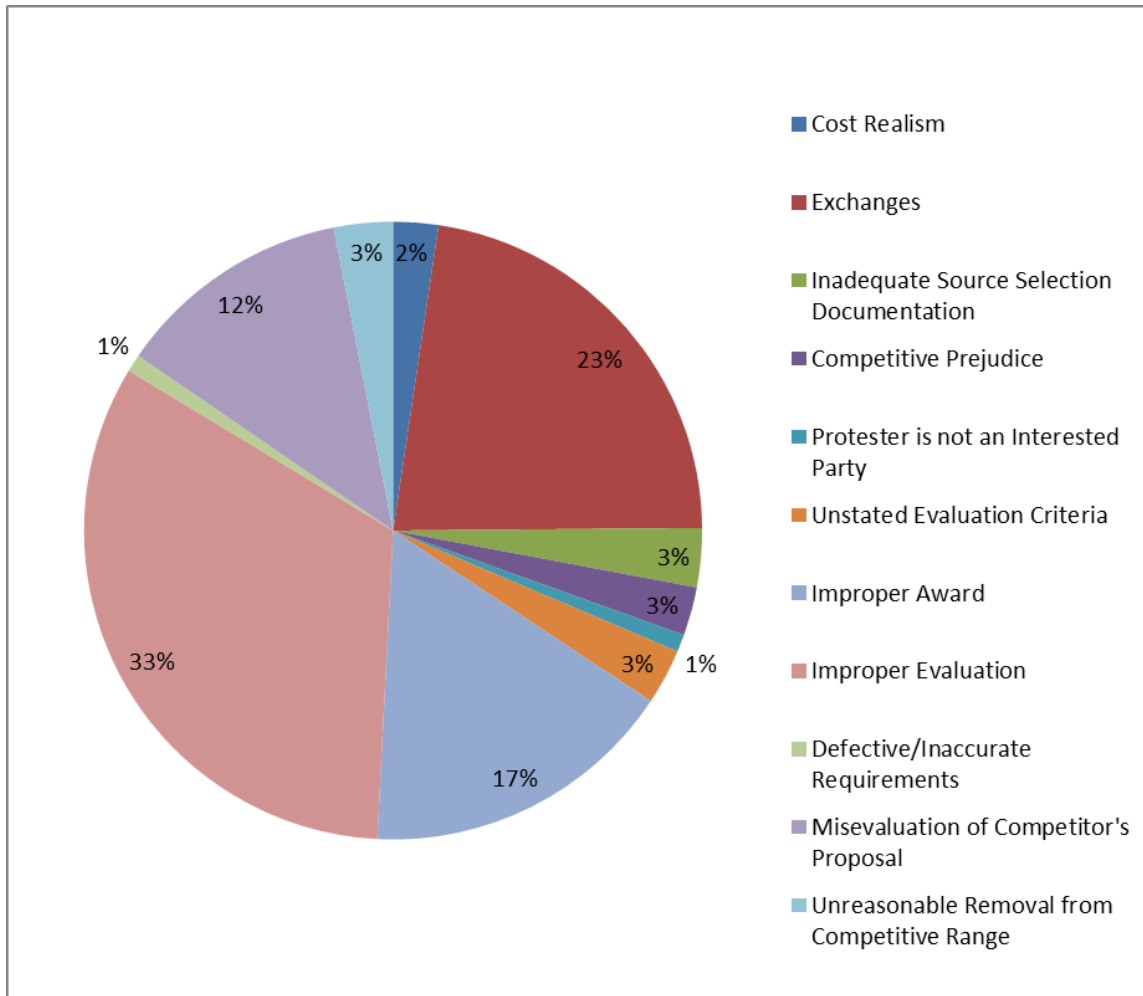


Figure 12. Sources by Themes (%)

Finally, in Step #2d, for the GAO, COFC, and Court of Appeals cases, the researchers also captured the case outcomes. Once again, case outcome is significant in devising proposed recommendations since the propensities of GAO and the COFC should inform the appropriate streamlining strategies. Figures 13 and 14 show the number of sources by outcome, both in absolute terms and as a percentage, of the total cases.

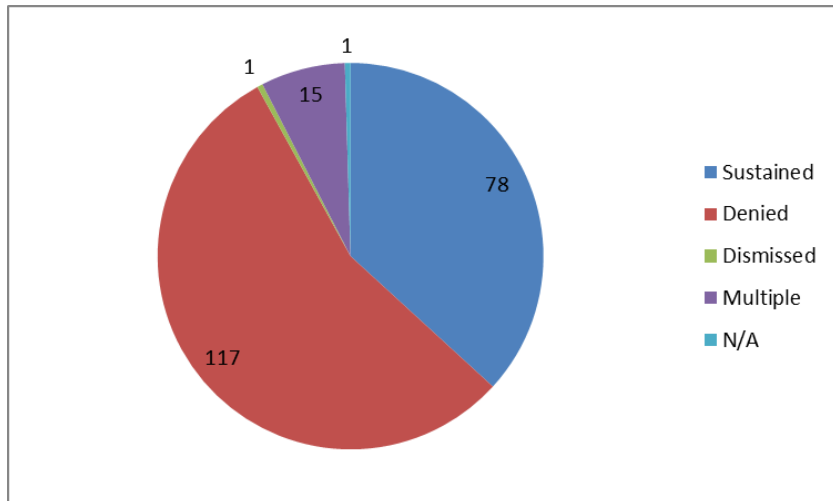


Figure 13. Sources by Outcome (#)

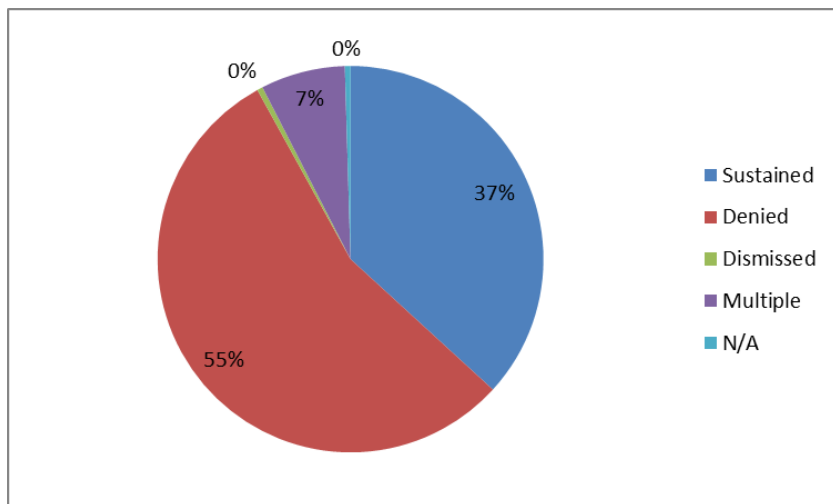


Figure 14. Sources by Outcome (%)

In Step #3, the researchers filtered the categorized data in order to determine the appropriate sources to retain. Specifically, the researchers sorted on the associated FAR Part as discussed previously. The initial sample size entering Step #3 was 212 sources; after applying Steps #3a through #3d as described in Chapter III, the researchers concluded with a sample size of 169 sources.

The selected sample of 169 sources exhibited attributes consistent with the initial sample of 212 sources. Specifically, as Figures 15 and 16 show, the selected sample was

made up of sources primarily related to FAR Part 15, followed by FAR Part 8, and then FAR Part 16 just like the initial sample shown previously.

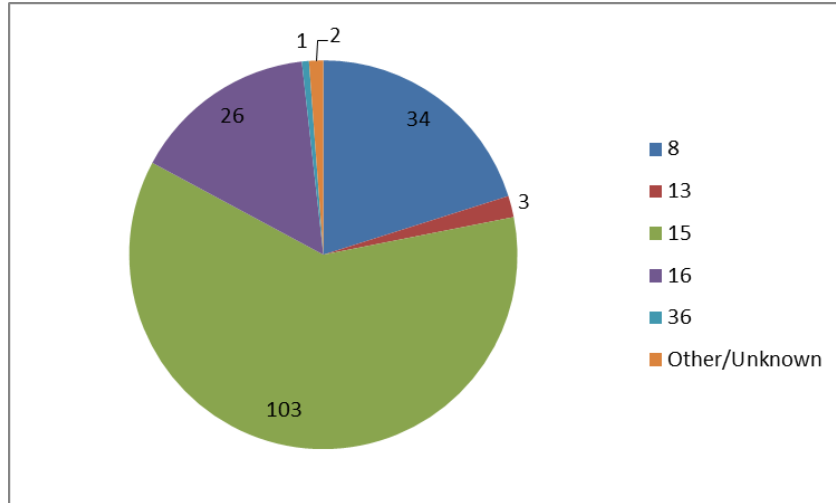


Figure 15. FAR Part (#)

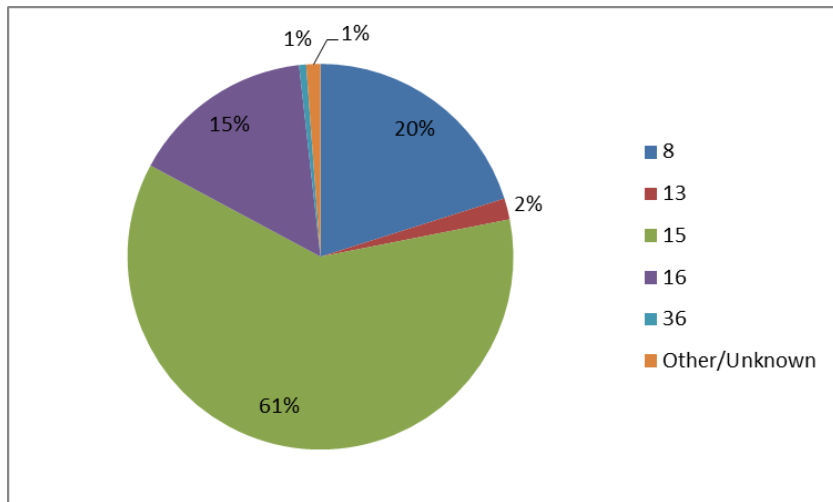


Figure 16. FAR Part (%)

Similarly, the selected sample mirrored the distribution of case outcomes; that is, both the initial sample and the selected sample contain mostly denied cases, followed by sustained cases, as shown in Figures 17 and 18.

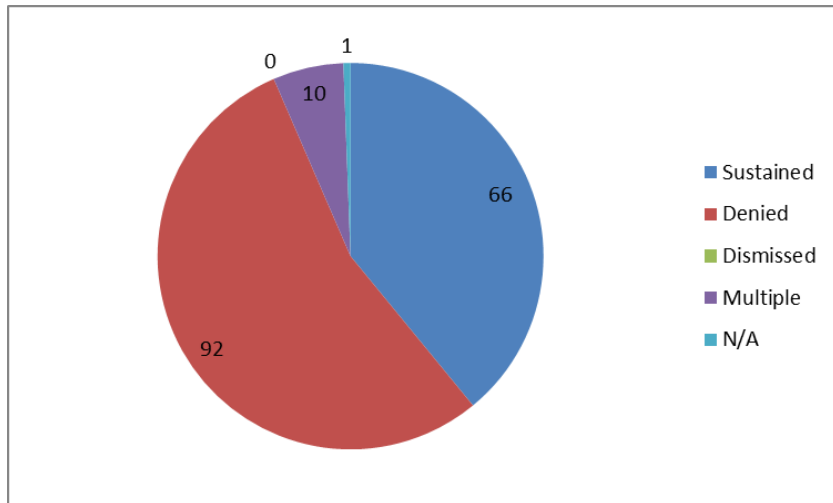


Figure 17. Outcome (#)

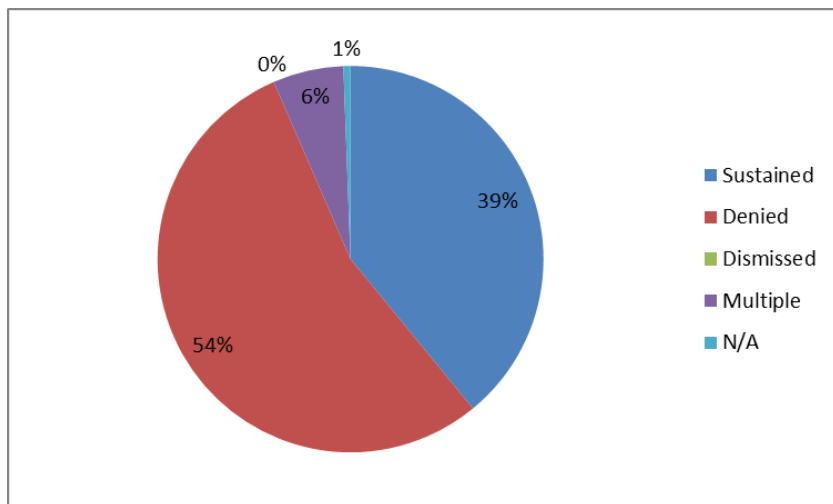


Figure 18. Outcome (%)

Likewise, the percentage of sources exhibiting particular themes was nearly identical between the initial sample and the selected sample. Figure 19 shows the distribution of the various themes within the selected sample. It mirrors that of the initial sample shown in Chapter III.

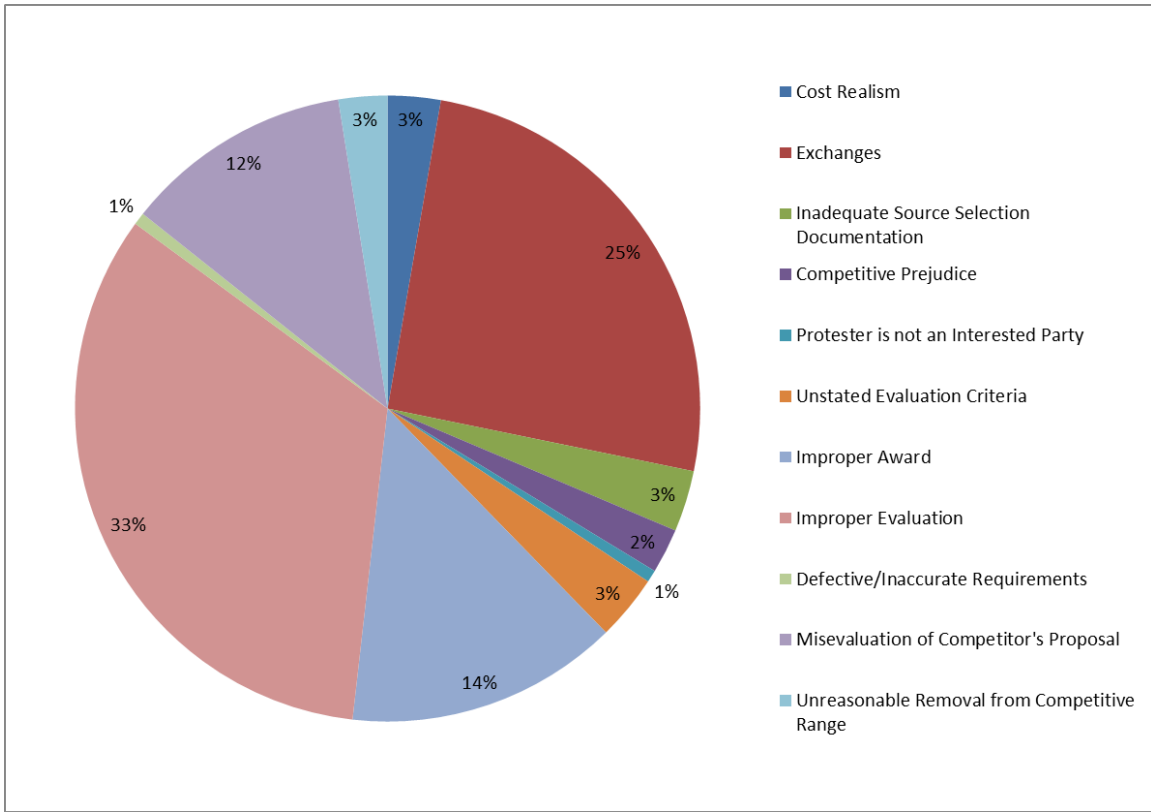


Figure 19. Themes (%)

Finally, the attribute of data concerned with source citations also mirrored that of the initial sample. While the absolute number of sources within each bin has changed due to the change in sample size, the relative proportion to the sample size is nearly identical. Figure 20 shows the number of times within the selected sample that a source was cited (horizontal axis) against the number of sources cited that many times (vertical axis). Once again, Figure 20 largely mirrors that of the initial sample shown in Chapter III.

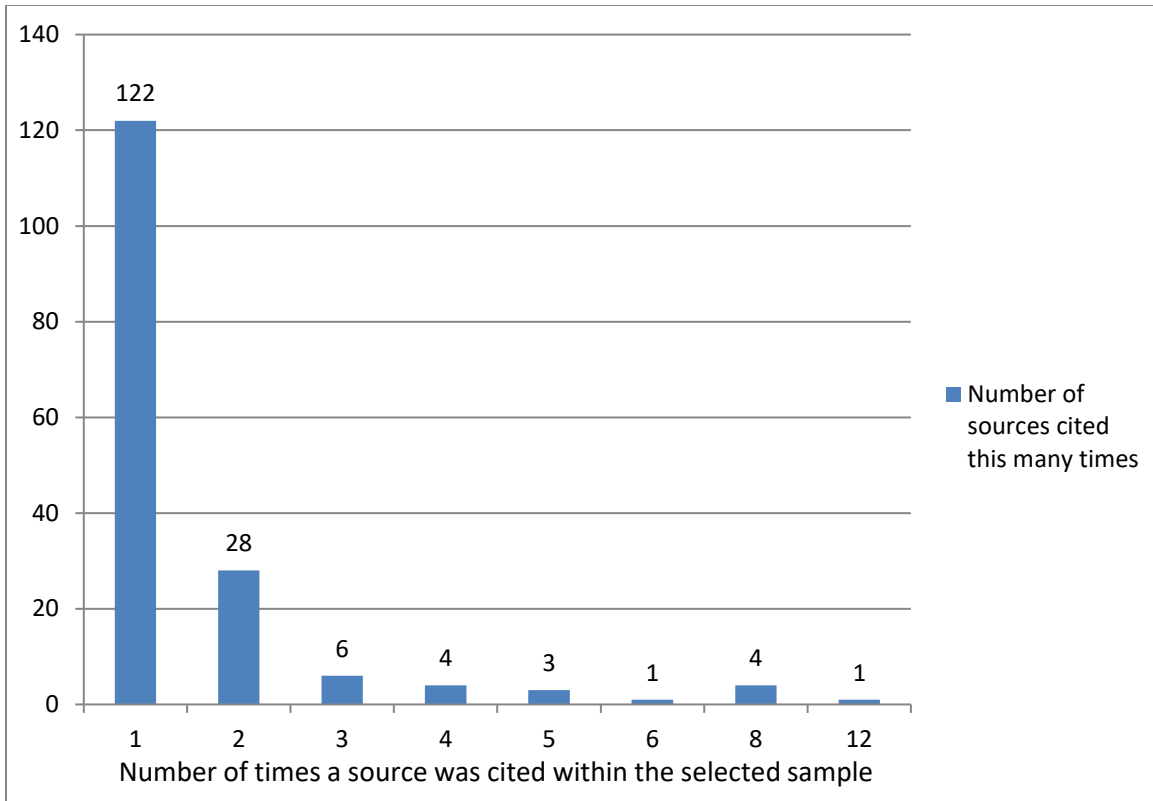


Figure 20. Number of Times Source Cited within Selected Sample

The fact that the selected sample exhibits data attributes which largely mirror that of the initial sample provides confidence that the selected sample is representative of the total sample. As such, the selected sample is appropriate for use in analysis. Further, the researchers believe that the results derived from the analysis performed on the selected sample (of 169) will indeed be applicable to the larger sample (of 212) and the total population represented by the sample (i.e., all federal TO/DO procurements).

The Literature Sample Summary table (provided as supplemental data) shows the 169 sources retained within the sample and their key data attributes. Chapter V discusses these sources, their relevance, and implications.

B. LOCAL MAC ORDERS

In Step #1a of the evaluation process described in section B of Chapter III, the researchers sorted the 23 relevant actions identified through the AMT tool by their status.

During this step, the researchers identified 17 as awarded and six actions as active, as shown in Figure 21.

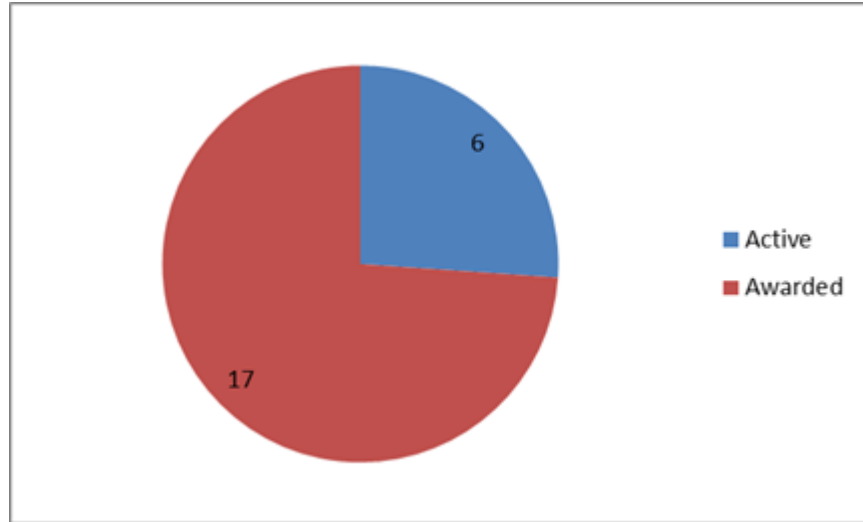


Figure 21. Status of Actions

Next, in Step #1b, the researchers identified the number of actions by estimated dollar value; first with the whole sample set of 23 actions, and then with just the 17-awarded actions. First, the researchers found that the majority of the 23 actions had an estimated value less than \$25 million (i.e., the current protest threshold for TO/DO efforts competed in accordance with FAR Subpart 16.5), with only three actions having an estimated value over \$25 million. As shown in Figure 22, of the 20 actions with an estimated value of less than \$25 million, 13 had an estimated value less than \$5 million.

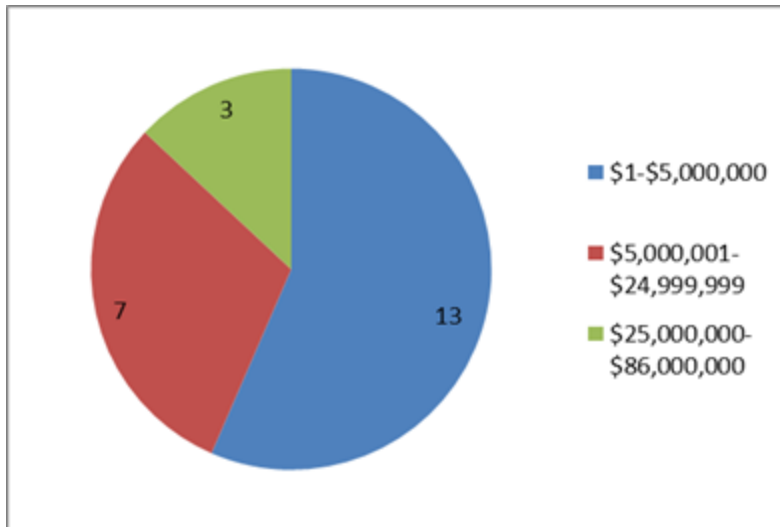


Figure 22. All Actions by Dollar (\$) Value

Figure 23 shows the breakout of awarded actions by estimated dollar value.

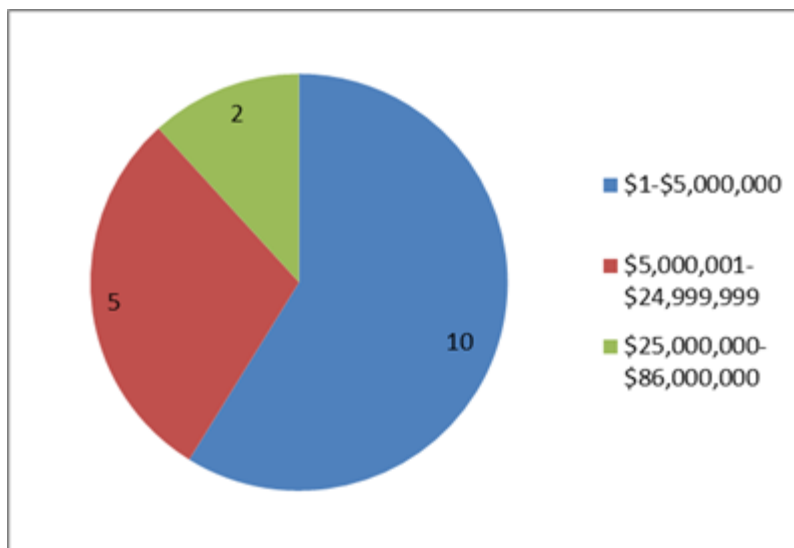


Figure 23. Awarded Actions by Dollar (\$) Value

In Step #1c, the researchers sorted the 23 total actions by SPAWAR Program Office/Code; Figure 24 shows the number of individual actions per SPAWAR Program Office/Code.

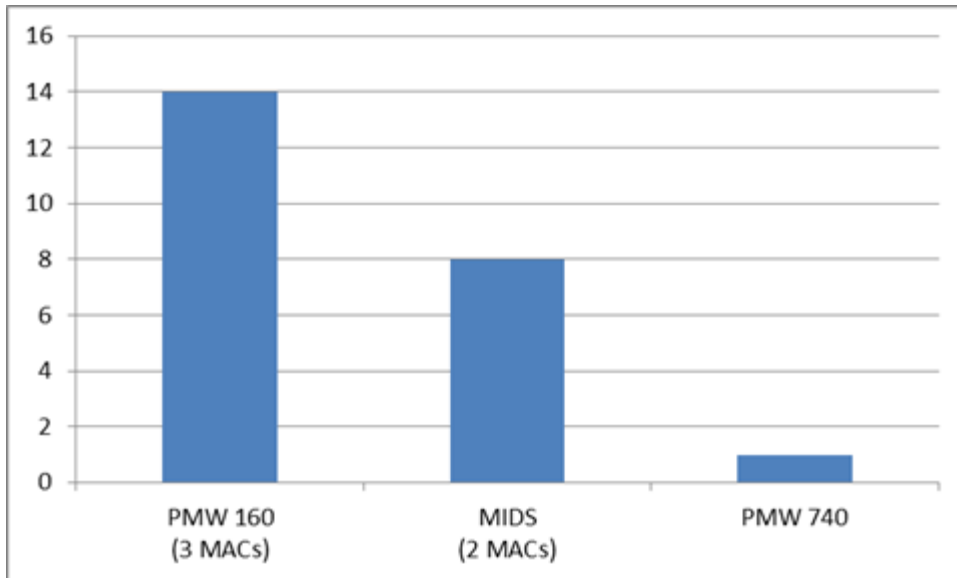


Figure 24. Individual actions by Program Office/Code

The researchers further sorted the actions to determine the number of individual MACs represented in the sample set and to calculate the number of tracked actions associated with each individual MAC. The researchers found that the 23 actions in the sample set relate to six individual MACs. As noted in Figure 24, there were three individual MACs in the Program Management Warfare 160 program office and two individual MACs in the Multifunctional Information Distribution System program office, indicating that those two program offices generated 22 of the actions in the sample set. Three of the four individuals interviewed in Step 3 represent those five MACs, or approximately 96% of the actions.

Finally, in Step #1d, the 17 awarded actions were evaluated to determine total PALT as it relates to dollar value; the six previously identified active efforts were not included in this calculation because their PALT is not complete.⁸ The scatter charts in Figure 25, Figure 26, and Figure 27 show the actual total PALT by estimated dollar value. For ease in presenting the data, the charts show actions grouped by estimated dollar values

⁸ In addition, it is worth noting that at least two of the active actions have already exceeded a 90-day PALT and are expected to exceed the average PALT for their respective dollar values.

\$1-\$5 million, \$5,000,001-\$24,999,999, and \$25,000,000 or more. Not surprisingly, the average total PALT is largest for actions valued at \$25 million or more.

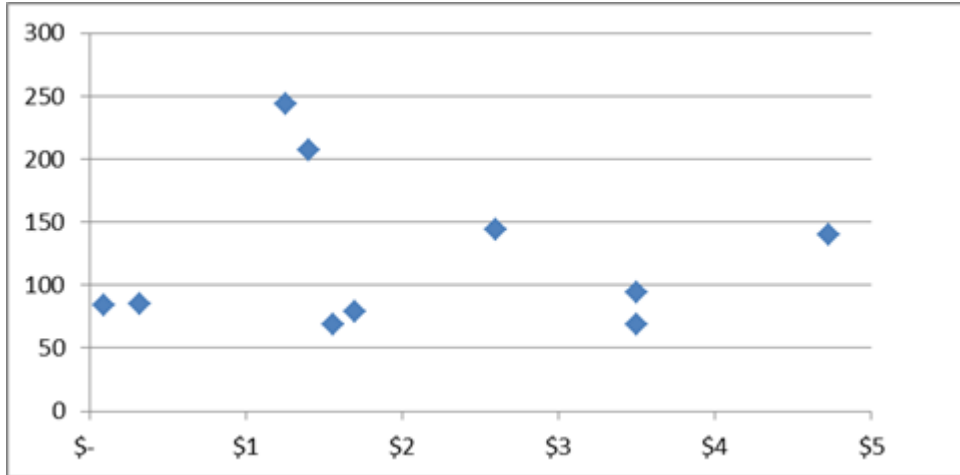


Figure 25. Total PALT (in days) by Value (\$M) for Actions \$1-\$5M

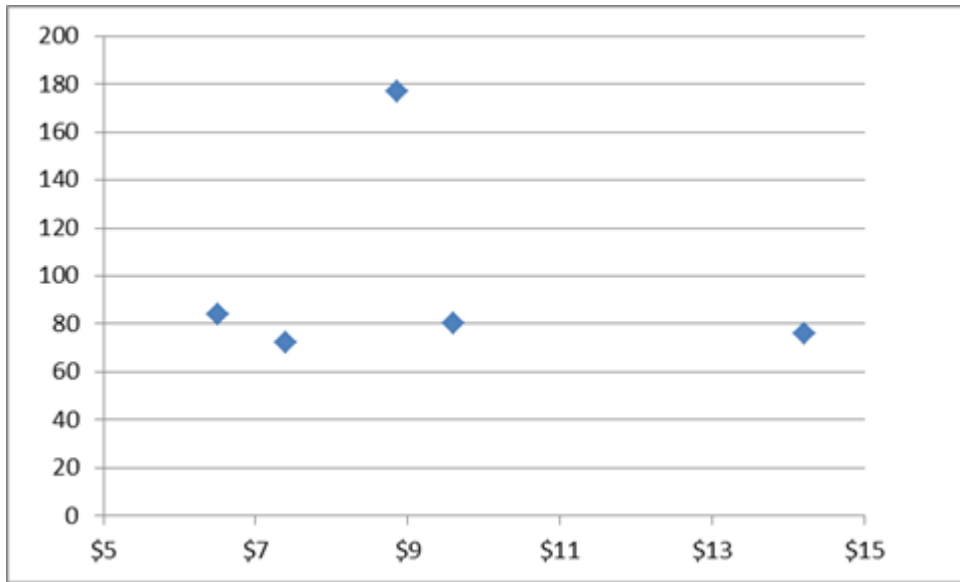


Figure 26. Total PALT (in days) by Value (\$M) for Actions \$5,000,001-\$24,999,999

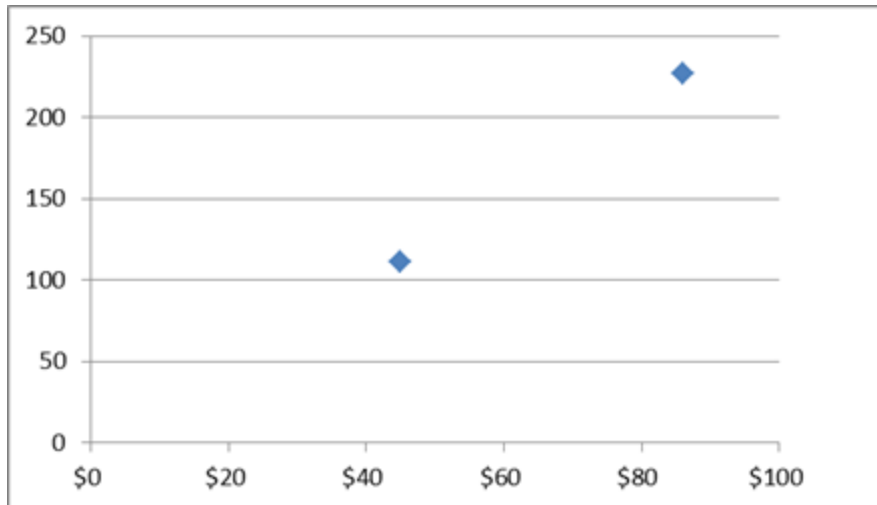


Figure 27. Total PALT (in days) by Value (\$M) for Actions over \$25M

Figure 28 depicts the average total PALT for the 17 awarded efforts by estimated value.

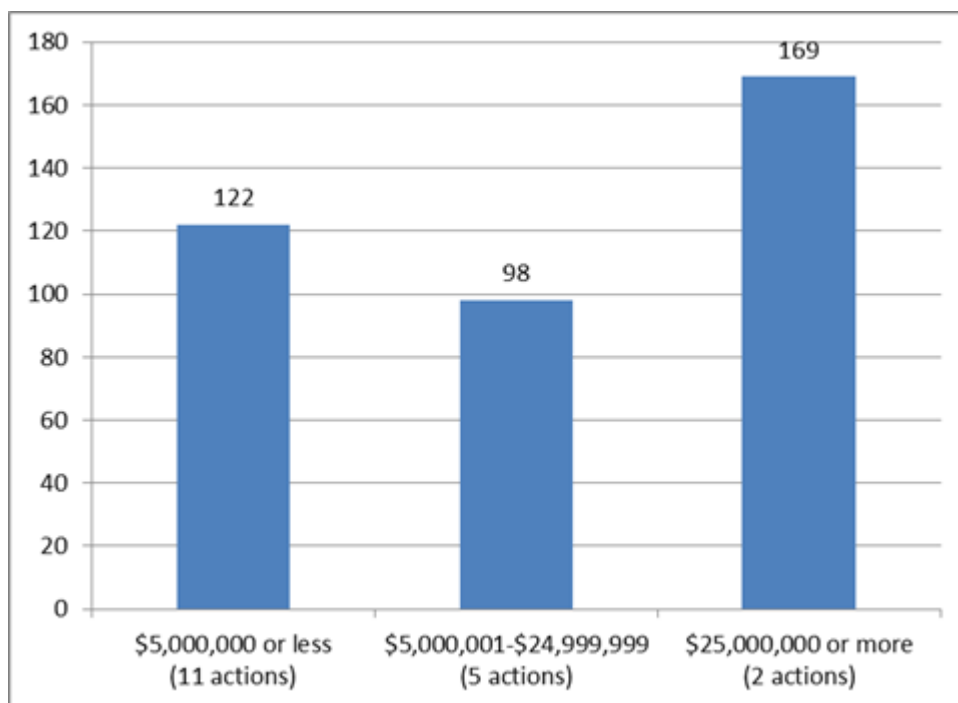


Figure 28. Average Total PALT (in days) by Value (\$)

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V. ANALYSIS

This chapter analyzes the data presented in Chapter IV and provides the researchers' observations within the context of relevant case law and local contract actions.

A. LITERATURE

As stated previously, the motivation for this research is that in the absence of specific guidance, contracting officers often default to familiar but more complex FAR Subpart 15.3 source selection procedures rather than use the FAR 16.505-authorized discretion to streamline fair opportunity competitions under multiple award IDIQs. As a result, both the government and industry firms expend unnecessary resources in the form of time and money. The researchers' goal is to provide recommendations for streamlining the procurement process related to the award of TOs/DOs under local MACs.

To that end, the researchers held that it was of paramount importance to thoroughly evaluate and understand how GAO, the COFC, and the Court of Appeals viewed protests relating to FAR Part 16 procurements. While these protests dealt with a litany of different issues pertaining to fair opportunity competitions, the researchers maintained that understanding the most frequent propensities of the GAO, COFC, and/or the Court of Appeals was of utmost importance when devising recommendations for local use.

As such, and as outlined in Chapter IV, 164 of the 169 literary sources retained for analysis were GAO protest cases. The other sources consisted of two COFC cases, two Court of Federal Appeals cases, and one industry article. The 169 sources were determined to be the most relevant to this study based on the procedures detailed in Chapters III and IV. Chapter IV stated that relevance was best determined by FAR Part. Specifically, in Step #3a of the sample selection process, the researchers first sorted on FAR Part 16; since the research topic is concerned with FAR Part 16 procurements, the researchers retained all FAR Part 16-related sources within the sample. For the remaining FAR Part-related sources, the theme-related attributes were used to determine whether the source was retained or removed. Since FAR Part 16 themes are the baseline for relevance, Figure 29 is useful in understanding the distribution of themes among the 25 FAR Part 16-related sources.

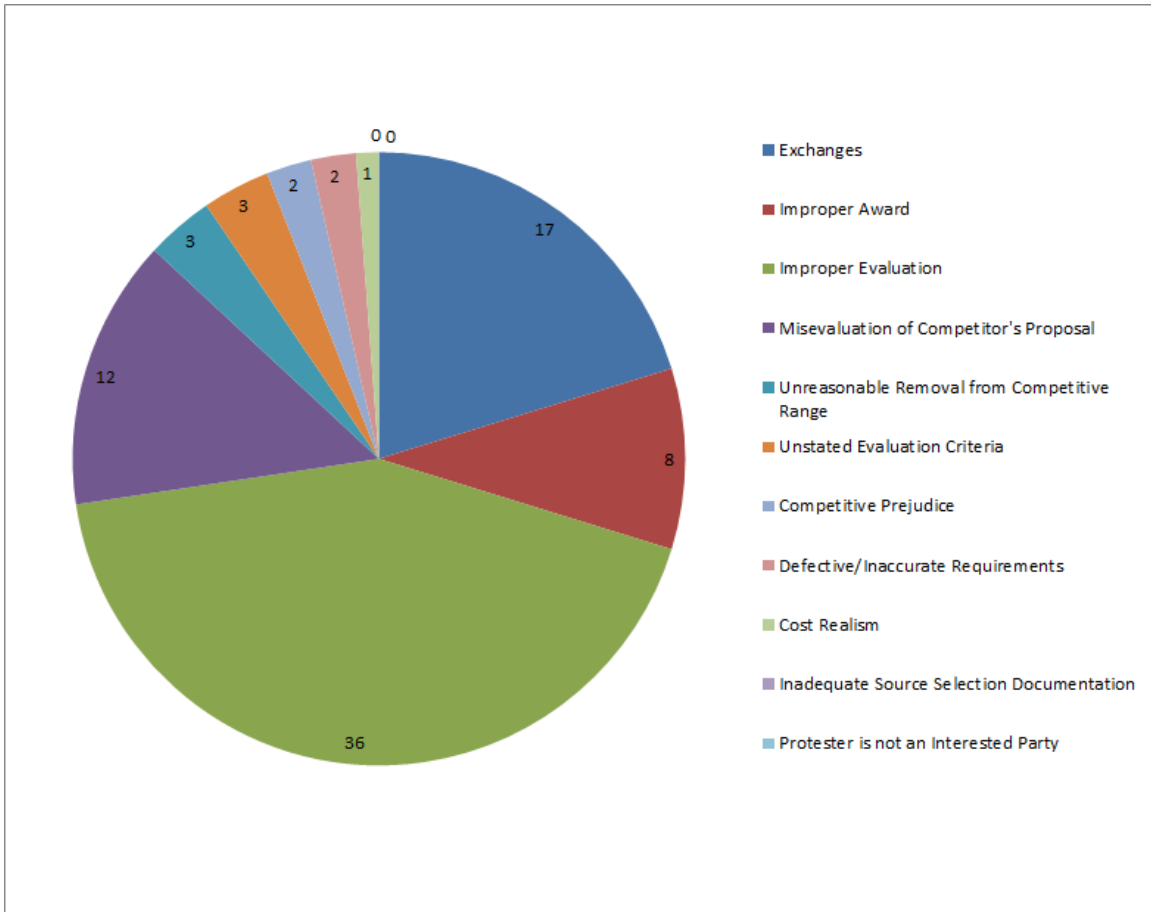


Figure 29. Distribution of FAR Part 16-Related Source Themes

As Figure 29 shows, the FAR Part 16 sources dealt primarily with protests related to

- Alleged improper evaluation
- Exchanges
- Alleged misevaluation of a competitor's proposal, and
- Alleged improper award

Not surprisingly, these were the four primary themes found across all 169 sources retained in the literary sample, as shown in Figure 30.

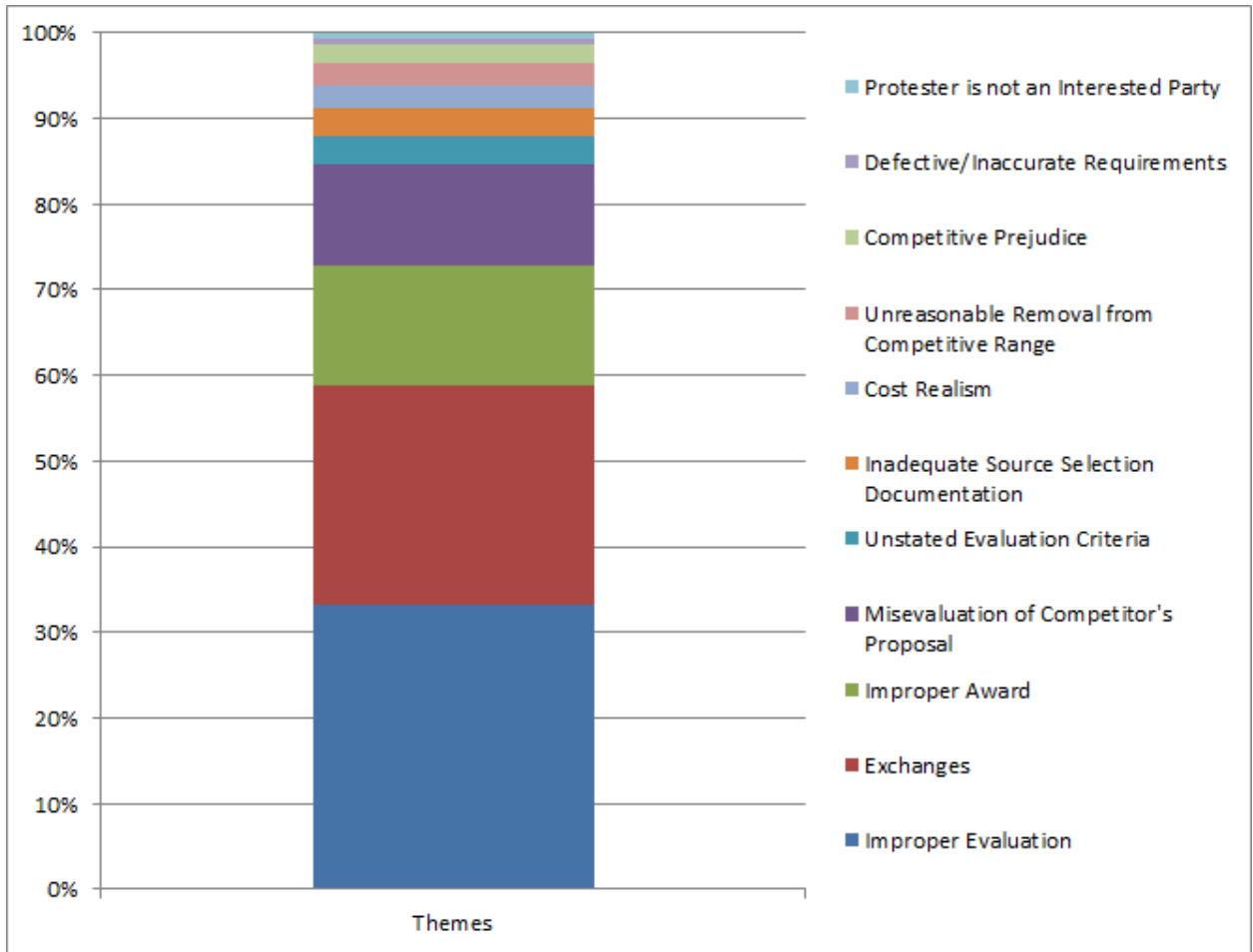


Figure 30. Theme Distribution for the Selected Sample

These four primary themes represented 85% of the total theme instances. For each of the four themes, the vast majority of cases were related to FAR Parts 8, 15, and 16; the FAR Parts 15 and 16 cases alone form the basis of the analysis documented herein. While the researchers did review the FAR Part 8-related cases, the results of the analysis are not documented in detail here because they largely mirror the FAR Part 16 findings presented in the subsequent sections. More importantly, FAR Part 16 procurements are the focus of this research effort and are highly relevant to SPAWAR procurement efforts, whereas, FAR Part 8 procurements are not.

1. Improper Evaluation

The most predominant theme across the sources was alleged improper evaluation. The improper evaluation theme included alleged improper evaluations related to technical, management, past performance, and cost/price source selection factors.

The cases regarding technical evaluation protests dealt with issues such as the agency applying different standards in evaluating the protester's proposal than it did competitors' proposals. Additionally, protesters took exception to the agency's ratings and/or strengths and weaknesses assigned. Across the cases, the technical evaluation issues surrounded agency evaluations of factors such as:

- Experience
- Technical approach
- Marketing approach
- Technical capability
- Key personnel
- Suitability
- Quality control

Similarly, the management evaluation issues surrounded the agency's evaluation of factors such as:

- Key personnel
- Management approach
- Staffing/fill rate
- Integrated team approach
- Program management

- Program manager turnover
- Delay in submitting invoices

The specific issues raised in connection with the management evaluation factor were those taking exception to the agency's ratings and/or strengths and weaknesses assigned. Further, protesters asserted receiving disparate treatment when compared to competitors and held that the evaluation was flawed.

The past performance evaluation protest issues were similar to those for the technical and management factors in that protesters disputed the ratings or strengths/weaknesses assigned and/or held that the agency applied different standards in evaluating its proposal than it applied to competitors.

Finally, the cost/price evaluation issues involved assertions that the evaluation unreasonably relied on a government estimate that was flawed or that proper cost/price realism was not performed.

As shown in Figure 31, the vast majority of these alleged improper evaluation instances are covered by the FAR Part 15 sources, the FAR Part 16 sources, and the FAR Part 8 sources. As such, these were the sources that the researchers focused on for analysis regarding improper evaluations.

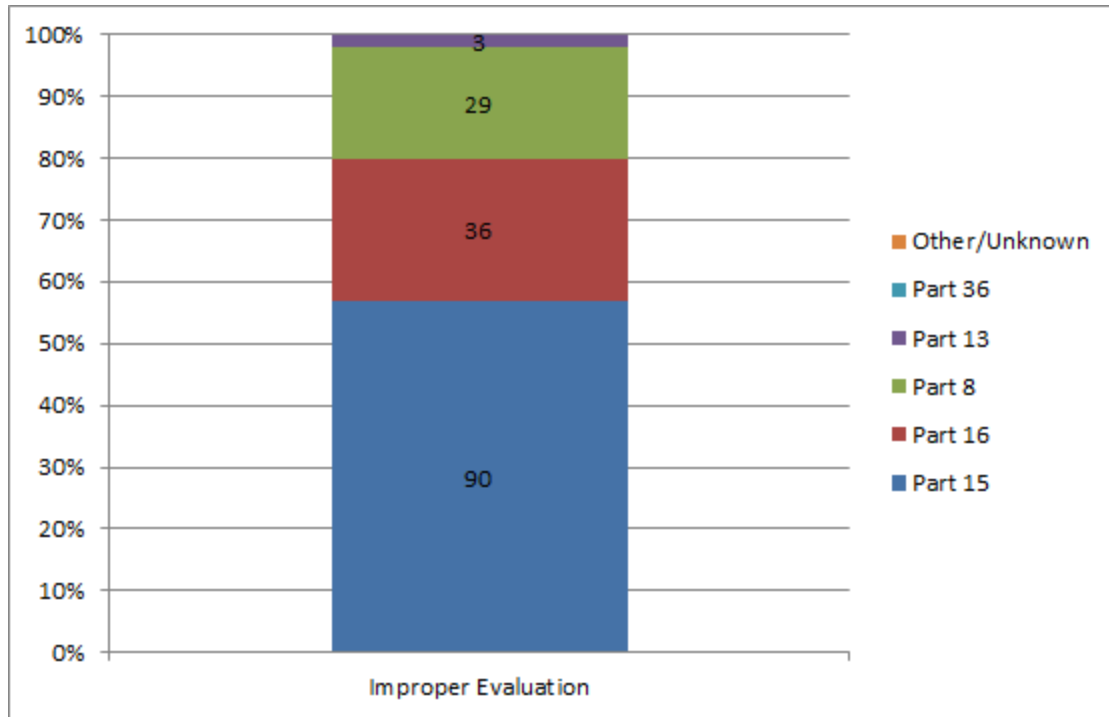


Figure 31. FAR Part Distribution for the Improper Evaluation Theme

It is well-established that FAR Part 16 procurements are not governed by FAR Part 15. Even so, protests pertaining to alleged improper evaluations under FAR Part 16 exhibited largely the same GAO findings as FAR Part 15 cases for the same or similar issues.

Specific to FAR Part 16 technical evaluations, the GAO has ruled that because the agency is best suited to define its own requirements and the contracting strategy by which to obtain them, the “evaluation of proposals, including the determination of the relative merits of proposals, is primarily a matter within the contracting agency’s discretion” (Government Accountability Office [GAO], 2013c, p. 6). The GAO generally reviews challenges for compliance with the terms of the solicitation. In other words, the GAO will not re-evaluate technical proposals; instead, they will review whether “the agency acted reasonably and in accord with the solicitation’s evaluation criteria and applicable procurement statutes and regulations” (GAO, 2013a, p. 6). Furthermore, the GAO has ruled that “a protester’s mere disagreement with the agency’s judgment in its determination of

the relative merit of competing proposals does not establish that the evaluation was unreasonable” (GAO, 2012b, p. 4).

In protests for alleged improper evaluations pertaining to FAR Part 15 procurements, the GAO has made similar determinations. For example, the numerous cases cited within FAR Part 16 ruling B-408465, Tele-Consultants, Inc., regarding whether the agency acted reasonably in evaluating the protester’s technical proposal, are all FAR Part 15-related rulings. This is not surprising since the FAR Part 15 rulings on alleged improper technical evaluations feature very similar findings. In these cases, the GAO did not independently evaluate the proposals but instead reviewed the agency’s evaluation for consistency with the solicitation.

The GAO’s rulings regarding alleged FAR Part 16 improper past performance evaluations show that this is again a matter that is largely within the agency’s discretion. In making a determination regarding a past performance evaluation, the GAO will not replace the agency’s judgment with their own where reasonable past performance ratings were assigned. Instead, the GAO will “examine the record to determine whether the judgment was reasonable, adequately documented, and in accord with the solicitation’s stated evaluation criteria” (GAO, 2008a, p. 8). The case cited within this FAR Part 16 ruling, specifically B-237060.2, Abt Associates, Inc., is a FAR Part 15-related ruling. This is because, once again, the FAR Part 15 rulings on alleged improper evaluations are very similar to the ones presented in FAR Part 16. In addition, FAR Part 15 rulings hold that “evaluation of past performance is, by its very nature, subjective, and an offeror’s disagreement with an agency’s evaluation judgments does not demonstrate that those judgments are unreasonable” (GAO, 2015a, p. 4). Furthermore, evaluation of past performance, “including the agency’s determination of the relevance and scope of an offeror’s performance history, is a matter of agency discretion, which we will not find improper unless it is inconsistent with the solicitation’s evaluation criteria” (p.4).

For the FAR Part 16 cost evaluations, the GAO has pointed to FAR 15.404-1(d) and ruled that a cost realism analysis is required when a cost-reimbursement contract (or order) is to be awarded. The agency is not required to analyze every single cost element; it is merely required to exercise sound judgment in accordance with FAR 15.404-1(c). The

GAO will “review an agency’s judgement in this area only to see that the agency’s cost realism evaluation was reasonably based and not arbitrary” (GAO, 2012c, p. 5). The cases cited within the identified FAR Part 16 case are once again FAR Part 15-related cases, which is not surprising since FAR 16.505(b)(3) states that “if the contract did not establish the price for the supply or service, the contracting officer must establish prices for each order using the policies and methods in Subpart 15.4” (FAR, 2018). It logically follows, then, that the GAO’s rulings regarding FAR Part 15-related cost evaluation protests mirror those in FAR Part 16. Here, again, a cost realism analysis is required for the award of a cost-reimbursement contract in accordance with FAR 15.404-1(d)(2). GAO will only review an agency’s evaluation to determine whether the cost realism analysis was “reasonable and not arbitrary” (GAO, 2004, p. 10).

Similarly, for FAR Part 16 price evaluation protests, the GAO has pointed to the FAR 15.402(a) requirement that an agency must make a fair and reasonable price determination prior to awarding a fixed priced contract. In this regard, the GAO has held that “the manner and depth of an agency’s price analysis is a matter within the sound exercise of the agency’s discretion,” and that GAO “will not disturb such an analysis unless it lacks a reasonable basis” (GAO, 2018, p. 11). Once again, the parallels with FAR Part 15 findings are not surprising given the requirement in FAR 16.505(b)(3) to use Subpart 15.4 pricing methods. As such, the FAR Part 15 findings show that GAO similarly maintains that “the nature and extent of a price analysis ultimately are matters within the exercise of the agency’s discretion,” and GAO’s review of the evaluation “is limited to determining whether it was reasonable” (GAO, 2017, p. 8).

When it comes to FAR Part 16 protests pertaining to evaluations, the GAO will review TO/DO competitions to ensure compliance with the terms and procedures specified in the solicitation. This is demonstrated in B-400442; B-400442.2; B-400442.3; B-400547; B-400547.2; B-400547.3; B-400564; B-400564.2; B-400564.3, Bay Area Travel, Inc.; Cruise Ventures, Inc.; Tzell-AirTrak Travel Group, Inc. In this case, the protesters argued that “the agency did not give sufficient weight to the price factor and failed to adequately document the best value tradeoff among proposals” and that “because price was the most

important factor, the agency was precluded from making award to a higher-priced proposal” (GAO, 2008b, p. 9). However, GAO held that,

FAR Subpart 16.5 expressly provides that the competition requirements of FAR Part 6 and the policies in Subpart 15.3 do not apply to the ordering process involving ID/IQ contracts. FAR 16.505(b)(1)(ii). Although the protesters argue that excluding the “policies” of FAR Subpart 15.3 does not prohibit the import of the “procedures” set forth in these provisions, we conclude that FAR Part 15 procedures do not, as a general rule, govern task and delivery order competitions conducted under FAR Part 16. Instead, we will review task order competitions to ensure that the competition is conducted in accordance with the solicitation and applicable procurement laws and regulations. (GAO, 2008b, p. 9)

As such, the GAO reviewed the record and found that,

The agency reasonably concluded that [the Protestor’s] proposal advantages were worth the additional price relative to each of the lower priced proposals. Although the protesters disagree with the agency’s conclusions, it has not shown them to be unreasonable, inconsistent with the solicitation, or insufficiently documented. (GAO, 2008b, p. 10)

The researchers found that the cases involving alleged improper evaluations for FAR Part 16 procurements largely mirrored the findings for these same types of protests in FAR Part 15 procurements. This is the case despite the fact that FAR Part 16 procurements are explicitly not subject to FAR Subpart 15.3 procedures. While GAO does rely on FAR Part 15 rulings in many cases, GAO explicitly states that FAR Subpart 15.3 does not apply to FAR Part 16 TO/DO competitions. Furthermore, GAO repeatedly returns to the actual language in the applicable solicitation as the foundation for its FAR Part 16 rulings.

2. Exchanges

Exchanges were the second most predominant theme found across the sources. The protests surrounding exchanges were filed based on the following issues:

- Agency failed to hold adequate discussions
- Discussions were not meaningful
- Discussions were misleading

- Belief that an offeror should have been given the opportunity to address issues in discussions when not really required

As with alleged improper evaluation, the majority of the instances dealing with exchanges are covered by the FAR Part 15 sources, the FAR Part 16 sources, and the FAR Part 8 sources, as shown in Figure 32. As such, these were the sources that the researchers focused on for analysis regarding exchanges.

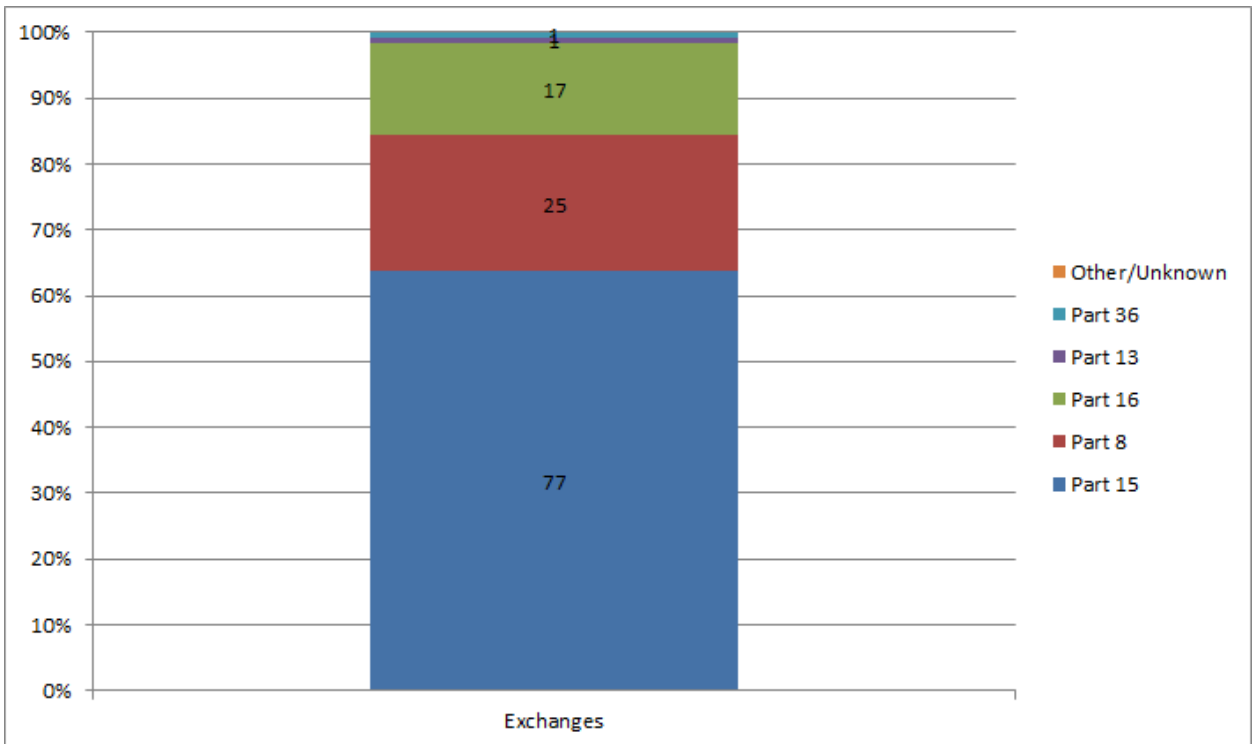


Figure 32. FAR Part Distribution for the Exchanges Theme

The researchers found that the GAO’s rulings first depended on whether the GAO believed that discussions (as opposed to clarifications) had indeed occurred. As discussed below, the GAO utilized the descriptions of the various types of exchanges from FAR Part 15 even within FAR Part 16 protests. Next, the researchers found that the GAO’s rulings depended on whether the record expressly stated that exchanges would be conducted in accordance with FAR Part 15 procedures despite the fact that the instant procurement was a FAR Part 16 competition. If the record did expressly state such an intent, then the GAO

evaluated the agency's actions in accordance with FAR Part 15. If the record did *not* expressly state such an intent, then the GAO still applied fairness standards which were consistent with FAR Part 15 negotiated procurements. In other words, exchanges under TO/DO competitions will largely be held to the same standards as a FAR Part 15 competition unless the record explicitly states an intent to do otherwise.

In deciding FAR Part 16-related protests surrounding exchanges, the GAO will first determine whether discussions or clarifications occurred. In FAR Part 16 cases such as B-410022, Companion Data Services (CDS), LLC, the GAO looked at FAR Part 15 for definitional guidance despite the fact that this procurement was not subject to FAR Part 15 requirements. In this specific case, CDS asserted that,

The various communications between [the agency] and the offerors during oral presentations constituted discussions. Accordingly, CDS maintains that because [the agency] conducted discussions with one or more of the offerors prior to CDS's exclusion from the competition, the agency was required to conduct discussions with CDS. (GAO, 2014, p. 11).

The GAO's "acid test" for determining whether an agency has engaged in discussions is "whether the agency has provided an opportunity for proposals to be materially changed" (GAO, 2014, p. 12). In contrast, per FAR 15.306(b)(2), "clarifications shall not be used to cure proposal deficiencies or material omissions, materially alter the technical or cost elements of the proposal, and/or otherwise revise the proposal" (FAR, 2018).

The GAO reviewed the record regarding the oral presentations and found that the agency's exchanges constituted clarifications in accordance with FAR 15.306(b)(2), not discussions, since the agency asked only limited questions to "enhance government understanding of proposals; allow reasonable interpretation of the proposal; [and] facilitate the government's evaluation process" (FAR, 2018). As such, the agency was not required to engage in discussions with CDS.

In similar FAR Part 15 procurement protests, the GAO has ruled using consistent logic. Specifically, they have held that it is "the actions of the parties that determine whether discussions have been held and not merely the characterization of the communications by the agency" (GAO, 2001, p. 5). Once again, the GAO asserted that

“the acid test for deciding whether discussions have been held is whether it can be said that an offeror was provided the opportunity to revise or modify its proposal” (GAO, 2001, p. 5). There were several FAR Part 15 cases where the agency stated in the record that it engaged in clarifications with the offerors, yet their actions were consistent with discussions in that revised proposals were requested and subsequently provided. As such, in those cases, the GAO ruled that discussions, not clarifications, took place.

The researchers concluded from the above that in a TO/DO MAC competition, if the GAO rules that clarifications (not discussions) took place, then the agency is not required to seek clarification from other or all offerors. This same principle also applies to FAR Part 15 competitions. However, if the GAO determines that discussions *did* take place in the TO/DO MAC competition, then the GAO will review the record to ascertain how the agency stated it was going to conduct exchanges. First, if the agency expressly stated that it intended to conduct discussions in accordance with FAR Part 15, then the GAO will evaluate the agency’s actions relative to FAR Part 15. If the agency did not expressly state that it intended to conduct discussions in accordance with FAR Part 15, then the GAO will apply fairness standards which it believes chiefly mirror the standards that apply to negotiated procurements.

If the GAO determined that discussions occurred, the record will be reviewed to determine whether the agency specified how such discussions were to be conducted. Where the record specified a particular process, the GAO will assess the record to verify that the process was properly followed. For example, in B-401503.4, Imagine One Technology & Management, Ltd, the agency issued a Request for Proposal (RFP) as a competitive small business set-aside. The RFP anticipated issuance of a TO under a multiple award IDIQ contract. The RFP stated that the TO competition would be conducted in accordance with FAR Part 16; however, the applicable ordering procedures were consistent with FAR Part 15 requirements (GAO, 2010a).

The RFP informed prospective offerors that, while discussions were not anticipated, the agency reserved the right to conduct them should they be necessary. The RFP also provided that the agency “may contact any or all or a limited number of awardees with questions concerning their responses as permitted under FAR Part 16” (GAO, 2010a,

p. 3). Despite this explicit statement, the record indicated that the agency implemented FAR Part 15 procedures when conducting discussions. Specifically, the record stated that “discussions with offerors in the competitive range were conducted in accordance with FAR 15.306(d)(2)” (GAO, 2010a, p. 3). Discussions were held with ASTM and Imagine One, the two offerors determined to be in the competitive range. Afterwards, the agency allowed ASTM and Imagine One to submit FPRs. These FPRs were evaluated and the Source Selection Authority (SSA) determined that ASTM’s proposal represented the best value to the government. As such, a TO was issued to ASTM, and Imagine One subsequently filed a protest. Their protest was filed on the basis that “the agency engaged in unequal discussions when it informed ASTM that a decrease in overall price would enhance materially the proposal’s potential for award,” (p.4) while simultaneously telling Imagine One that its rates were unrealistically low. The protester asserted that, “while an agency may inform an offeror that its price is too high, the agency’s statement to ASTM provided the firm with an improper advantage over other offerors” (p. 7).

The GAO disagreed with Imagine One’s arguments. In its ruling, the GAO first reaffirmed that FAR Part 15 procedures do not generally apply to TO/DO competitions. The GAO further stated that it “will review task order competitions to ensure that the competition is conducted in accordance with the solicitation and applicable procurement laws and regulations” (GAO, 2010a, p. 11). The GAO further held that “where, as here, the agency’s evaluation record expressly provides that the agency conducted discussions in accordance with FAR Part 15, the GAO will evaluate the agency’s adherence to those regulations in evaluating this aspect of the evaluation” (p. 7).

In accordance with FAR 15.306(d)(3), the contracting officer must

discuss deficiencies, significant weaknesses, and adverse past performance information to which the offeror has not yet had an opportunity to respond” and are “encouraged to discuss other aspects of the offeror’s proposal that could, in the opinion of the contracting officer, be altered or explained to enhance materially the proposal’s potential for award. (FAR, 2018)

Although discussions cannot be conducted in a way that favors one offeror over another, discussions do not need to be identical among offerors; instead, they should be tailored according to each offeror’s proposal per FAR 15.306(d)(1) and FAR 15.306(e)(1).

Here, GAO found that the discussions with ASTM were conducted properly (GAO, 2010a). It is interesting to note that in this case, the solicitation referenced both FAR Part 15 and FAR Part 16 as the guiding procedures for the procurement; in determining its ruling, the GAO noted both references and ruled in accordance with the agency's actions, which were consistent with FAR Part 15.

So what about FAR Part 16 procurements that do not expressly state that discussions will take place in accordance with FAR Part 15? Absent any specific guidance on discussions in FAR Part 16, the GAO has held that such discussions will be reviewed according to the standards applicable to negotiated procurements. As such, discussions must be:

- In accordance with the solicitation and applicable laws and regulations
- Fair
- Not misleading
- Meaningful
- Not unequal

The review of the literature sample revealed that the GAO's discussions standards for FAR Part 16 competitions are very similar to those under FAR Part 15. In fact, the GAO has stated in numerous FAR Part 16 rulings that "where an agency conducts a task order competition as a negotiated procurement, the GAO's analysis regarding fairness will, in large part, reflect the standards applicable to negotiated procurements" (GAO, 2003, p. 6). This implies that the GAO will largely look to FAR Part 15 in determining fairness with regard to FAR Part 16 protests.

For example, in B-407474; B-407493, Mission Essential Personnel (MEP), LLC, the agency requested proposals from its three MAC contract holders to provide intelligence support services in Afghanistan. The solicitation provided for issuance of TOs on a low-price, technically-acceptable basis, considering price and current contract performance. MEP was eliminated from the competition on the basis that their proposal was not

technically acceptable. Specifically, the agency identified three concerns: (1) program manager turnover, (2) invoice submission delays, and (3) the inadequacy of the firm's ability to provide personnel in a timely manner (GAO, 2013b).

MEP took issue with each of the agency's three concerns. MEP maintained that the agency assigned unreasonable weaknesses to its proposal for having program manager turnover and invoice submission delays where it held that these issues were really the "result of agency actions rather than its own deficient performance" (GAO, 2013b, p. 3). According to the agency, it found MEP technically unacceptable "solely because of MEP's allegedly low fill rates" (p.3). Since the other two issues were not the cause for MEP's disqualification, the agency held that it was not required to disclose these issues to MEP during discussions (GAO, 2013b).

The GAO discovered that the record showed, in fact, that the agency identified the three issues above during its evaluation and that these three issues together were the basis for MEP's disqualification. In this regard, the GAO also found that the agency was required to have disclosed its concerns to MEP during discussions. Furthermore, the GAO held that,

Although the regulations concerning discussions under [FAR] Part 15 do not, as a general rule, govern task and delivery order competitions conducted under FAR Part 16, our office nonetheless will review task order competitions to ensure that the competition is conducted in accordance with the solicitation and applicable laws and regulations. (GAO, 2013b, p. 5).

While FAR 16.505 does not provide guidance for conducting discussions under TO/DO competitions, the GAO has held that exchanges in that context must be fair and not misleading (GAO, 2010b). Here, the GAO did not find the discussions to be fair since the record showed that the agency failed to disclose two weaknesses that it identified as the basis for MEP's disqualification (GAO, 2013b).

From this specific case, the researchers gathered that the GAO will require an agency to disclose all significant weaknesses and deficiencies identified during a FAR Part 16 competition if discussions are held. This largely mirrors the FAR Part 15 requirements since in similar FAR Part 15 rulings, the GAO has stated that discussions must at least disclose deficiencies and significant weaknesses in the proposals of each offeror within the

competitive range per FAR 15.306(d)(3) (GAO, 2006). Specifically, the discussions must be detailed enough so the offeror is made aware of the areas in its proposal which require explanation or revision (Comptroller General of the United States, 1993a). In such cases, the GAO will assess the discussions to determine whether the agency disclosed weaknesses that would preclude the offeror from a reasonable chance of award if not addressed.

For example, in B-412949; B-412949.2, Vencore Services and Solutions, Inc., the protester contested the award of an order to ManTech Advanced Systems International, Inc., on the basis “that the agency conducted misleading discussions with regard to its costs, and that the agency’s evaluation of the awardee’s technical proposal was flawed” (GAO, 2016a, p. 1). Vencore alleged that “the agency conducted misleading discussions by relying on a flawed independent government cost estimate (IGCE) to convey a concern that Vencore’s labor rates were so low that they created significant risk” (p.5). Vencore further argued that “the agency misled the company into raising its labor rates by failing to advise offerors” (p.5) after the agency had determined that its IGCE was grossly overstated.

In several rulings, the GAO reaffirmed that the regulations concerning discussions under FAR Part 15 do not generally apply to TO/DO competitions. The GAO has repeatedly held that while “FAR 16.505 does not establish specific requirements for discussions in a task order competition,” when discussions do occur, “they must be fair and not misleading” (GAO, 2016a, p. 5).

The record showed that the agency’s IGCE varied drastically during the course of the procurement. Despite this fact, the agency did not re-open discussions with offerors. As a result, the GAO ruled that “the agency’s discussions misled Vencore about the cost of its proposal by indicating that the agency considered [DELETED] of Vencore’s proposed labor rates to be so low as to pose significant risk” (GAO, 2016a, p. 9). From this specific case, the researchers concluded that even in a FAR Part 16 competition, the GAO will look to FAR Part 15 with regard to fairness standards.

Once again, in reviewing FAR Part 15-related protests regarding exchanges, the same logic is applied. In these cases, the GAO states that to be lawful, discussions, when they occur, must be meaningful and must not prejudicially mislead offerors per FAR

15.610(c) (Comptroller General of the United States, 1993b). For example, an agency may not misinform an offeror, even unintentionally, of an alleged proposal weakness or deficiency that does not really exist or of a government requirement that is not truly applicable (Comptroller General of the United States, 1994). Specifically, an agency may not “mislead an offeror during discussions into responding in a manner that does not address the agency’s concerns” (Comptroller General of the United States, 1994, p. 9).

Next, discussions must be meaningful. For example, in B-402040.2; B-402040.3, Sabre Systems, Inc., offers were received from three vendors, including Sabre and STG. After evaluation, discussions, and subsequent FPRs, the TO was issued to STG and Sabre subsequently filed a protest (GAO, 2010c). Sabre alleged that “the agency failed to provide it with meaningful discussions regarding previously unidentified weaknesses” (p.6). In this particular case, the GAO ruled that it was an inadequate proposal that resulted in Sabre being removed from the competition, not the lack of meaningful discussions. Both of the cases cited within this FAR Part 16 ruling are FAR Part 15 cases. This is not surprising since the ruling here for the agency to “lead the offeror into the areas of its proposal that require correction or amplification” (GAO, 2010c, p. 6) largely resembles the requirements within FAR Part 15 GAO rulings.

Finally, discussions must not be unequal. In FAR Part 16 protest B-413486; B-413486.2, SSI, SSI argued that the agency “failed to conduct discussions in accordance with the standards set forth in FAR Part 15, which the protester asserts were applicable to this procurement” (GAO, 2016b, p. 4). Specifically, SSI argued that

The agency violated applicable procurement regulations by failing to request final proposal revisions (FPR), to provide offerors an opportunity to submit written FPRs and revise their prices, and to provide a common cutoff date for offerors to address alleged deficiencies and significant weaknesses. (GAO, 2016b, p. 4)

The GAO’s ruling began by reiterating that it will not re-evaluate proposals and will only determine whether the agency had followed the terms and procedures outlined in the solicitation. Furthermore, the GAO’s assessment regarding fairness will largely mirror the standards applicable to negotiated procurements (GAO, 2015b).

The RFP stated, “the Government intends to award without discussions. The Government reserves the right to enter into discussions. Offerors shall provide their best terms from a cost or price and technical standpoint as the Government does not anticipate an opportunity to revise proposals” (GAO, 2016b, p. 5). SSI’s contract ordering provisions only required that the firm be provided a fair opportunity to compete. The contract provisions also stated that upon proposal receipt the contracting officer may conduct discussions with all or some of the offerors that submitted proposals, issue a TO based upon initial proposals, reject proposals, or cancel the solicitation in its entirety. There was no contract requirement that the agency had to request and receive written FPRs after engaging in discussions.

After reviewing the record, the GAO found that the agency was not required to request and accept written FPRs after conducting discussions and hearing oral proposal revisions (GAO, 2016b). As such, the GAO did not find it unreasonable or unfair that the agency did not request written FPRs (2016b).

Also at issue in this case was the agency’s choice to accept other non-FPR-related written information from particular offerors after engaging in discussions. Since FAR 16.505 does not specify requirements for conducting discussions, the GAO was left to simply determine whether the offerors were treated fairly (GAO, 2016b). The record reflected that offerors, including SSI, “were treated equally in that each offeror was given the opportunity to address the agency’s concerns with their proposal” (p.7). After discussions, it was determined that SSI had addressed the agency’s concerns; however, other offerors had not addressed all concerns. As such, the agency “elected to permit them to be addressed with later, limited written submissions” (p. 7). In this case, the GAO found that since SSI had already adequately addressed the agency’s concerns, it did not demonstrate that it was treated unfairly by the agency’s actions (2016b).

This case is significant because while the GAO relied on FAR Part 15 standards to ensure fairness in the conduct of discussions and subsequent proposal revisions, the GAO did not unnecessarily impose all FAR Part 15 requirements such as written FPRs and a related common cutoff date. Instead, the GAO allowed for the flexibilities afforded in FAR

Part 16 by only utilizing FAR Part 15 requirements where fairness was concerned and let the solicitation's terms and conditions dictate the remaining standards.

3. Misevaluation of Competitor's Proposal

The third largest instance of a theme across the sources was one regarding alleged misevaluation of a competitor's proposal. Protests asserting misevaluation of a competitor's proposal were based on arguments such as the following:

- Competitor was unfairly allowed to offer a non-conforming product
- Competitor was unreasonably determined to be technically acceptable
- Disparate treatment in that protester received a strength or a weakness that the competitor should also have received
- Competitor should have been disqualified due to an Organizational Conflict of Interest (OCI)
- Competitor was rated too favorably
- Competitor received unmerited strengths

As with the other three themes, 85% of the instances dealing with misevaluation of a competitor's proposal were covered by the FAR Part 15 sources, the FAR Part 16 sources and the FAR Part 8 sources, as shown in Figure 33. As such, these were the sources that the researchers focused on for analysis regarding misevaluation of a competitor's proposal.

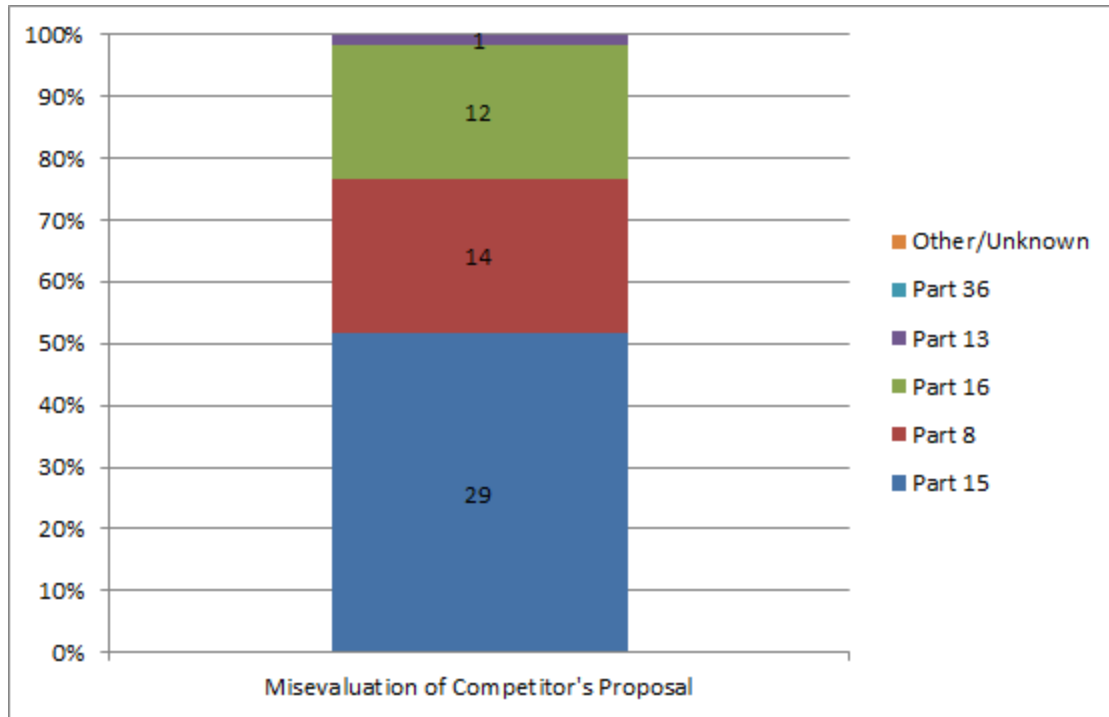


Figure 33. FAR Part Distribution for the Misevaluation of Competitor's Proposal Theme

As with alleged improper evaluations, the GAO reviews protests regarding alleged misevaluations of competitor's proposals in much the same way. Specifically, the GAO has held that the proposal evaluation in a TO/DO competition is largely within the agency's discretion, and a protester's disagreement with that evaluation does not make it unreasonable (GAO, 2013c). Furthermore, the GAO repeatedly holds that their role is not to re-evaluate proposals; rather, their role is to review the agency's actions with regard to the evaluation to ensure that it is reasonable and in accordance with the solicitation. (GAO, 2007). Finally, the GAO has held that agencies must sufficiently document the basis for their award decisions such that the GAO can reasonably determine that the agency used sound judgment in making its award decision (GAO, 2016b).

4. Improper Award

The fourth largest instance of a theme across the sources was one regarding alleged improper awards. Protests asserting improper award were based on arguments such as the following:

- Awardee failed to comply with RFP requirements
- Quoted items not on FSS contract
- Protester should have received the award because it submitted the lowest-price, technically acceptable proposal.
- Award decision is not supported by a proper price/technical tradeoff
- Presence of OCI which should have precluded award to competitor
- Agency may not solicit quotations on one basis and then make award on another basis
- FSS contract does not include scope of the contract awarded
- Award of a TO/DO may eliminate future competition
- Award of a TO/DO is outside the scope of the IDIQ
- Underlying FSS contract expired
- Agency deviated from RFP evaluation criteria

As with improper evaluation and exchanges, 85% of the instances dealing with improper award were covered by the FAR Part 15 sources, the FAR Part 16 sources and the FAR Part 8 sources, as shown in Figure 34. As such, these were the sources that the researchers focused on for their analysis regarding improper awards.

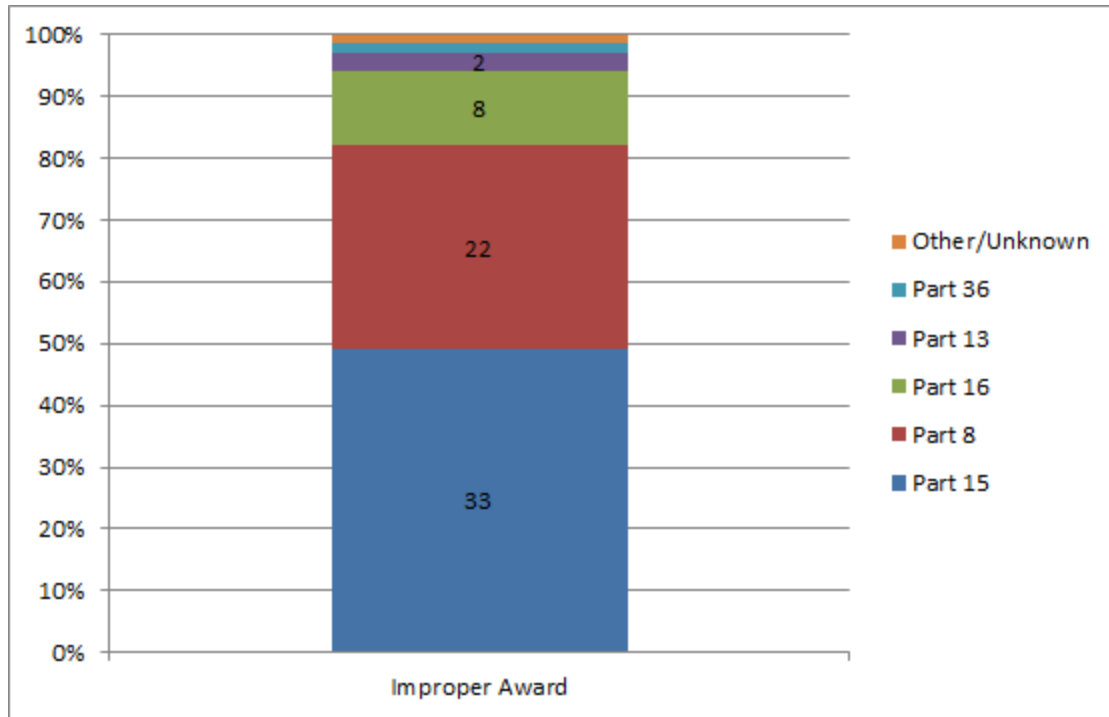


Figure 34. FAR Part Distribution for the Improper Award Theme

The sources dealing with alleged improper awards were primarily related to FAR Part 15 procurements. Many of these centered on the SSA’s source selection decision. In these cases, the GAO held that,

Source selection officials in negotiated procurements have broad discretion in determining the manner and extent to which they will make use of technical and price evaluation results; price/technical trade-offs may be made, and the extent to which one may be sacrificed for the other is governed only by the tests of rationality and consistency with the evaluation criteria. (GAO, 2010d, p. 12).

Where such a tradeoff is made, FAR 15.308 requires documentation of the decision and that “the documentation shall include the rationale for any business judgments and trade-offs made or relied on by the SSA, including benefits associated with additional costs” (FAR, 2018). The GAO will not disturb such decisions unless they are “shown to be unreasonable or in violation of procurement statutes or regulations” (Comptroller General of the United States, 1987, p. 4).

Not surprisingly, although FAR Subpart 15.3 does not apply to procurements conducted under FAR Part 16, the GAO's findings relative to FAR Part 15 protests in this area are often utilized in deciding similar FAR Part 16 protests. For example, in B-406059.2, General Dynamics Information Technology, Inc., General Dynamics alleged that the agency's award decision did not properly consider whether the awardee's proposal was worth the related price premium. This particular protest was denied because the GAO found that "the SSA's award decision was properly documented and that the documentation included the rationale for the trade-off decision, including the benefits associated with [the awardee's] higher price" (GAO, 2012d, p. 4).

B. LOCAL MAC ORDERS

In an article titled "Competitive Processes in Government Contracting: The FAR Part 15 Process Model and Process Inefficiency," Vernon J. Edwards, a federal contracting subject matter expert, relates competitive acquisition procedures to information processing. In the article, he states that, "[t]he decision maker collects information about alternative choices (competing firms), assesses each alternative on the basis of specified criteria (evaluation factors), and then compares each alternative to the others on the basis of those assessments in order to rank them and determine which is best" (Edwards, 2003, para. 1). Edwards concludes that regardless of the (competitive) method of contracting used, the process is the same. Thus, in preparation for a competitive acquisition, contracting personnel must design a process for getting the necessary information (i.e., proposals), assessing it (i.e., evaluation criteria), and comparing the alternatives to make a decision (i.e., basis for award).

Ideally, the process is designed as efficiently as possible for the particular action, taking into consideration necessary demands on both the government resources assigned to the action and the time and cost demands put on offerors competing for the effort. As mentioned several times in this paper, rather than designing an efficient competitive process for each procurement, contracting personnel often default to a process that Edwards terms the "FAR Part 15 Process Model." In fact, "[t]he FAR has never prescribed a step-by-step process for conducting a source selection; instead, it has prescribed rules governing

the design of source selection processes” (Edwards, 2003, para. 4). Even so, Edwards (2003) asserts, a process model emerged with two key characteristics: (1) all offerors submit a complete proposal addressing all criteria for award, and (2) the agency negotiates with multiple offerors. The impacts of these two characteristics are (1) the amount of information required to be generated by offerors and then reviewed and evaluated by the government and (2) the time and resources required to generate, review, and evaluate it (2003). Therefore, in the context of fair opportunity competition under local MACs, the goal should be to design a simple and efficient process for choosing a contractor that, for example, keeps submission requirements to a minimum, uses comparative analysis, and provides for communications with only the best suited offeror(s). After all, all competitors for an order have already undergone evaluation in accordance with the extensive and complex FAR Part 15 requirements for award of their basic contract.

Analysis of the data presented in Chapter IV resulted in several observations related to the size (in dollars) of an effort and the PALT associated with that effort. The first key observation was that the majority of local MAC orders (20 of 23, or 87%) are valued at under \$25 million; what is more, over half of the orders are valued at under \$5 million.

When the researchers combined the data obtained through AMT with the additional procedural information collected through individual interviews with SPAWAR contracting personnel, the researchers were further able to analyze the efficiencies (or inefficiencies) of the procedures used to award orders under local MACs.

As noted in Chapter III, the researchers conducted interviews with four local contracting personnel; these four individuals were specialists and contracting officers responsible for executing all of the actions on the six different MACs identified. Review of the individual actions and discussions with the respective personnel revealed that the processes and procedures used to award individual orders under two of the MACs (14 total orders; 10 awarded) were somewhat streamlined, whereas the processes and procedures used to award individual orders under the other four MACs (nine total orders; seven awarded) were not at all streamlined. In order to avoid disclosure of any potentially source selection sensitive information, the researchers will hereafter refer to the group of orders

that were somewhat streamlined as Group A and the group of orders that were not at all streamlined as Group B.

Analysis of the key elements of each procurement, based on the questions identified in Chapter III, revealed the following observations:

1. Ordering Instructions

In accordance with FAR 16.504(a)(4)(iv), MAC IDIQ contracts must include the procedures that will be used to ensure all awardees are provided a fair opportunity to be considered for each order over the micropurchase threshold. That is, all MAC IDIQ basic contracts must include ordering instructions. As provided under FAR Subpart 16.5, the ordering instructions can be broadly defined and simply state that orders will be awarded using FAR 16.505(b)(1) procedures; in such cases, the detailed procedures for fair opportunity competition are provided at the individual order level and are included in the proposal request for the order. This approach allows for the flexibility to determine the most effective ordering procedures for each individual order, but it also requires additional effort to develop and review procedures for each order.

Alternatively, the basic contract may include very detailed ordering instructions that define a standard process, including details of how the fair opportunity competition will be carried out for all orders. This approach requires adherence to the exact same process for each order as prescribed in the basic contract and requires that any changes to that process be incorporated into the basic contract via a bilateral modification.

All of the local MACs reviewed by the researchers include a local clause (5252.216-9216 Procedures for Issuing Orders) that essentially reiterates the required elements of an order per the FAR, but the clause does not explicitly detail the processes or procedures that will be used to effect the fair opportunity competition. Two of the MACs (both in Group B) had a separate clause in Section H of the basic contract that further specified fair opportunity procedures; however, the additional clause was written with open-ended language so as to still allow flexibility at the order level. In other words, all of the local MACs reviewed were issued with broad language allowing for ordering procedures to be specified at the order level. There are both pros and cons to this approach.

The pro is that the contracting officers maintain the maximum amount of flexibility when contracts are written this way and may structure each order proposal request as they see fit (within FAR limitations). The con, however, is that the tendency is to resort to FAR Subpart 15.3 procedures rather than construct tailored procedures as authorized under FAR Subpart 16.5. Furthermore, in the case of local MACs, several contracting personnel indicated that they often follow the same (or similar) procedures for each order, meaning that they could benefit from detailing many aspects of the fair opportunity procedures at the basic contract (vice the order) level.

It is also worth noting that Group A MACs included language in the clause indicating that issuance of orders would be done in accordance with FAR Subpart 16.5; in the Group B contracts, there is no mention of FAR Subpart 16.5. A key observation here is that where FAR Subpart 16.5 is not referenced, the ordering procedures were generally more consistent with FAR Subpart 15.3 source selection processes. This is consistent with the observation above. While using FAR Subpart 15.3 procedures is not wrong, per se, adopting FAR Subpart 15.3 procedures more often than necessary results in more work and longer award schedules.

2. Decision Authority

Unless otherwise determined (on a case-by-case basis), the contracting officer is the decision authority for all fair opportunity order competitions. When someone other than the contracting officer is determined to be the decision authority, however, the acquisition timeline is likely to increase significantly. This is in part because of the added step of obtaining an additional approval and decision. Since the MAC basic contracts must be awarded in accordance with FAR Subpart 15.3 procedures, where the decision authority is most likely someone other than the contracting officer and all MAC awardees have already been determined to be technically capable of performing any in-scope efforts, there should be little risk in utilizing the contracting officer—as opposed to a programmatic or technical representative—as the decision authority at the order level.

Of the 17 awarded orders represented by the interviewees, 12 utilized the contracting officer as the decision authority and 67% of those orders had a PALT of fewer

than 84 days; the average PALT of those 12 orders was 94 days. In contrast, only one, or 20%, of the five orders with a decision authority other than the contracting officer had a PALT under 84 days; the average PALT of these orders was 155 days. The three main reasons for increased PALT when the contracting officer did not serve as the decision authority include:

- Additional time was required for the decision authority to make an award determination;
- An SSP in accordance with DoD Source Selection Procedures was prepared, requiring additional time for document coordination and approval by the decision authority; and
- The use of FAR Subpart 15.3 evaluation procedures, including multiple evaluation factors, led to an extended and unnecessarily complex evaluation process.

The last two factors will be addressed in subsequent paragraphs.

There were only two local MACs evaluated for which the contracting officer did not act as the decision authority for individual orders; for both MACs, the Program Manager was the decision authority. The researchers could not identify any obvious technical (or other) reason necessitating a decision authority other than the contracting officer. In fact, it was suggested to the researchers that the likely reason for the use of a decision authority other than the contracting officer was simply a desire to maintain the status quo or a reluctance on the part of the program office to give up control of the actions.

3. SSP

In accordance with DoD Source Selection Procedures, an SSP approved by the SSA is required for all best-value, negotiated, competitive procurements; however, FAR Subpart 16.5 does not require the preparation of formal evaluation plans (i.e., SSP) (FAR 16.505(b)(1)(v)(B)).

An SSP was not developed and executed for the individual orders in Group A; however, an SSP was developed and executed for the individual orders in Group B. While a separate SSP is not required for each order under a MAC, it may be prudent to develop some kind of plan if the decision authority is someone other than the contracting officer because it could help manage expectations between the decision authority and the evaluation team regarding the fair opportunity evaluation procedures. However, as noted in the “Decision Authority” section above, the development and approval of a formal SSP leads to an increased PALT and is generally unnecessary. Of the three local MACs in Group B for which an SSP was routinely developed for individual orders, only two of those contracts actually used a decision authority other than the contracting officer.

4. Evaluation Criteria

FAR 15.304(c)(2) requires the evaluation of cost/price and quality of the product/service “through consideration of one or more non-cost evaluation factors” for every source selection. FAR Subpart 15.3 procedures also require the evaluation of past performance and small business participation (with few exceptions) and the DoD Source Selection Procedures mandate the use of standardized rating tables and definitions for “all competitively negotiated FAR Part 15 acquisitions with an estimated value greater than \$10 million” (Defense Procurement Acquisition Policy [DPAP], 2016, p. 1). In contrast, FAR Subpart 16.5 only mandates the consideration of cost/price for each order, encourages streamlined procedures, and suggests that submission requirements be kept to a minimum.

Of the 17 awarded orders under local MACs, the 14 actions in Group A utilized a lowest price technically acceptable (LPTA) evaluation method. These actions were evaluated using a streamlined method that assigned an acceptable/unacceptable rating to a technical factor then awarded to the lowest priced acceptable offeror. In contrast, all nine actions in Group B were awarded using a best-value trade off method. Furthermore, the efforts that used a trade-off method included multiple evaluation factors and sub-factors and used the DoD Source Selection Procedures standard ratings definitions (as opposed to a streamlined approach using pluses/minuses, acceptable/unacceptable designations), leading to an extended and unnecessarily complex evaluation process. A 2016 Naval

Postgraduate School study called “Contract Source Selection: An Analysis of Lowest Price Technically Acceptable and Tradeoff Strategies” showed that “tradeoff source selections take 105% longer than LPTA source selections” (Hill, Odom, Osman, & Paulk, 2016). Again, it is important to limit evaluation factors to only those that are absolutely necessary to identify the best offeror from among the already-qualified MAC awardees.

For nearly all of the 23 actions, the competition was for a repeatable end item, generally a build to print or production effort. Considering the fact that all MAC awardees have already gone through the extensive evaluation process to receive a basic contract award under the MAC, it should be assumed that they are capable of performing all work within the scope of that MAC. As such, the evaluation of each order should not focus on determining if the offeror can perform the work, but rather on which offeror can *best* perform the work.

5. Pre-Priced Items

As stated in FAR 16.505(b)(3), “if the contract did not establish the price for the supply or service, the contracting officer must establish prices for each order using the policies and methods in Subpart 15.4” (FAR, 2018). However, in some cases, prices for supplies or services are established at the time of the award of the base contract; in such cases, the contracting officer must have already determined prices to be fair and reasonable. Considering the flexibility offered in FAR 16.505(b)(1)(ii) that the contracting officer does not have to contact all MAC awardees “before selecting an order awardee if the contracting officer has information available to ensure that each awardee is provided a fair opportunity to be considered for each order” (FAR, 2018), it follows that as long as the contracting officer can compare established pricing of products offered under the basic contract, a separate proposal process for all awardees prior to issuing an order may not be required. This is most easily demonstrated in the case where established unit pricing exists for a particular item; if the contracting officer believes the information available (e.g., the established pricing tables) is sufficient to make an award, and prices can be compared among the MAC awardees, then the contracting officer can determine that all awardees have been given a fair opportunity to be considered. However, in cases where only certain

pricing elements have been established, or in the case where services are being ordered and a labor mix is proposed, additional evaluation will likely be required. Generally, when services are being ordered, evaluation of proposals will be necessary to ensure adequate understanding of the requirement; however, it is important to recognize that establishing ceiling values for various cost or pricing elements in the basic contract can streamline the ordering process.

Some, but not all, local MACs reviewed included some kind of established pricing, but all of the personnel interviewed indicated that no orders had been awarded based on the established pricing alone; instead, contracting officers generally regarded established pricing as a ceiling value and awardees generally offered discounted prices when orders were competed.

VI. RECOMMENDATIONS

The analysis and findings from Chapter V confirmed the researchers’ hypothesis that local MACs could indeed benefit from streamlining initiatives. Additionally, the researchers became aware through analysis of case law that the ability to successfully streamline procurements using FAR Part 16 flexibilities is directly affected by the degree to which the agency conducted the competition reasonably and in accordance with the stated evaluation criteria, solicitation and applicable procurement laws and regulations. As such, the researchers provide recommendations in this chapter for streamlining the fair opportunity competition process; all recommendations are consistent with the required and optional ordering procedures identified in Table 1.

Table 1. Required and Optional Ordering Procedure Elements.
Adapted from Gines & Shields (2016).

Required FAR 16.505 Ordering Procedures Elements
Must provide each awardee a fair opportunity to be considered for each order exceeding the micropurchase threshold (FAR 16.505(b)(1)(i))
Must not use any method (e.g., allocation or designation of any preferred awardee) that would not result in fair consideration given to all awardees prior to placing each order over the micropurchase threshold (FAR 16.505(b)(1)(ii)(B)) (exceptions to fair opportunity are listed in FAR 16.505(b)(2))
Must develop placement procedures that: 1) provide each awardee fair opportunity for all applicable orders (FAR 16.505(b)(1)(ii)(A)) and 2) are tailored to the requirement and other aspects of the acquisition environment (FAR 16.505(b)(1)(ii)(C))
Must consider price or cost under each order as one of the factors in the selection decision (FAR 16.505(b)(1)(ii)(E))
Optional FAR 16.505 Ordering Procedure Elements
Should keep submission requirements to a minimum (FAR 16.505(b)(1)(ii))
May use streamlined procedures, including oral presentations (FAR 16.505(b)(1)(ii))

Required FAR 16.505 Ordering Procedures Elements
Need not contact each awardee under the contract before selecting an order awardee if sufficient information is available to ensure fair opportunity consideration (FAR 16.505(b)(1)(ii))
Should not apply FAR Part 6 competition requirements (FAR 16.505(b)(1)(ii))
Should not apply FAR Subpart 15.3 source selection procedures (e.g., competitive range, discussions, etc.) (FAR 16.505(b)(1)(ii))
Do not require formal evaluation plans or scoring of quotes or offers (FAR 16.505(b)(1)(v)(B))

A. RECOGNIZE THE DIFFERENCE BETWEEN FAR PART 15 AND FAR PART 16

As the researchers pointed out in earlier chapters, the use of or dependence on FAR Subpart 15.3 procedures generally results in a longer-than-necessary PALT for fair opportunity competitions. This dependence is often simply the result of a lack of familiarity with the differences between FAR Subpart 15.3 procedures and FAR Subpart 16.5 flexibilities. As has been noted throughout this paper, there is a distinct and intentional difference between the two. There is value in recognizing the difference, and research shows that one best practice for doing so is establishing and using unique terminology related to fair opportunity competitions. It is true that the litmus test, according to GAO, is the methods and actual actions performed by an agency to select an awardee, not the terminology itself. However, use of unique terminology for FAR Subpart 16.5 efforts can help to create a mind-set that emphasizes the differences to both contracting personnel and offerors (Gines & Shields, 2016). Examples include the use of “fair opportunity notice” or “fair opportunity proposal request” instead of “solicitation,” “interchanges” instead of “discussions,” and “fair opportunity response” instead of “proposal” (Air Force Materiel Command, 2017). See Table 2 for some additional recommended terms identified during research. Again, the use of unique terminology alone is not sufficient to influence a GAO review if methods and actual actions follow FAR Subpart 15.3 procedures, but getting contracting personnel used to different terminology for key aspects of the process can help

to establish familiarity and re-condition the way fair opportunity competitions are conducted within an agency.

Table 2. Recommended FAR 16.5 Terminology. Adapted from Air Force Materiel Command (2017).

Similar DoD Mandatory Source Selection Procedures or FAR Subpart 15.3 Term	Recommended FAR Subpart 16.5 Term
Proposal, Task Order Submission, Submission	Fair Opportunity Response, Fair Opportunity Submission
Request for Proposals (RFP)	Fair Opportunity Proposal Request (FOPR), Fair Opportunity Notice
Source Selection	Fair Opportunity Selection
Source Selection Authority (SSA)	Fair Opportunity Decision Authority (FODA)
Source Selection Decision Document (SSDD)	Fair Opportunity Decision Document (FODD)
Source Selection Plan (SSP)	Fair Opportunity Selection Plan
Source Selection Team	Fair Opportunity Team
Competition	Fair Opportunity Competition

B. SIMPLIFY THE EVALUATION

For many local SPAWAR contracts, the longest phase in the contracting process is the evaluation phase, which has a significant impact on overall PALT. The duration of the evaluation phase is largely driven by the evaluation criteria and methods that are chosen to determine which offeror provides the best value to the government. As such, the researchers have several recommendations pertaining to simplifying and streamlining the evaluation phase.

1. Contracting Officer as Fair Opportunity Decision Authority (FODA)

The FODA is the individual designated to make the best value decision. In accordance with FAR 15.303(a), the SSA is supposed to be the contracting officer for FAR Part 15 procurements “unless the agency head appoints another individual for a particular acquisition or group of acquisitions” (FAR, 2018). In the case of SPAWAR procurements, Defense Federal Acquisition Regulation Supplement (DFARS) Subpart 215.3 applies which states, “Contracting officers shall follow the principles and procedures in Director, Defense Procurement and Acquisition Policy memorandum dated April 1, 2016, entitled ‘Department of Defense Source Selection Procedures,’ when conducting negotiated, competitive acquisitions utilizing FAR part 15 procedures” (DPAP, 2018). The DoD Source Selection Procedures go on to say that “for acquisitions with a total estimated value of \$100 million or more, the Agency head shall appoint, in writing, an individual other than the contracting officer as the SSA in accordance with FAR 15.303(a)” (DPAP, 2016, p. 1). In other words, for defense-related FAR Part 15 procurements, the contracting officer is permitted to be the SSA for acquisitions estimated at less than \$100 million.

More importantly, FAR Part 16 is silent regarding the decision authority. Moreover, since FAR Subpart 15.3 explicitly does not apply to FAR Part 16 procurements, it would follow that the \$100 million limitation would also not apply. As such, there is no reason the contracting officer could not serve as the FODA on any and all FAR Part 16 competitions. In fact, this is precisely what the researchers recommend. The researchers believe this recommendation is consistent with the spirit and intent of FAR 1.102-4 (e) which states:

If a policy or procedure, or a particular strategy or practice, is in the best interest of the Government and is not specifically addressed in the FAR, nor prohibited by law (statute or case law), Executive order or other regulation, Government members of the Team should not assume it is prohibited. Rather, absence of direction should be interpreted as permitting the Team to innovate and use sound business judgment that is otherwise consistent with law and within the limits of their authority. (FAR, 2018)

Finally, as discussed in Chapter V, when someone other than the contracting officer was determined to be the decision authority, the acquisition timeline increased

significantly. Specifically, the researchers found that the average PALT for order evaluations that used the contracting officer as FODA was 94 days versus an average PALT of 155 days for order evaluations that did not use the contracting officer as FODA. Since the MAC basic contracts were awarded in accordance with FAR Subpart 15.3 procedures, where the decision authority was most likely someone other than the contracting officer, and all MAC awardees were determined to be technically capable of performing any in-scope efforts, there is little risk in utilizing the contracting officer—as opposed to a programmatic or technical representative— as the FODA at the order level.

2. Ordering Instructions

As discussed in Chapter V, all of the SPAWAR local MACs provided generic, or flexible, language at the basic contract level. This practice tends to afford contracting officers the most flexibility in establishing fair opportunity competition procedures at the TO/DO level, but the researchers also pointed out that several of the local MACs followed exactly the same process for each order. In such cases, specifying fair opportunity procedures in the basic contract can have the benefit of simplifying a fair opportunity proposal request (FOPR). However, when specific ordering instructions are provided at the order level, it is recommended that the basic contract ordering procedures clause include, at a minimum, language indicating that individual fair opportunity orders will be awarded using FAR 16.505(b)(1) fair opportunity processes and that such processes will be identified at the order level.

Perhaps more impactful is the researchers' recommendation to use fair opportunity-specific language where appropriate within both the basic contract and the individual order. As discussed, the use of unique FAR Subpart 16.5 terminology from the beginning will assist with solidifying the mind-set that all efforts will be conducted within the flexibilities allowed in FAR Subpart 16.5 (i.e., not in accordance with the requirements of FAR Subpart 15.3). As such, when defining the fair opportunity procedures, whether in the basic contract or at the order level, it is recommended that terms such as those recommended in Table 2 be used to describe the process in the context of FAR Subpart 16.5.

3. Start with LPTA

As discussed in Chapter V, the researchers found that the local MAC data supported the findings from a study which showed that the use of trade-off source selection procedures resulted in a 105% longer procurement time than LPTA source selections (Hill, Odom, Osman, & Paulk, 2016). Furthermore, the difference in PALT times between local MACs, which used these two types of source selection procedures, showed that additional evaluation factors increases procurement time. As a result, the researchers hold that streamlining evaluation criteria is key to this initiative.

First, the researchers recommend that LPTA be used for most TO/DO competitions since the offerors were already found to be technically competent and competitive during the basic contract competition. As such, TO/DO competitions on price alone should be sufficient in many cases. Such an approach would likely withstand scrutiny from the GAO since the case law largely showed that price analysis is within the discretion of the agency, and the GAO “will not disturb such an analysis unless it lacks a reasonable basis” (GAO, 2018, p. 11). Moreover, the GAO will review the agency’s actions to determine whether they were consistent with the evaluation criteria (GAO, 2012a). The researchers hold, then, that if the agency clearly states the evaluation scheme is to be LPTA within the FOPR and then conducts the evaluation accordingly, it could realize significant time and resource savings.

4. Past Performance

Under FAR Subpart 16.5, there is no requirement to consider past performance, as the idea is that this criterion has already been evaluated prior to award of the basic contract; in short, past performance evaluation should be limited to the contractor’s performance within the IDIQ because it would be duplicative to evaluate past performance outside the IDIQ, as this was already done for the award of the basic contract. However, if it is necessary to help distinguish the best MAC awardee for a particular TO/DO, the contracting officer should consider limiting any past performance evaluation to only past performance under the basic contract (i.e., evaluation of TO/DO efforts under the same contract).

5. Multi-Phase / Multi-Step Process

While none of the local actions evaluated used a multi-phase or multi-step process for evaluation, research suggests that such processes have been used consistent with fair opportunity requirements. For example, under a MAC with many awardees, requesting offerors to submit an initial “white paper” for evaluation first could save resources in the long run by narrowing down the field of potential awardees who will submit a more detailed proposal for evaluation (Gines & Shields, 2016). The key to successful use of such a process is ensuring that the details of the process and criteria to narrow the selection is very clearly and unambiguously articulated in either the TO/DO proposal request or the basic contract (as appropriate). While a phased approach likely will not reduce the overall PALT (because of the multiple steps involved), it could help to reduce the resource burden on contracting personnel (and on offerors) in cases where many proposals are expected (Gines & Shields, 2016).

6. Simplified Evaluation Framework

In the event an LPTA framework is not sufficient to meet the agency’s needs, the researchers recommend a comparative analysis of the technical proposals vice an in-depth and complicated evaluation found in so many FAR Part 15 competitions. Performing a comparative analysis means that the offerors’ responses can be compared to one another rather than first having to be scored independently against the evaluation criteria using a scoring system (e.g., colors, adjectival ratings). This method allows evaluators to document facts (or differences) about each response and more quickly determine the most suitable offeror (Gines & Shields, 2016). This is an unfamiliar, even uncomfortable, concept for many contracting personnel, as it is in direct contradiction with the requirements of FAR Part 15 procedures, which require comparison of proposals only against the stated evaluation criteria. However, there is nothing in FAR Subpart 16.5 prohibiting it; in fact, FAR 13.106-2(b)(3) recognizes comparative analysis as acceptable for simplified acquisition, so why not apply it to FAR Subpart 16.5 ordering procedures (Gines & Shields, 2016)?

Another recommendation for simplifying the evaluation process in the event that the LPTA framework is not sufficient is to utilize plus/minus, acceptable/unacceptable, or pass/fail criteria rather than documenting relative strengths, deficiencies, significant weaknesses, and risks to support evaluation (as is required in FAR Subpart 15.3). This approach would allow a more tabular evaluation (e.g., list of evaluation criteria with a simple plus/minus or pass/fail notation) of offers rather than an extensive narrative documenting strengths, weaknesses, and deficiencies. While FAR Subpart 15.3 requires the supporting information, there is nothing in FAR Subpart 16.5 that prohibits such streamlining.

7. Exchanges

Chapter V revealed that the GAO will determine whether discussions occurred in accordance with the requirements of FAR Subpart 15.3 or within the flexibilities of FAR Subpart 16.5 by reviewing both the agency's actions as well as the actual verbiage within the solicitation. In the case of Imagine One Technology & Management, Ltd, the agency identified in the solicitation that they "may contact any or all or a limited number of awardees with questions concerning their responses as permitted under FAR Part 16" (GAO, 2010a, p. 3). Despite this explicit statement, the evaluation record stated "that discussions with offerors in the competitive range were conducted in accordance with FAR 15.306(d)(2)" (p.3). As such, GAO evaluated the agency's adherence to the FAR Subpart 15.3 regulations for this particular aspect of the evaluation. In other words, even though the solicitation indicated an intention to execute in accordance with FAR Subpart 16.5, the agency resorted to FAR Subpart 15.3 procedures, so the agency was held to FAR Subpart 15.3 standards.

As a result of these GAO rulings, the researchers recommend that the agency add explicit language to FOPRs that reserve the government's right to hold discussions with all, none, or some of the offerors in accordance with the flexibilities afforded under FAR Part 16. By explicitly stating this, the agency will be complying with the GAO's requirement to conduct the procurement in accordance with the solicitation. Further, the researchers recommend that the agency abstain from using FAR Part 15-specific language

such as “competitive range” and “final proposal revisions” in its solicitation. While similar activities may be occurring within the FAR Part 16 acquisition, the agency is still allowed great flexibility in these areas as seen in Chapter V. By invoking the FAR Part 15 language, the agency may inadvertently be tethering itself to these cumbersome processes which, if not followed, would not withstand a GAO protest.

C. DOCUMENTATION

Chapter V revealed that documentation was also a driver for increased PALT. As such, the researchers have recommendations for streamlining key documents which contributed to this increase; namely, the SSP, the Source Selection Decision Document (SSDD), and the BCM.

1. Source Selection Plan

As seen in Chapter V, the development and approval of an SSP was a driving factor for longer PALT in local MACs. Since an SSP is not required under FAR Part 16, the researchers recommend ceasing the practice of developing one for such procurements. The contents of that document will already be captured by other procurement documents such as the solicitation. The researchers believe development of an SSP is redundant. However, in cases where the FODA is not the contracting officer, the researchers believe that development of a Fair Opportunity Selection Plan (a streamlined SSP-like document) is prudent to document, guide, and organize the evaluation.

2. Source Selection Decision Document

The development and approval of an SSDD was also a driving factor for longer PALT in local MACs, especially where the contracting officer was not the decision authority. This was largely due to the fact that the SSDD leveraged other detailed evaluation documents such as a Technical Evaluation Report (which was akin to a Source Selection Evaluation Board Report) and a Cost Evaluation Report. These reports followed the DoD Source Selection Procedures in that they provided relative strengths, weaknesses, deficiencies, and risks. While FAR Subpart 16.5 requires that the contracting officer document the basis for the award of all orders, such documentation does not need to be

nearly as detailed. Even for orders valued at \$5.5 million or more, the contracting officer need only document the relative importance of quality and cost/price factors; formal evaluation plans are not required per FAR 16.505(b)(1)(iv)(D).

Moreover, the researchers found that the GAO requires agencies to clearly and sufficiently document the basis of their source selection decision. Further, in determining a protest, the GAO will review the record to ensure that the agency made reasonable judgments and that they were consistent with the evaluation criteria as stated in the solicitation. As long as the decision is documented sufficiently for the GAO to determine that it was reasonable, it is not likely to be questioned. During the local interviews, the researchers saw examples of streamlined decision documents currently being used by some SPAWAR contracting personnel. As such, the researchers recommend these documents be leveraged to develop a Fair Opportunity Decision Document (FODD) template to be reviewed and approved by affected stakeholders.

3. Business Clearance Memorandum

Local MACs are subject to clearance requirements found in NMCARS 5201.690. Specifically, the regulation states:

[Head of the Contracting Agencies (HCAs)] shall establish written procedures defining the types of contract actions that will require a business clearance, the applicable dollar thresholds, and the review and approval process. At a minimum, HCA procedures shall address business clearance requirements for ... contracts (including task and delivery orders against indefinite-delivery contracts, basic ordering agreements, blanket purchase agreements, and other contract tools). (Department of the Navy [DoN], 2018)

In accordance with this direction, SPAWAR has developed and released its written procedures on BCMs in the form of a SPAWAR Contract Policy and Procedures Manual (SCPPM). The SCPPM for BCMs provides a standard Annex 2 BCM template as well as templates for TO/DO BCMs. In reviewing the TO/DO BCM template, it does not appear that it differs much from the Annex 2 BCM other than the language has been changed to reflect the fact that it pertains to an order vice a contract.

Development and approval of a BCM (most often a pre-BCM and a post-BCM), also drove increased PALT. The Annex 2 BCM requirements are extensive and the SCPPM template for TO/DO BCMs does not relieve those requirements. The researchers suggest that SPAWAR take advantage of NMCARS 5201.690(e) which states:

Annex 2, Business Clearance Memorandum, contains the required content and recommended format to document decisions on contract actions that are subject to business clearance requirements. If an activity plans to use a format other than Annex 2, the activity shall notify [Deputy Assistant Secretary of the Navy (Acquisition and Procurement)] by submitting its HCA approved alternate format by email. (DoN, 2018)

Specifically, the researchers suggest that the SCPPM TO/DO BCM template be reviewed and streamlined to include only what is absolutely necessary and required. That template should then be reviewed and approved internal to SPAWAR and then provided to Deputy Assistant Secretary of the Navy (Acquisition and Procurement) for review and approval.

4. Templates

The researchers initially intended to create templates for the agency to use which reflect streamlining initiatives. As the researchers began this project, it quickly became apparent that stakeholder involvement, and ultimately approval, of the recommendations provided herein is essential to obtain prior to template development. The content and format of the templates will largely be driven by the streamlining philosophy adopted and as such, the researchers recommend agency approval of the recommendations provided so that template development can begin.

Assuming agency approval is obtained, the researchers recommend the templates be developed within a working group comprised of all affected stakeholders. This will help minimize the amount of resistance encountered during the implementation phase. As for the templates themselves, the researchers discovered that the Air Force Material Command has already developed several templates for FAR Part 16-related documents which could be utilized as a starting point. Consistent with the researchers' recommendation, these templates are deliberate in their use of FAR Part 16 language as opposed to FAR Part 15

language. The researchers recommend that these templates be adapted for SPAWAR use, routed, approved, and then implemented formally within the SCPPM.

D. CONCLUSION

Not all of the suggested streamlining techniques presented here have withstood the test of a protest, as the flexibilities afforded under FAR Subpart 16.5 are not commonly exercised. Where there is no direct case law available to guide a contracting officer through a particular streamlining technique, the researchers suggest that the key take-away from the research conducted for this paper is to explicitly reference FAR Part 16 and clearly identify any streamlined procedures that are intended to be used. In short, say exactly what you want to do, then do exactly that; problems tend to arise when an agency does not explicitly specify the unique or different process they intend to follow or when the agency specifies such a process but does not follow that process. Furthermore, distinct terminology will help emphasize the difference between a streamlined FAR Subpart 16.5 process and the standard FAR Subpart 15.3 procedures. There is undoubtedly room for streamlining TO/DO competitions, but this area is largely uncharted territory due to the tendency to default to a FAR Subpart 15.3 process; contracting officers must be willing and prepared to take risks, albeit strategic ones, to benefit from the flexibilities authorized in FAR Subpart 16.5 to save valuable government and industry resources.

SUPPLEMENTAL LITERATURE SAMPLES SUMMARY

This supplemental table shows the 169 sources retained within the data sample identified in Chapter IV. The table provides a listing of the cases analyzed along with their key data attributes, including case number, case title, outcome, FAR part, number of times cited, and themes. As described in Chapter III, the sources are color coded either green and/or yellow to identify relevance.

To view the table, please contact the Naval Postgraduate School library.

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