

Memo for 1423 Advisory Panel
From Robert M. Cooper
Subject Reynolds Comment on Negotiation Process
Date 2/23/6

Subject comment was available at the Public Meeting today and was an elaborated concurrence with a discussion on the Wifcon.com Forum initiated by Vern Edwards advocating an A&E two-step process in lieu of the FAR Part 15.3 process for virtually all negotiated procurement. Although appealing in simplicity and flexibility, it is not innovative (A&E procedures are not a significant departure from Part 15), is inaccurate regarding protests, is unnecessary given the flexibilities of the rewritten Part 15, (exchanges), is unduly restrictive (precludes comparative exploration), and is naïve regarding implementation (workforce weaknesses).

1 Not innovative because formal two-phase design-build selection procedures (FAR 36.3) are specifically restricted to situations where: three or more offers are anticipated, design work MUST be performed before developing cost proposals, and there are substantial B&P expenses. Several criteria must be considered including requirements definition, time constraints, capability/experience, agency resources, suitability, past performance, and other non-cost factors. Further, Phase II includes the same evaluation factors in a Part 15 solicitation including management approach, key personnel, and technical solutions with technical and price proposals that “SHALL be evaluated separately IAW WITH PART 15”.

2 Inaccurate because it alleges most protests merely concern procedural defects, which is not always the case. For example, although GAO prefers to defer to agency discretion when exercised within reason, a recent case in COI was a departure from that policy (see Alion Case, B-297022.3, 1/9/6). There are many substantive protests, and many protests are sustained where the file was insufficiently documented to evaluate a determination, or a decision was insufficiently supported. Further, there have been recent high profile protests involving ethics violations, such as the Lockheed/Boeing case.

3 Unnecessary because although based on flexibility for the parties to shape an effective agreement, the rewritten Part 15 included many methods to facilitate this capability including at the start the expanded role of “business manager operating under guiding principles” at FAR 1.102, oral proposals (15.102), advisory multi-step (15.202), pre-solicitation and post-solicitation exchanges (15.201 and 306), award w/o discussion clause (52.215-1(f), and the Low Price Technically Acceptable (LPTA) award alternative (15.101-2).

4 Restrictive in light of 15.306(d)(4) for “discussions on solutions exceeding mandatory minimums”. The sudden focus on one offeror based solely on qualifications would preclude comparative exploration of competitive discussions regarding a range of innovative solutions.

5 Naïve regarding implementation. The initial Forum comments speak in terms of “we” needing to figure out how to implement a simplified version of the A&E 2-step process. Who is this? How are they to be trained, on top of all the training already needed to implement the unabsorbed reforms of the Nineties. A long-term major Test for commercial items in FAR Part 13.5 would allow using Simplified Procedures when buying commercial up to \$5 Million. However GAO audits found this liberating procedure greatly underutilized, signaling an uncertain and conservative posture in an overworked and under trained acquisition workforce.

Further, given the drastic downsizing over the last decade, many acquisition functions are being outsourced under FAR 7.5. Is it likely these surrogate buyers have sufficient mission knowledge and agency loyalty to tailor the best “deal” time and again in continuously varying situations? (See “Confronting the Looming Crisis in the Federal Workforce” by Shelley Econom in the Winter 2006 Public Contract Law Journal)