

THE NEGOTIATED ACQUISITION PROCESS IN GOVERNMENT CONTRACTING

by
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In a recent discussion on the Wifcon.com forum, Vern Edwards made the following comment in a Tuesday, January 10, 2006 - 04:37 pm posting about how contracts are solicited and awarded:

“Instead of devoting too much energy to writing statements of work and contract terms and then soliciting competitive proposals, we need to figure out how to hire a really, really good contractor and make our relationship with it as effective as we can. We need to learn how to sit down with contractors and say: "Look, this is what's at stake. Now, let's sit down together and figure out the best way to go about this work and how much it's going to cost and determine what we can reasonably expect from one another. And let's figure out how to keep track of how we're doing so we can take corrective action when we discover that we're not doing things as well as we should." We need to figure out how to do that really, really well.”

[<http://www.wifcon.com/discus/messages/3011/4713.html?1137187687#POST16316>]

The comment made me begin thinking about what is wrong in the present contracting system and what do we need to do to ‘fix’ the system. The problems in the system really aren’t ‘contract administration’ (although there are challenges there), but contract placement is in dire need of fixing.

The FAR Part 13 and 14 processes generally flow pretty well. They have their share of problems but they are not the most pressing issue. It is the Part 15 processes that are the cause of all of the difficulties. Part 15 is the area of lengthy, legalistic processes, Requests for Proposals, massive technical and cost proposals, detailed evaluations, discussions (or not), all sorts of cost/price evaluation problems, source evaluation board reports, and selection decisions. And virtually any step in that lengthy process can subject the acquisition to a protest. So to attempt to avoid the ‘procedural protest,’ we complicate and delay the process by taking more time, and spending both industry’s and Government money, papering the processes and reviewing and reviewing the paper before ever finally making a decision – which may be protested nonetheless. Are the protests truly valid? Did the agency really pick the wrong company, or did the agency just step on a ‘procedural landmine’ that sends them back into the proposal and evaluation process, only to be subject to another protest later? The FAR Part 15 rewrite did not “fix” the historical problems as much they just changed processes.

So, the question is: Is there an alternative process which could be used or developed through which we can fix the types of problems and issues identified above? Maybe there is.

There is an existing process out, used on a daily basis by virtually every Agency, is essentially non-competitive from a cost/price perspective, but accounts for millions of

dollars of expenditures each yearand nobody bats an eyelash at its use – Brooks Act awards for Architect & Engineering (A&E) services. The process is relatively simple - obtain company qualifications, perform a relatively quick review against the evaluation criteria, bring in the ‘selected company’, negotiate the prices and award a contract. No ‘competitive proposals,’ no questions about clarifications/exchanges/discussions, etc. None of the traditional Part 15 ‘process problems’ occur in these types of actions. Currently however, this process is restricted to use for A&E services. So what if we consider using a Brooks Act “like” process for all Part 15 type procurements?

How could a Brooks Act “like” process replace the current FAR 15 procedures?

The Government could announce in general terms its needs some type of work to be performed and at the same time announce what criteria the Government will use to select a company for negotiation of a contract. The evaluation/selection criteria could be defined and tailored with each ‘solicitation announcement’, e.g., experience in performing related work, resumes of management officials to be used, references (past performance), etc. Since cost/price cannot be obtained at this time, it would not be an evaluation criterion in the initial selection. Obtaining a reasonable cost/price is always, or should be, the Government’s objective and in it’s best interest on every acquisition. So we can deal with that later in the process.

After publication of the announcement, interested companies would respond within a short time frame expressing their interest and providing their qualification against the evaluation criteria. No lengthy explanations or volumes of proposals – simple and concise information. The Government would perform an evaluation of the responses received, write a selection decision and begin negotiations with the highest rated company. At most the time to make the selection should take no more than a couple weeks. So the time from publication of the announcement to making a selection should be no more than 4 – 5 weeks.

The Government and selected company would then sit down one-on-one and attempt to develop a mutually beneficial contract arrangement. The Government and company would construct the detailed specifications, or at least to the detail needed for the contract – either a ‘statement of objectives’ or some form of detailed specification – they can determine that in negotiations. There would be Government publication of massive amount of information to ensure all companies had “equal information”, no pre-proposal conferences, in short none of the current FAR Part 15 trappings to ensure all companies were on an equal footing so that the procurement could be considered ‘full and open competition.’ But the process would still meet that standard - all companies would be free to submit their qualifications for evaluation against the established criteria and receive a fair and unbiased evaluation for selection.

During negotiations, whatever information the company needed to construct the contract would be provided then, not as part of the proposal/evaluation process. Even the Government’s budget for the project, it’s cost estimates, everything could and should be open. The Government would evaluate the company’s proposed pricing, have access to

its books, cost history, etc. and make a 'fair and reasonable' cost/price determination using cost or price analysis, and not have to rely on 'price competition,' which in itself is a misnomer in most FAR Part 15 competitions anyway. ¹ If the Government determined an agreement could not be reached on scope, terms and conditions, price, etc. with the 1st company, the Government would have the option of either terminating negotiations with the 1st company and bringing in the 2nd place company from the evaluation process to begin negotiations; or, continuing negotiations with #1 and bringing in the 2nd place company and begin dual negotiations. These dual negotiations, if implemented, could be used to provide competitive pressures on the 1st company, if needed. [Of course, the 1st company's interests would best be served by not reaching an impasse in negotiations because the Government would not be obligated to continue discussions with them, the Government, like under a Brooks Act action, could simply terminate discussions.]

Type of contract, contract terms, etc. would all be developed during the negotiations with the selected company(ies). The objective would be to develop the best business arrangement possible. If the 2nd company was brought in for dual negotiations under this concept, there should be no prohibition on negotiating, for example, a cost contract with one company and a fixed price with another, or a CPAF with one and a CPIF with another – all with different terms and conditions, each with the same final objective/result. The Government however would not be obligated to complete negotiations with company 2, and if negotiations bogged down, the Government could elect to terminate discussions with company 1 and 2 at any time, and if it desired to bring in company 3 for negotiations. If competitive negotiations occurred and ran to completion, then the final selection would be the company offering the best arrangement to achieve the stated objective. Cost would become a selection factor only if competitive negotiations were entered into – not an evaluation factor, only a factor in determining the best arrangement for the Government.

Under this approach, where discussions were only conducted with the initially selected offeror, contract pricing would take on greater significance. But that is not a problem which is impossible to overcome. Training already exists in this discipline, but will have to be brought back to the forefront of the training. The proposed process does however, permit the avoidance and problems of having to develop and defend 'most probable cost' estimates required under the current evaluation and selection processes of Far Part 15. Even if competitive negotiations are entered into, there is not a 'most probable cost' – but a final negotiated cost with each company. So the hypothetical problems of proposal evaluation of today would go away.

The grounds for protest under this process would be relatively simplistic. Unsuccessful offerors could only challenge the evaluation process. Protests could only question if the Government complied with its stated evaluation criteria and did it have a rational basis for the selection? Beyond that, only if a second offeror was brought in for concurrent negotiations and were completed would there be a chance to protest and challenge the award decision. [This second protest exposure should limit any unscrupulous contracting officers from bringing in a second company simply as a means to pressure the original

company into unwarranted price reductions or to force capitulation on other unreasonable Government demands.]

What would the benefits be of such a process?

- ? Proposal preparation and submission times could be reduced to 15 – 30 days because the evaluation criteria should not be complex.
- ? Time to award contracts would be reduced from 8 – 16 months down to maybe 2 months if agreements could be quickly reached – with letter contracts, even less.
- ? Company bid and proposal costs (B&P) would shrink dramatically. There would be no spending of millions of dollars by multiple companies submitting ‘competitive proposals.’ Exorbitant B&P costs would disappear from future overhead rates paid by the Government.
- ? Over time, the numbers of people required in the acquisition process should also shrink – thus reducing the number of contracting and technical Federal employees required to implement today’s processes.
- ? Legal costs for both parties would shrink dramatically.
- ? Protests as we know them today would essentially evaporate save for questions on did then Government comply with our stated evaluation criteria in the initial selections. A relatively narrow and easily resolved issue.
- ? The process IS more in line with ‘commercial practices.’
- ? Increased overall performance. Companies that are not performing today, whom we cannot (or do not have the stomach to) default could simply be sent home under terminations for convenience. Today, a convenience termination may be not be an option for true consideration due to the time involved in going through a FAR Part 15 process to replace the existing contractor. Under this revised process, we could replace the contractor in a matter of weeks. So performance becomes critical to retention of the contract.

What would be the downside of such a process?

- ? Contact pricing will take on renewed importance and cost/price training may need to be reinvigorated and refreshed. But whatever losses may occur in the interim would seem to be immediately off-set by the immediate cost savings for both Government and industry.
- ? Price competition as we know it today would disappear. But in reality does ‘price competition’ really exist today anyway when we consider the preponderance of today’s deals are ‘best value’ selections?²
- ? Public perception of ‘non-competitive’ contracts would have to be overcome.

FOOTNOTES:

1. Price competition can be a valuable tool when utilizing a fixed-price form of contract. However, once we head down the range of contracts toward a cost-plus-fixed-fee (CPFF) contract, ‘price’ becomes more of a perception than a reality -

and "price" competition on a CPFF contract is an illusion?

Arguably, any 'price' comparison among two offerors on a Time and Materials (T&M)/Labor-Hour contract, even using fixed hourly rates in the contract is also illusionary. [If company A's hourly rate is \$50 per hour and Company B's hourly rate is \$60, but Company A provide a much more knowledgeable person with better productivity who can accomplish a work task in 1&1/2 hours to Company B's employee who takes 2 hours on the same task.....what usefulness was there to the 'price competition' that showed Company A was a 'better value'? Unless offeror's are bound by the hours to perform a task (which virtually never occurs in a T&M contract), then this artificial 'price competition' merely satisfies the existing FAR requirement to consider price, but does nothing more.]

2. Today in best value selections, there is no requirement to 'quantify' the cost trade-off, only determine that a trade-off decision was made and the differential "has value."
(FAR 15.308 "... Although the rationale for the selection decision must be documented, that documentation need not quantify the tradeoffs that led to the decision.")

So while the perception of 'price competition' is there under today's best value transactions, in reality it is not.