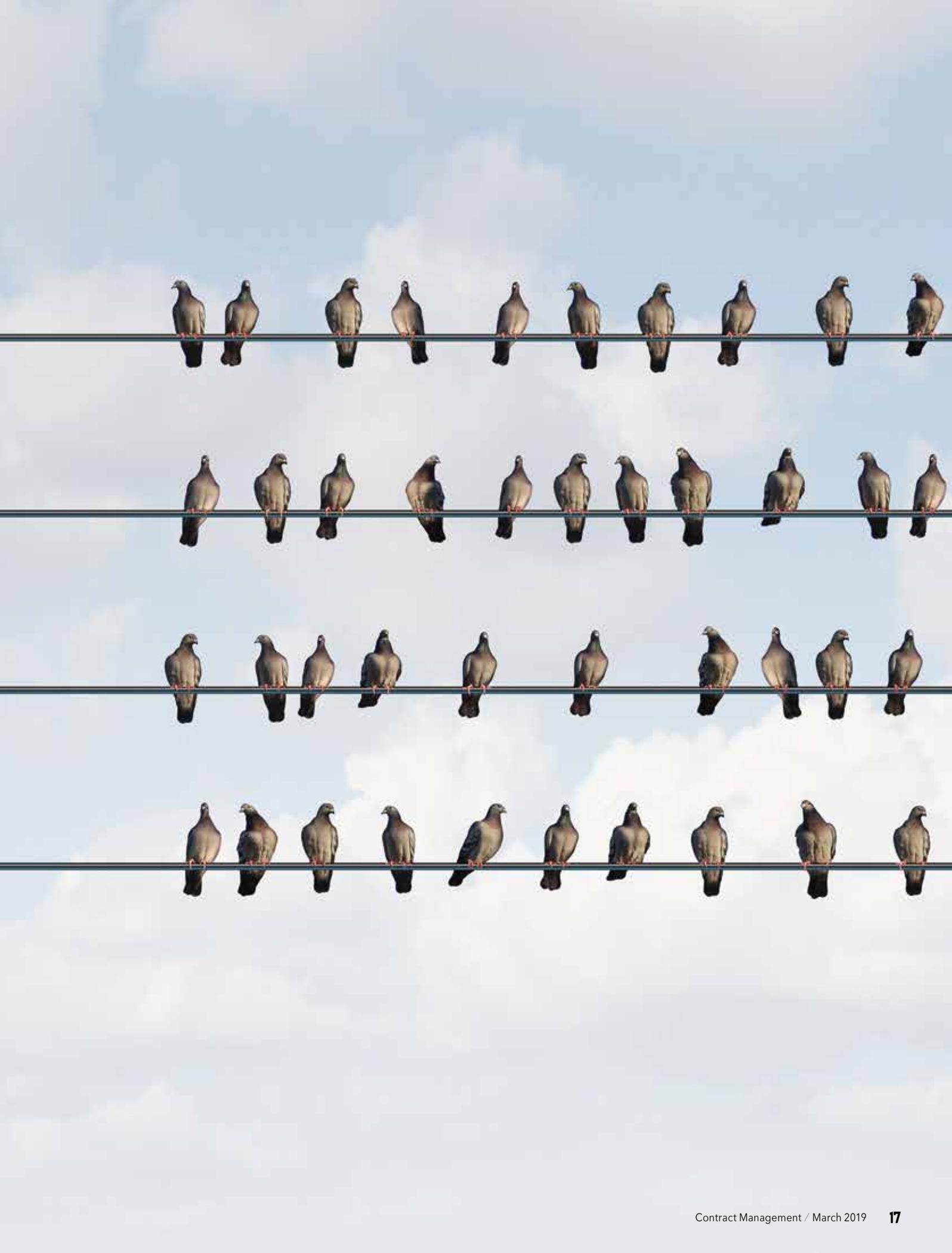




Alone Again— Naturally?

How to Properly Justify Sole-Source Awards

By Susan L. Turley





If you're not competing your sources,

you not only need good reasons for not doing so, but you have to be able to articulate a clear and compelling rationale for your acquisition strategy.

In his 1972 hit, "Alone Again (Naturally)," singer Gilbert O'Sullivan bemoans his inability to escape the solitary life.¹ Perhaps O'Sullivan should have become a federal government contractor, where he might have found it rather rewarding to be all alone as a sole source. In fiscal year 2017, for example, the Department of Defense (DOD) awarded about 56% of its \$319.8 billion in contract obligations through procurements that lacked any real competition, according to one study.²

The frequency of sole-source awards persists, despite more than a century of policy and regulatory direction otherwise, beginning with 1809 legislation dictating that "all purchases and contracts for supplies or services...shall be made by open purchases, or by previously advertising for proposals."³ In 1984, the Competition in Contracting Act⁴ mandated that agencies "obtain full and open competition through the use of competitive procedures" when buying goods or services.⁵ Both the *Federal Acquisition Regulation (FAR)* Part 6 and the *Defense FAR Supplement (DFARS)* Part 206 incorporate this policy, making full and open competition the preferred acquisition method. Why? Because "healthy competition is the lifeblood of commerce—it increases the likelihood of efficiencies and innovations."⁶

That said, this article is not about why competition is generally good, because many others have already made that argument very persuasively.⁷ Instead, it focuses on how to properly justify a noncompetitive procurement, emphasizing four critical points:

- **Consider Competition**—The default starting point for all acquisitions should be to compete;
- **Research the Market**—You must do market research to determine whether competition is feasible;
- **Justify the Decision**—If you decide you can't compete, you must justify your decision; and
- **Provide the Details**—Bare assertions that no one else can or should do the work are insufficient.

Step 1. Consider Competition

Too often, the presumptive strategy from the get-go—especially in procurements with well-performing, well-established incumbents—seems to be that competition is pointless. However, because the acquisition planning stage is the best (frequently the only) opportunity to build competition into a procurement, every acquisition strategy should consider whether "full and open competition" is appropriate.

The *FAR* defines *full and open competition* as occurring when "all responsible sources are permitted to compete."⁸ In this context, it further defines a *responsible prospective contractor* (or *responsible source*) as a "contractor that meets the standards in 9.104."⁹ *FAR* Part 9 clarifies that a "responsible source" *must* have:

- The required financial, technical, production, and operational resources to perform;
- Adequate experience and a satisfactory record of both performance and business ethics; and
- The necessary management, organizational and operational controls to ensure safety, quality, and other critical aspects of performance.¹⁰

In other words, full and open competition doesn't *actually* mean that every would-be supplier or contractor that *wants* to compete will get the opportunity to do so. Suppliers who recently declared bankruptcy, have horrendous past performance records, or are under indictment are probably not "responsible sources," and you may exclude them from your procurement without forgoing full and open competition.

The flip side, however, is that you can't assume only the incumbent or preferred supplier is a "responsible source." You must do market research to help shape and validate your acquisition strategy.

Step 2. Research the Market

FAR Part 10 governs market research. It's one of the *FAR*'s shortest parts, covering less than three pages in the hard-copy version.¹¹ And only a few lines—10.002(b)(2)(i)-(viii)—address how to do market research. The rest of the section tells acquisition personnel why they have to do market research and *what* to do with the results.

The scarcity of detailed *FAR* guidance does not correspond, however, to any lack of importance or difficulty connected with market research:

Market research—the process used to collect and analyze data about capabilities in the market that could satisfy an agency's needs—is a critical step in the acquisition process, informing key decisions about how best to acquire goods and services.¹²

In my experience, market research can also be of the most challenging step in the process and certainly one that engenders significant anxiety for inexperienced acquisition personnel.¹³

Part of the difficulty may stem from our tendency to isolate common activities in our personal lives from similar undertakings in our careers. Market research is literally something most people do on a regular basis, if not every day. Think about the last time you or someone you know bought a car. Most of us—even if we're highly satisfied with every aspect of the car we currently drive—don't quickly decide that we're going to buy the same exact car from the very same dealer, with the only differences being a newer model and a higher price. Instead, we explore our options, using research techniques very similar to those for researching a government-funded purchase. Review the following suggestions from DOD¹⁴ and compare them to what you have done or would do before purchasing a vehicle:

- Read trade journals;
- Engage knowledgeable people (government and industry) in specific markets;
- Identify and engage known sources of services;
- Employ and review market surveys to obtain information from potential sources;
- Conduct vendor and customer site visits to assess capabilities and practices;
- Attend trade shows, conferences, and symposia;
- Perform web searches;
- Review results of recent market research on similar or identical requirements;
- Seek feedback via formal requests for information and sources sought synopses;
- Obtain source lists of similar services from other contracting activities or agencies, trade associations, or other sources; and
- Review catalogs and literature published by providers.

The exact methodology may differ, but these are tools that most of us employ on a regular basis. We do ourselves a disservice when we fail to apply the experiences and skills gained in our personal lives to our professional activities. One of my organization's hiring managers always asks candidates for subcontract management jobs to describe the last time they made a major personal purchase because he thinks the answer offers significant insight into the capabilities they would bring to work.

Another suggestion that may improve and facilitate market research is to focus not on the incumbent or desired source, but on the other potential competitors. Return to the car-buying analogy: If you're satisfied with your current vehicle, how much data do you really need to determine that your existing ride is a "responsible source?" Instead, the better course of action might be to concentrate on identifying and assessing other options.

Translated to the contracting arena, the point is to avoid spending time and energy on validating the incumbent's superiority. This can prove problematic for those who don't regularly work in procurement (e.g., engineers or program managers), because they frequently think that the purpose of a sole-source justification is only to "justify" why the desired contractor is a "sole source." Admittedly, that's a legitimate argument, given that FAR Part 6 requires the justification to demonstrate "that the proposed contractor's unique qualifications or the nature of the acquisition requires" a sole-source pro-

curement.¹⁵ The problem with an incumbent-centric approach is that it glosses over the requirement that the contractor's qualifications be unique—in other words, not shared by *any other* potential offeror.

The issue isn't solely why or whether the preferred vendor can do the work—because of course they can, or you shouldn't be considering an award to them at all, let alone a sole-source award. The emphasis should be to determine whether *anyone else* can meet your requirements. To drive home this point, my organization has begun rebranding sole-source justifications as "noncompetitive" justifications. Focusing on the inability to compete helps focus the market research on establishing the lack of other contractors with the needed skills, which in turn bolsters the resulting justification.

Start by identifying the crucial qualifications a potential contractor would need to fulfill your requirements. This will guide your market research, and you should end up with one of two outcomes:

- You will determine that truly no other source can meet your needs, with solid supporting evidence for your justification; or

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- You will identify possible alternative sources, and you'll already have outlined the bulk of your source-selection criteria.

Step 3. Justify the Decision

FAR 6.302 lists seven circumstances permitting other than full and open competition:

- Only one responsible source and no other supplies or services will satisfy agency requirements;
- Unusual and compelling urgency;
- Industrial mobilization; engineering, developmental, or research capability; or expert services;
- International agreement;
- Authorized or required by statute;
- National security; and
- Public interest.

After briefly reviewing a few others, the following discussion will focus on the first—and most common—rationale.¹⁶

“Unusual and compelling urgency” seems highly attractive at first blush, given that acquisition professionals seldom have adequate time to award contracts and the program or customer almost always needed the suppliers or services yesterday. Unfortunately, FAR 6.301(c) makes it very clear that such situations are really neither *unusual* nor *compelling*: “Contracting without providing for full and open competition shall not be justified on the basis of [a] lack of advance planning by the requiring activity.” In 2015, the Government Accountability Office (GAO) emphasized the same point, sustaining the protest of a sole-source award based on the “agency’s failure to engage in reasonable and adequate advance planning.”¹⁷ GAO wrote:

[U]nder no circumstances may non-competitive procedures be used due

to a lack of advance planning... [C]ontracting officials must act affirmatively to obtain and safeguard competition; they cannot take a passive approach and remain in a sole-source situation when they could reasonably take steps to enhance competition.¹⁸

So, the fact that competing a procurement would delay award seldom qualifies as “urgent and compelling.” An example of what *does* qualify would be a recent justification and approval (J&A) on FedBizOpps¹⁹ to obtain “emergency lockdown meals” for a federal prison in West Virginia “[d]ue to the institution being immediately and unexpectedly being placed on lockdown, [and] an order was needed immediately in order to feed the inmate population.”²⁰

For government agencies, “authorized or required by statute” is relatively easy, as it deals with statutorily directed acquisitions from sources such as Federal Prison Industries or the Government Printing Office.²¹ It seems unlikely a defense contractor would ever use this exception, but occasionally someone claims that the government customer “directed” the use of a certain source. However, if that direction is not in the contract or in writing from the contracting officer, it almost certainly fails to support a sole-source award.²²

The “international agreements” exception allows noncompetitive procurements when required by the terms of such an agreement or by written direction from a foreign government that will reimburse the U.S. agency for the acquisition costs.²³ During my tenure as a DOD attorney, I saw this most frequently with foreign military sales, where the receiving country directed the acquisition to go to an in-country contractor. DFARS 206.302-4(c) allows DOD to substitute a written description of the agreement terms or directions that require the noncompetitive acquisition for a full-blown J&A.

Another application is directed subcontracting under cooperative agreements, which is not explicitly referenced in DFARS Part 206 but instead in DFARS Part 225 on foreign acquisitions. DFARS 225.871-5(a) authorizes the “direct placement of subcontracts with particular subcontractors... [when] specifically addressed in the cooperative project agreement.” For North Atlantic Treaty Organization (NATO) cooperative projects,²⁴ DFARS PGI 225.871-5 states that the “cooperative project agreement is the authority for a contractual provision requiring the contractor to place certain subcontracts with particular subcontractors,” and no separate J&A is required.

“Only One Responsible Source”

As previously mentioned, FAR 6.302-1(a)(2) is the most common rationale for sole-source procurements. It states:

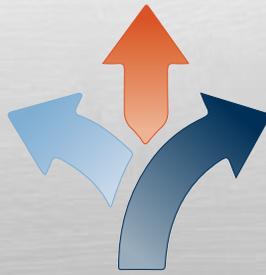
When the supplies or services required by the agency are available from only one responsible source... and no other type of supplies or services will satisfy agency requirements, full and open competition need not be provided for.²⁵

The FAR then offers several examples of the exception, the most common of which is in 6.302-1(a)(2)(ii):

Supplies may be deemed to be available only from the original source in the case of a follow-on contract for the continued development or production of a major system or highly specialized equipment, including major components thereof, when it is likely that award to any other source would result in—

(A) Substantial duplication of cost to the government that is not expected to be recovered through competition; or





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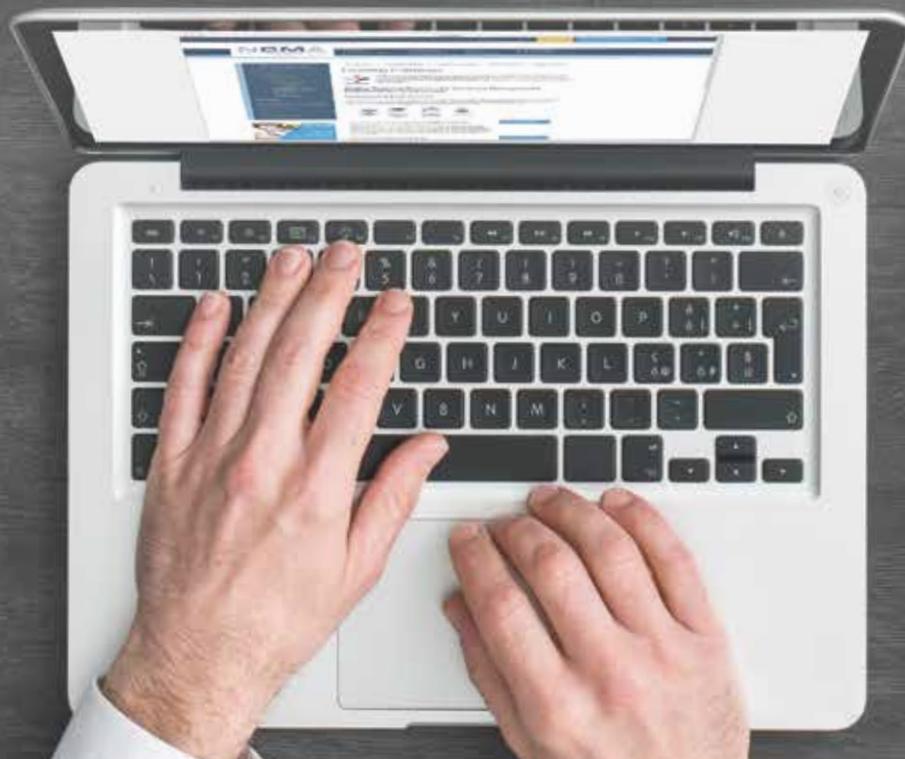
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(B) Unacceptable delays in fulfilling the agency’s requirements.²⁶

Ever helpful, the FAR goes on to explain that this authority may apply in situations such as the following:

- When there’s “a reasonable basis to conclude” that only “unique supplies or services available from only one source or only one supplier with unique capabilities” can satisfy the agency’s minimum needs²⁷;
- When agency standardization requirements dictate that only specified makes and models of technical equipment and parts, available from only one source, will satisfy the agency’s needs for additional units or replacement items²⁸; or
- When one source owns the intellectual property (data rights, patents, copyrights, or secret processes) or controls basic raw materials—although “the mere existence of such rights or circumstances does not in and of itself justify the use of these authorities.”²⁹

The caveat to this last example seems to be intended to drive agencies and prime contractors to do a better job of acquiring the needed rights to second-source a product. A DOD guide on preparing J&As says:

If the justification is based upon the absence of required data or the existence of limited rights in data, the justification must thoroughly document the actions taken to obtain missing data or to validate, challenge, or otherwise remove this impediment.³⁰

For data rights, such actions might include negotiating the “purchase of unlimited rights, royalty provisions, government purpose license rights, or other arrangement.”³¹ For patents or copyrights, overcoming this “impediment” could include the “authorization and consent” procedures under FAR 27.201, “Patent and Copyright Infringement Liability.”³²

For those awards based on “unacceptable delay” or unrecovered “duplicated costs,” GAO cases provide some insight into what does and doesn’t work:

- A U.S. agency properly purchased only Glock firearms for Pakistan’s military when Pakistan had a logistics system in place to support the weapons and “supporting a new firearm would be overly burdensome”³³;
- A sole-source follow-on award to the incumbent contractor for a highly specialized, automated, centralized, naval command-and-control and weapons control system was appropriate because award to any other offeror would lead to unacceptable delay³⁴; and
- When a second source “has made significant progress towards becoming an approved source under the agency’s source approval rules, and the remaining time required for approval is not long,” a sole-source award with a justification that does not consider the viability of the second source was improper.³⁵

Not only do poor justifications carry the risk of a sustained protest for government agencies, justifications performed by defense contractors face significant scrutiny during contractor purchasing system

reviews (CPSRs). During 2017 CPSRs, the Defense Contract Management Agency found substandard sole source justifications at a third of contractors evaluated, making them number six on the list of top 10 material deficiencies.³⁶

If the FAR, as previously outlined, provides such detailed guidance, why do both government and industry contracting officials seem to have such a problem with sole-source justifications? As with many other provisions of the FAR, what seems relatively straightforward in theory becomes much more challenging in practice. Besides suffering from a lack of planning, inadequate market research, and an overly narrow focus, too many justifications make vague, unsupported assertions and assume that readers will accept them without question.

Step 4. Provide the Details

View the sole-source justification as an exercise in persuasive advocacy. Write so that any reader, even—or especially—one

HOW TO FIX AN INADEQUATE SOURCE JUSTIFICATION	
EXAMPLE	HOW TO FIX IT
ONLY KNOWN SOURCE	Explain and provide details: <ul style="list-style-type: none"> ▪ Why is it the only known source? ▪ What market research did you perform to determine it was the only source available?
ONLY QUALIFIED CONTRACTOR/SUPPLIER	Explain and provide details: <ul style="list-style-type: none"> ▪ Why is it the only qualified contractor or supplier? ▪ What are the barriers to qualifying an additional source?
PROGRAM/REQUESTOR WANTS TO GO WITH THIS CONTRACTOR OR SUPPLIER	Although programs and other functions have input into the sourcing process, ultimately the contracting or supplier manager must make the sourcing decision. Explain and provide details: <ul style="list-style-type: none"> ▪ Why does the requestor want to solicit only this supplier? ▪ What has the requestor done to see if other contractors or suppliers could perform the work? ▪ What would it cost (in both time and money) to try to use another source?
CUSTOMER-DIRECTED SOURCE	Must have written direction from the <i>government</i> customer.
NEED TO PLACE PURCHASE ORDER QUICKLY, SO NO TIME TO COMPETE	Explain and provide details: <ul style="list-style-type: none"> ▪ Why is there not enough time to compete? ▪ What can be done to prepare to compete next time? ▪ How will delaying the procurement harm the government?

with no knowledge of the acquisition, can follow the trail to the desired conclusion: A sole-source procurement is in the best interests of everyone involved. Admittedly, most government agencies (and probably many government contractors) have mandatory forms and formats that may stifle the “storytelling,” but even the most restrictive structure still leaves some room for engaging persuasion.

Be clear, convincing, and compelling. I’ve read some justifications where the person writing the justification obviously didn’t understand what it said, didn’t believe it, or both. If the author isn’t confident that no other source will satisfy the requirement, then how can he or she expect the reader to accept that assertion?

“Specificity is What Makes Good Storytelling, and Good Storytelling is What Makes Money....”³⁷

The key, as with most advocacy, is supporting details; avoid generalities as much as possible. Go back to the car-buying exercise and imagine you’re trying to persuade your significant other to accept your conclusion. Simply proclaiming, “I did my research, and this make and model is the best choice out there” probably won’t achieve your desired result. However, suppose you provided the following information:

- It has the best resale value in its class, according to *Kelly Blue Book*;
- No other vehicle in this class averages more than 30 miles per gallon, based on EPA estimates;
- It received the J.D. Powers “most dependable” award in its class;
- It’s the only vehicle that comes with all the options we want (power windows, heated leather seats, towing package, four-speed manual transmission, Bluetooth enabled, etc.); and
- The local dealer has it in stock and can deliver in time for our cross-country trip next month, while we would have to order any other comparable vehicle and wait at least two months.

Different and better information will probably lead to a different and better outcome, and the same holds true for source justifications.

One of the most common mistakes I’ve seen is the assertion—without more—that “it would cost too much and take too long to compete.” FAR 6.302-1 doesn’t require absolute precision—only that it’s “likely [not *definite* or *conclusive*] that award to any other source would result in...[s]ubstantial duplication of cost...that is *not expected* [rather than *certain* or *guaranteed*] to be recovered through competition.”³⁸ That being said, the allowable “fudge factor” only stretches so far:

If the justification is based on “substantial duplication of costs” or “unacceptable delays,” the justification must quantify the costs in terms of either time or money and provide the basis for these estimates.³⁹

When trying to estimate the costs or delay, consider the following:

- What kind of transition would another supplier require? How great is the learning curve?
- If you have qualification requirements, what would be required to get another supplier qualified? What level of qualification testing (e.g., flight testing of component or of the complete product) would the supplier need?
- How much would this qualification cost and how long would it take? What’s the basis for these estimates (similar parts qualified in the past, facility cost and manpower estimates, etc.)?
- What would be the technical risk to the government or the contractor with such a course of action?
- What is the acquisition outlook for the relevant program? If the program is only in a sustainment mode or there is limited future demand, then it is probably less likely that the agency or prime contractor could recover the increased costs of trying to compete or that suppliers would be willing to invest their own funds in the qualification and start-up efforts.

- Don’t assert that “there’s no money in the budget to compete.” The decision to compete should be independent of the budget—whether your own or the customer’s for contractors. Remember, competition is presumed to save money, so the justification must demonstrate that competing would result in unrecovered, duplicated costs.

Once you’ve obtained the needed estimates, use them to support the “magic words” in your justification:

- “Using any other supplier would result in duplicated costs that would not be recovered through competition.” Then explain how much more it would cost and why.
- “Attempting to compete would result in unacceptable delay in meeting the government’s requirements.” Describe the length of the delay and how it would harm the customer or ultimate user. For DOD, explaining the negative impact on the warfighter can prove especially compelling. For defense contractors, a good source for this information can be the J&As for the prime contracts posted on FedBizOpps.

Another error is to assume that a supplier’s small business status justifies a noncompetitive procurement. It doesn’t—but it could support “full and open competition after exclusion of sources.”⁴⁰ You may set aside a procurement for:

- Small business concerns,
- Eligible 8(a) participants,
- HUBZone small business concerns,
- Service-disabled veteran-owned small business concerns,
- Women-owned small business concerns, or
- Economically disadvantaged women-owned small business concerns.

However, you must compete as much as possible within these groups. At least you aren’t required to complete a separate justification for such procurements.⁴¹

J&A Case Studies: Adequacy/Persuasiveness

The following are two real-world examples of J&As posted on FedBizOpps using a “check the box/fill in the blanks” template. Review them and see what you think about their adequacy and persuasiveness. (Let me stress that the intent is not to malign the authors of these documents but to use the J&As to help demonstrate ways to improve.)

EXAMPLE 1, DOD:

4. STATUTORY AUTHORITY PERMITTING OTHER THAN FULL & OPEN COMPETITION: This J&A is based upon the authority of 10 USC 2304(c)(1), only one or a limited number of responsible sources will satisfy agency requirements, as implemented by FAR 6.302-1.

5. RATIONALE JUSTIFYING USE OF CITED AUTHORITY:

The current Acquisition/Repair Method/Suffix Code(s) is (are)

- 0. The part was not assigned AMC/RMC 1 through 5 when it entered the inventory, nor has it ever completed screening.
- 1. Suitable for competitive acquisition for the second or subsequent time.
- 2. Suitable for competitive acquisition for the first time.
- 3. Acquire, for the second or subsequent time, directly from the actual manufacturer.
- 4. Acquire, for the first time, directly from the actual manufacturer.
- 5. Acquire directly from a sole source contractor which is not the actual manufacturer.

C. This part requires engineering source approval by the design control activity in order to maintain the quality of the part. Existing unique design capability, engineering skills, and manufacturing/repair knowledge by the qualified source(s) require acquisition/repair of the part from the approved source(s). The approved source(s) retain data rights, manufacturing/repair knowledge, or technical data that are not economically available to the Government, and the data or knowledge is essential to maintaining the quality of the part. An alternate source must qualify in accordance with the design control activity's procedures, as approved by the cognizant Government engineering activity. The qualification procedures must be approved by the Government engineering activity having jurisdiction over the part in the intended application. If one source is approved, A/RMCs 3, 4, or 5 are valid. If at least two sources are approved or if data is adequate for an alternate source to qualify in accordance with the design control activity's procedures, A/RMCs 1 or 2 are valid.

Only the above will be solicited because the articles to be acquired are highly specialized parts, designed and manufactured by a non-Government activity and the technical data required for manufacture by other than the above is not available and no value added other than the above source. [REDACTED] are the only commercial manufacture source available for the subject part and hold all technical source controlled drawings. The data needed to fully compete the contract to manufacture is not physically available, and cannot be obtained economically, nor is it possible to draft adequate specifications or any other adequate, economical description of the manufacture for a competitive solicitation. In addition the item is a Critical Safety Items (CSI) and any available data including manufacture manuals, associated drawings and specifications, and supporting test equipment availability required to accomplish the manufacture of the subject part number have not been found adequate to support full and open competition. Any additional sources must acquire engineering source approval from the [REDACTED] prior to contract award.

Market Research was conducted in accordance with FAR Part 10. The results of the Market Research conducted (or the reason(s) Market Research was not conducted) are as follows: The available technical data necessary to facilitate manufacture of this [REDACTED] is insufficient to support competitive acquisition. [REDACTED] has determined this is a Critical Safety Item (CSI). Prospective new sources will require [REDACTED] approval. Source Development Department indicate no Source Approval Request (SAR) has been received from any party interested in becoming an approved source. [REDACTED] is the only approved source at this time.

POSSIBLE ISSUES:

The justification:

1. Uses acronyms and terms without explaining their meaning or relevance: What is an “Acquisition/Repair Method Code,” and what does it signify? Who is the “DCA,” and why does his/her approval matter? How does the item’s designation as a “Critical Safety Item” support the justification?
2. Asserts limited data rights as the basis for the justification but does not address the caveat in FAR 6.302-1(b)(2) that “the mere existence of such rights or circumstances does not in and of itself justify the use of these authorities.”
3. Seems to imply that using any other source would result in duplicated costs that the agency wouldn’t recover through competition (FAR 6.302-1(a)(ii)(A)) by saying things such as “the data needed to fully compete the contract...cannot be obtained economically, nor is it possible to draft... any other adequate economical description of the manufacture.” However, it doesn’t quantify the relevant costs or explain how that estimate was reached (FAR 6.303-2(b)(9)(ii)).
4. Purports to discuss market research but really just reiterates assertions made elsewhere in the document that have very little to do with market research. It fails to highlight the very compelling fact (not shown) that the agency posted a “Sources Sought” notice on FedBizOpps and no other potential source responded.

For the most part, this justification seems to simply recite canned, boilerplate language and thus lacks any supporting detail required by FAR 6.303-2. Based on what is included, it’s probable that the assertions could be fleshed out to fully justify this sole-source procurement (e.g., qualification of a new source or attempting to purchase/recreate the proprietary technical data would probably add significant costs and delay to the procurement). However, as written, it seems inadequate and unconvincing.



EXAMPLE 2, CIVILIAN AGENCY:

4. Authority and Rationale: Identify the statutory authority, FAR title and FAR citation permitting other than full and open competition. It may be one of the following most commonly used citations by the operating divisions of the Department of ██████████ but other exceptions may apply per FAR Subpart 6.3.

41 USC § 253(c)(2), as implemented by FAR 6.302-1 - Only one responsible source and no other supplies or services will satisfy agency requirements per FAR 3.302-1; AND FAR 6.302-2 - Unusual and compelling urgency.

FAR 6.302-1: Only one responsible source and no other supplies or services will satisfy agency requirements, 41 USC 3304(a)(1).

(This vendor has the entire five year chemical inventory list for the ██████████ Service Unit and has under the current contract continually keep it update and current per OSHA requirements.

FAR 6.302-2: Unusual or compelling urgency, 41 USC 3304(a)(2).

(█████████ Online has developed a comprehensive online Material Safety Data Sheet (MSDS) management program exclusively for the ██████████ Service Unit and their staff. IMPACT - The inability for the continuation of services at the ██████████ Service Unit will impact the ability of the end users to effectively manage the hazardous material/safety program and have an adverse impact on the safety of the personnel working in and around the ██████████ Service Unit.)

7. Market Research:

Market Research located only one source able to provide the services required. Additionally, if another source were to be found, there are anticipated startup costs required to build existing ██████████.

This period of performance is for 5 years.

POSSIBLE ISSUES:

The justification:

1. Improperly cites *both* FAR 6.302-1 and 6.302-2. FAR 6.302-1(b) states that this authority "shall not be used when any of the other circumstances is applicable."
2. Repeatedly states that market research "located only one source able to provide the services required," but provides no details. Even in a relatively low-dollar value procurement (which this was), the justification should include at least basic details of the market research (e.g., when, how, and by whom it was conducted and how the results support the conclusion) per FAR 6.303-2(b)(8).
3. Asserts that the current "vendor has the entire five-year chemical inventory list...and continually keep [sic] it update [sic] and current per OSHA requirements." Besides the grammatical errors, nothing explains why only this vendor can do that. Couldn't the agency provide the inventory list to other potential contractors? Why is keeping the list updated and current such a "highly specialized service" (FAR 6.302-1) that requires such "unique qualifications" (FAR 6.303-2(b)(5)) that no other contractor can perform?
4. Fails to demonstrate the "unusual and compelling urgency" of the sole-source award. The statement that "inability for the continuation of services... will impact the ability of end users to effectively manage the hazardous material/safety program and have an adverse impact on the safety of the personnel" seems focused on what would happen if the services ceased entirely. It doesn't explain why this situation precludes competition.
5. Does not comply with the limitations on the period of performance when using FAR 6.302-2. Paragraph (d) of this subpart states:
 - (1) The total period of performance of a contract awarded or modified using this authority—
 - (i) May not exceed the time necessary—
 - (A) To meet the unusual and compelling requirements of the work to be performed under the contract; and
 - (B) For the agency to enter into another contract for the required goods and services through the use of competitive procedures; and
 - (ii) May not exceed one year, including all options, unless the head of the agency determines that exceptional circumstances apply. This determination must be documented in the contract file.
6. There was no determination by the agency head, even though the period of performance is five years, nor does it seem reasonable that the agency would require the entire five years to compete the services.
7. Claims that using another source would require "anticipated startup costs," but fails to quantify the costs and explain how that estimate was derived, as required by FAR 6.303-2(9)(iii).

Finally, remember that a sole source justification is not simply a compliance requirement or a hurdle to jump on the way to legal sufficiency. While complying with law and regulation is, of course, a valid motive, recognizing that the justification also represents a good *business decision* will help achieve solid, defensible results. Everyone involved in government contracting

ultimately has a responsibility to be a good steward of the taxpayers' funds. Those of us with private industry also owe a fiduciary duty to shareholders or others who depend on the company turning a profit. So, when writing the justification, explain why this noncompetitive procurement is in the best interests of the program, the customer, the government, the company—or,

in other words, why being "alone again" is, in fact, perfectly and properly "natural." 

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ENDNOTES

1. "Alone Again (Naturally)," Gilbert O'Sullivan, track B2 on the U.S. album *Himself* (MAM Records, 1972).
2. Rhys McCormick, Samantha Cohen, Gregory Sanders, and Andrew P. Hunter; "Acquisition Trends 2018: Defense Contract Spending Bounces Back Executive Summary" (Center for Strategic and International Studies (CSIS), September 2018): 2, 8 (asserting that DOD awarded only 46% of its obligations through "effective competition," a term which CSIS defines as "a competitively sourced contract awarded after receiving two or more offers." (Rhys McCormick, Samantha Cohen, and Maura Rose McQuade; "Measuring the Outcomes of Acquisition Reform by Major DOD Components" (CSIS, September 2015): footnote 1)).
3. Kate M. Manuel, "Competition in Federal Contracting: Legal Overview" (Congressional Research Service, January 21, 2015): 4 (quoting 2 Stat. 536).
4. 10 USC 2304 for DOD, NASA, and the Coast Guard and 41 USC 253 for other government agencies.
5. As stated by 41 USC 253(a)(1): "Except as provided in subsections (b), (c), and (g) and except in the case of procurement procedures otherwise expressly authorized by statute, the head of an agency in conducting a procurement for property or services...shall obtain full and open competition through the use of competitive procedures in accordance with the requirements of this chapter and the *Federal Acquisition Regulation*; and...shall use the competitive procedure or combination of competitive procedures that is best suited under the circumstances of the procurement."
6. Office of the Under Secretary of Defense for Acquisition, Technology and Logistics, Defense Pricing and Contracting (DPC) Office, "Enhancing Competition Awareness in DOD" (May 2010 PowerPoint training): Slide 2, available at <http://www.acq.osd.mil/dpap/cpic/cp/docs/training.ppt>.
7. See, e.g., the DPC webpage on competition, <https://www.acq.osd.mil/dpap/cpic/cp/competition.html>; the "Competition in Contracting Act of 1983: Hearings Before the Senate Committee on the Armed Services," 98th Congress, First Session (1983); the Government Accountability Office (GAO), "Contract Management: Agencies Are Not Maximizing Opportunities for Competition or Savings under Blanket Purchase Agreements Despite Significant Increase in Usage" (September 9, 2009); and Jacques S. Gansler, William Lucyshyn, and Michael Arendt; University of Maryland, Center for Public Policy and Private Enterprise, School of Public Policy; "Competition in Defense Acquisitions" (February 2009), available at www.dtic.mil/dtic/tr/fulltext/u2/a529406.pdf.
8. FAR 2.101.
9. *Ibid.*
10. FAR 9.104-1.
11. The shortest is Part 38, "Federal Supply Schedule Contracting," which is just slightly more than a page (not counting, of course, Parts 20, 21, and 40, which are reserved).
12. GAO, "Market Research: Better Documentation Needed to Inform Future Procurements at Selected Agencies" (October 9, 2014): 1.
13. See, generally, *ibid.*
14. DOD Office of Defense Procurement and Acquisition Policy, "Market Research Report Guide for Improving the Tradecraft in Services Acquisition" (March 2017): 3.
15. FAR 6.303-2(b)(5).
16. A highly unscientific search on December 18, 2018, of the FedBizOpps active and archived records for justifications and approvals turned up 56,406 related to the first rationale, with 6,756 for unusual and compelling urgency, 544 for industrial mobilization, 116 for international agreement, 3,719 for authorized or required by statute, 50 for national security, and 2,496 for public interest.
17. GAO, *XTec, Inc.*, B-410778.3 (October 1, 2015).
18. *Ibid.*, at 10-11.
19. FedBizOpps.gov is the federal government's website for posting and publicizing most federal procurement opportunities.
20. Department of Justice, Bureau of Prisons, Solicitation 15B12119PUUA50002—Emergency Lockdown Meals, available at <https://www.fbo.gov/spg/DOJ/BPR/12104/15B12119PUUA50002/listing.html>. The prison involved was the Federal Correctional Complex in Bruceton Mills, a high-security prison that houses almost 1,300 inmates.
21. See FAR 6.302-5(b).
22. In other words, the fact that the customer program manager "likes this contractor" isn't going to cut it.
23. See FAR 6.302-4(a)(2).
24. DFARS 225.871-2 defines a *cooperative project* as a "jointly managed arrangement" described in a written agreement aimed at furthering "standardization, rationalization, and interoperability" of the armed forces of NATO member countries and that provides for the following:
 - At least one other participant besides the United States shares the cost of research and development, testing, evaluation, or joint production (including follow-on support) of certain defense articles;
 - A jointly developed defense article is produced concurrently in the United States and another member country; or
 - The United States acquires a defense article or service from another member country.
25. FAR 6.302-1(a)(2).
26. FAR 6.302-1(a)(2)(ii)(A)-(B). (DOD, NASA, and the Coast Guard also have this option for "follow-on contracts for the continued provision of highly specialized services" (FAR 6.302-1(a)(2)(iii)).)
27. FAR 6.302-1(b)(1).
28. FAR 6.302-1(b)(4).
29. FAR 6.302-1(b)(2).
30. Headquarters Air Force Materiel Command (AFMC), Contracting Policy Division, Directorate of Contracting, "Justification and Approval Preparation Guide and Template" (undated): 7 (hereinafter, "AFMC J&A Guide"); available at https://www.acq.osd.mil/dpap/ccap/cc/jcchb/Files/DVD/Training_Scenarios/tornado/j_a.docx.
31. *Ibid.*
32. According to FAR 27.201-1(a)-(b): "[T]he exclusive remedy for patent or copyright infringement by or on behalf of the government is a suit for monetary damages against the government in the Court of Federal Claims. There is no injunctive relief available, and there is no direct cause of action against a contractor that is infringing a patent or copyright with the authorization or consent of the government (e.g., while performing a contract)... The government may expressly authorize and consent to a contractor's use or manufacture of inventions covered by U.S. patents by inserting the clause at 52.227-1, 'Authorization and Consent.'"
33. U.S. Army, The Judge Advocate General's Legal Center and School, Contract and Fiscal Law Department, "2018 Contract Attorneys Deskbook" (2018): Ch. 5, p. 12 (internal citations omitted).
34. *Ibid.*, at 5-13.
35. GAO, *Barnes Aerospace Group*, B-298864, B-298864.2, 1 (Dec. 26, 2006).
36. John C. Foley and Maura Lachance, "Contractor Purchasing System Review (CPSR) and Property System Discussion" (March 7, 2018): slide 18, available at <http://www.ncmaboston.org/wp-content/uploads/2018/03/4.-DCMA-Perspective-CPSR-and-Property-Audits.pptx>.
37. Constance Wu (actor and star of TV series *Fresh Off the Boat* and the movie *Crazy Rich Asians*), "Constance Wu Quotes," BrainyQuote.com (2018), available at https://www.brainyquote.com/quotes/constance_wu_706509.
38. FAR 6.302-1(a)(2)(ii) (emphasis added).
39. AFMC J&A Guide, see note 30, at 7.
40. I.e., FAR Subpart 6.2.
41. See FAR 6.203-6.207.

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