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from professors ralph c. nash and john cibinic

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¶ 6 POSTSCRIPT III: OUR COMPETITIVE SYSTEM

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In two recent articles, Ralph and I looked into whether the process of competitive negotiation (source selection) “works” to encourage firms to do business with the Government. See *Our Competitive System: Does It Work?*, 36 NCRNL ¶ 70, and *Postscript II: Our Competitive System*, 38 NCRNL ¶ 3. We think the process is cumbersome, takes too long, and is too expensive. In *Postscript II*, we argued that the competitive system (rules and procedures) is badly designed and maladapted to present circumstances. In this article, we want to show, by way of example, that the system is worse when the bad design is poorly executed.

A Request For Proposals For Commercial Services

We routinely scan the System for Award Management (SAM.gov) to look at Requests for Proposals and see what agencies are doing. On December 23, 2023, a Saturday, the Army posted an 80-page commercial item RFP, W5168W24R0014, at SAM.gov. The RFP sought proposals for an indefinite-delivery, indefinite-quantity firm-fixed-price contract to provide “dining facility attendant services” at Fort Wainwright, Alaska, home to the 1st Brigade Combat Team of the 11th Airborne Division. The competition was set aside for small businesses. The RFP gave prospective offerors until noon on January 31, 2024—37 calendar days—to study its terms and submit proposals.

(NOTE: We refer to the RFP in the past tense because this article is being written in the holiday week following the RFP’s release and the RFP might be amended before this issue of the REPORT reaches readers.)

Here is how the SAM.gov announcement described the requirement:

The Contractor shall provide quality services in support of the installation food service program supporting the warfighter with flexible, efficient, and cost-effective services through management innovations and use of industry best practices, where applicable, while ensuring compliance with all applicable laws, rules, and regulations.

The Functions And Organization Of An RFP

In competitive procurements, an RFP prescribes contract terms, seeks proposals, and states the

ground rules for competition. An RFP's three essential parts are (1) a model (draft) contract, (2) instructions to offerors, and (3) a statement of the Government's selection criteria ("evaluation factors") and procedures. See Federal Acquisition Regulation 15.203.

To facilitate proposal preparation RFPs must be well organized and well written because they are often voluminous. Offerors may have to read, digest, and respond to hundreds or even thousands of pages of what may be unfamiliar text. Questions to the agency usually must be in writing, which takes time. So the quality of the competition depends on the quality of the RFP, as well as the quality of the competitors.

RFP format affects readability and understanding. FAR 15.204-1 specifies a Uniform Contract Format (UCF) for contracts to be awarded pursuant to FAR Part 15. It organizes an RFP into four parts and 13 sections, as follows:

Part 1—The Schedule

- A – Solicitation/contract form
- B – Supplies or services and prices/costs
- C – Description/specifications/work statement
- D – Packaging and marking
- E – Inspection and acceptance
- F – Deliveries or performance
- G – Contract administration data
- H – Special contract requirements

Part II—Contract Clauses

Part III—List of Documents, Exhibits, and Other Attachment

- J – List of attachments

Part IV—Representations and Instructions

- K – Representations, certifications, and other statements of offerors or respondents
- L – Instructions, conditions, and notices to offerors or respondents
- M – Evaluation factors for award

In the UCF, the model contract includes Sections A through J. The competition instructions and contractor selection criteria (evaluation factors) are in sections K, L, and M.

The UCF is not mandatorily applicable to RFPs for commercial products and services, although some Contracting Officers do apply it. Instead, FAR 12.303 prescribes a different format:

(a) Standard Form (SF) 1449;

(b) Continuation of any block from SF 1449, such as—

- (1) Block 10 if an incentive subcontracting clause is used (the contracting officer shall indicate the applicable percentage);
- (2) Block 18B for remittance address;
- (3) Block 19 for line item numbers;
- (4) Block 20 for schedule of supplies/services; or
- (5) Block 25 for accounting data;

(c) Contract clauses—

- (1) [FAR] 52.212-4, Contract Terms and Conditions—Commercial Products and Commercial Services, by reference (see SF 1449, Block 27a);
- (2) Any addendum to [FAR] 52.212-4; and
- (3) [FAR] 52.212-5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Products and Commercial Services;

(d) Any contract documents, exhibits or attachments; and

(e) Solicitation provisions—

- (1) [FAR] 52.212-1, Instructions to Offerors—Commercial Products and Commercial Services, by reference (see SF 1449, Block 27a);

- (2) Any addendum to [FAR] 52.212-1;
- (3) [FAR] 52.212-2, Evaluation—Commercial Products and Commercial Services, or other description of evaluation factors for award, if used; and
- (4) [FAR] 52.212-3, Offeror Representations and Certifications—Commercial Products and Commercial Services.

Items (a) through (d) constitute the model contract in that format. The RFP under study was not prepared in either of the two formats described above and did not include a discernable model contract.

The Contract Line Items

FAR Subpart 4.10, *Uniform use of line items*, tells agencies to identify and specify what they are buying in numbered “line items.” See FAR 4.1001. The contract line items are the heart of a model contract. They are concise descriptions of the things being purchased and specify quantities and units of measure. See FAR 4.1005-1. If a more detailed description is needed, it is included in a supplemental specification (for products), work statement (for services), or data description (for information), which is cited in the relevant line item and is part of the model contract. Contract prices, delivery dates or performance periods, and contract clauses apply to specific line items.

The RFP under study included four line items for services. Item 0001 was for one month of “phase-in services”; Item 0002 was for 60 months of “program management”; Item 0003, was for 60 months of “dining facility attendant services” at one facility; and Item 0004 was for the same services at a second facility. Line items 0001 and 0002 did not describe the work to be done or refer to a work statement, so it was not clear what, specifically, the contractor would be expected to do during phase-in and program management, what results it would have to produce, and what costs it would have to incur. Line items 0003 and 0004 referred to Section 4 of a 28-page “Performance Work Statement” (PWS). See the definition of *performance work statement* in FAR 2.101 and the brief description in FAR 37.602. Section 4 was entitled, “Operational Requirements” and was four pages in length. The PWS did not mention “phase in” or “program management.”

The Performance Work Statement (PWS)

The PWS was attached to the RFP and organized in eight sections as follows:

- (1) General Information
- (2) Government Furnished Property, Facilities, and Services
- (3) Contractor Furnished Items and Equipment
- (4) Operational Requirements
- (5) Performance Requirements Summary
- (6) Reporting
- (7) Related Documents, Definitions, and Acronyms
- (8) Applicable Regulations, Publications, Forms, and Labels.

The longest section was General Information, which took up 14 of the 28 pages. The shortest sections were “Government Furnished Property, Facilities, and Services,” which stated that the Government would not provide any, and “Contractor Furnished Items and Equipment,” which stated: “The Contractor shall furnish everything required to perform this contract, including but not limited to: office equipment, office supplies, cleaning supplies, etc.”

Paragraph 1.1.2 of Section 1 stated:

1.1.2 The United States Government uses the Performance Based Services Acquisition (PBSA) strategy to provide the descriptions, instructions, and references in this document. The Government provides

additional details or references when experience indicates a need exists to drive a specific effective and efficient outcome. The presence of these additional details or the absence of these details reflect the performance-based nature of this format and should not be construed to mean this performance-based document lists all implied tasks necessary to achieve the successful level of performance. **Referenced publications, regulations, and guidance in this PWS provide specific performance standards; the Contractor, Sub-Contractors (herein the Contractor) must adhere to those standards unless specific relief has been given, in writing, by the Contracting Officer (KO).** [Emphasis in original.]

PWS Subsection 1.2, *Scope of Effort*, provided in part as follows:

1.2.1 The Contractor shall provide all supervision, labor, personnel, materials and supplies to perform activities as defined in this PWS. The Contractor shall perform the requirements in this PWS and conform to the professional standards identified in this contract and shall follow all applicable instructions and directives as identified by this PWS. *All services provided by the Contractor in this contract shall be performed in accordance with (IAW) Tri Service Food Code (TB MED 530), Army Policy, and all applicable local, state, and federal laws, regulations and policies. In the event of a conflict between any law and regulation, the more stringent rule shall apply.* Contractor tasks include but are not limited to the following: facility sanitation, janitorial services, and management functions in support of the installation's [Dining Facility Attendant (DFA)] mission. [Emphasis added.]

The TRI SERVICE FOOD CODE (TB MED 530) mentioned in the above paragraph, currently dated March 1, 2019, is a 454-page technical bulletin issued jointly by the military services and available online. The bulletin's Section 1-2, *References*, states: "A list of applicable references and prescribed and referenced forms is provided in appendix A." Appendix A is 12 pages long. It lists:

- 15 "DOD and Joint/Multiservice Publications";
- 5 "Air Force Publications";
- 17 "Army Publications"; and
- 18 Navy and Marine Corps "Instructions/Publications."

Under the heading *Other Publications*, it lists:

- 77 sections of various titles of the CODE OF FEDERAL REGULATIONS;
- 29 papers published in various journals;
- 2 National Fire Protection Association (NFPA) standards; and
- 14 National Sanitation Foundation (NSF) standards.

Finally, *Appendix A* lists the 768-page U.S. Public Health Service 2013 FOOD CODE and its 33-page supplement. That document cites numerous additional references. The PWS is not specific about how and to what extent any of those references will apply to the contractor. There is no indication of tailoring of any of those references.

THE GOVERNMENT CONTRACTS REFERENCE BOOK (5th ed. 2021) at page 475 defines *tailoring* as: "[t]he process by which individual sections, paragraphs, or sentences of specifications, standards, and related documents selected for use in a procurement are reviewed and modified so that each one that is selected contains an accurate statement of the government's needs, is not unduly restrictive, and

incorporates commercial items or nondevelopmental items.” See FAR 11.201, *Identification and availability of specifications*, stating:

- (c) When documents refer to other documents, such references shall—
 - (1) Be restricted to documents, or appropriate portions of documents, that apply in the acquisition;
 - (2) Cite the extent of their applicability;
 - (3) Not conflict with other documents and provisions of the solicitation; and
 - (4) Identify all applicable first tier references.

Thus, without tailoring it appears that the contract resulting from this procurement will require the contractor to comply with thousands of pages of Government documents while performing what is supposed to be a commercial service.

It simply is not reasonable to believe that anyone in the successful offeror’s organization will have read, digested, and understood all of that referenced material upon contract award. The RFP gave offerors only 37 days for RFP analysis and proposal preparation. Only an incumbent or former contractor could know how, and how strictly, the Government’s contract administration personnel will apply and enforce all that material. A new contractor might find the PWS to be a minefield of nitpickery on the part of Government personnel. In a rational contracting system the parties would discuss such requirements and reach understandings before signing a contract. But Government agencies like to award contracts “without discussions” or limit discussions to Government disclosure of significant weaknesses or deficiencies it found in proposals.

If the Government really intends to require strict compliance with all that material, then there is no practical way for either party to know upon contract formation what their specific obligations will be. Moreover, the incorporation of so many voluminous Government documents issued by organizations other than the one awarding the contract, without tailoring and without complete reference information, such as edition or date, raises a question: Would changes made to such documents by the issuing organization during contract performance automatically apply to the contract, without a change order or supplemental agreement? Is the contractor supposed to keep track of those documents and implement changes at its own initiative? What about equitable adjustments?

Wholesale incorporation of so much material will make contract performance risk exceedingly high for the contractor and may make the service unnecessarily expensive for the Government. Specification without tailoring is inconsistent with Government-wide and longstanding Department of Defense principles of sound practice. See FAR 11.002(c). See also the guidance in Military Handbook 245D (1996), *HANDBOOK FOR PREPARATION OF STATEMENT OF WORK*, Section 3.6.3, stating that a well-written Statement of Work:

- d. References only the absolute minimum applicable specifications and standards needed. Selectively invokes documents only to the extent required to satisfy the existing requirements. (The tailoring of reference document requirements should result in a reduction to the overall costs otherwise incurred if all requirements stated in a document are invoked).

Also, the incorporation of all that Government material puts the lie to the notion of a “Performance Work Statement,” because a PWS is supposed to specify results, not processes. See FAR 37.602. The *TRI SERVICES FOOD CODE* contains two pages of instructions just on hand washing.

Solicitation Provisions And Contract Clauses

Pages 6 through 66 and 77–80 of the RFP listed 133 applicable *solicitation provisions* and *contract*

clauses. See the definitions in FAR 2.101. Some of the provisions and clauses appeared in full text, the others were incorporated by reference.

The provisions and clauses included the five commercial texts prescribed in FAR Part 12:

- FAR 52.212-1, *Instructions to Offerors—Commercial Products and Commercial Services*;
- FAR 52.212-2, *Evaluation—Commercial Products and Commercial Services*;
- FAR 62.212-3, *Offeror Representations and Certifications—Commercial Products and Commercial Services*;
- FAR 52.212-4, *Contract Terms and Conditions—Commercial Products and Commercial Services*; and
- FAR 52.212-5, *Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Products and Commercial Services*.

The other 128 provisions and clauses in this commercial items RFP were prescribed in various other parts of the FAR and Defense FAR Supplement.

Clauses and provisions are separated under the UCF and the commercial items contract formats. But the clauses and provisions in this RFP were mingled indiscriminately, which might confuse offerors not familiar with Government contracting practices. Inexplicably, an important addendum to FAR 52.212-4 does not appear immediately after the clause, on page 38, as it should, but on page 77. The addendum replaces the commercial terms for inspection and acceptance with a weirdly edited version of the noncommercial text of FAR 52.246-4, *Inspection of Services—Fixed Price (AUG 1996)*.

Evaluation Factors For Award

An addendum to FAR 52.212-2 stated that the agency planned to conduct a lowest price technically acceptable (LPTA) competition. See FAR 15.101-2. Technical acceptability was to be determined on the basis of (1) “technical capability” as demonstrated by a “staffing plan,” and (2) past performance.

The RFP described the “technical capability” evaluation factor as follows:

Factor 1 – Technical Capability. The Technical Capability Factor evaluation provides an assessment of the offeror’s capability to satisfy the Government’s minimum requirements. This factor has one subfactor that will be used to determine the overall technical capability: Staffing Plan.

Subfactor 1 – Staffing Plan. To be considered acceptable, the Offeror shall clearly demonstrate that their staffing is appropriate to successfully perform the PWS requirements. Appropriate staffing includes the number of personnel and the labor mix to successfully perform the PWS requirements. The offeror’s staffing and rationale shall clearly demonstrate (1) that the number of staff and the associated labor type outside of serving times is appropriate to clearly demonstrate successful completion of the PWS requirements; and (2) the staffing will ensure successful continuous operations of all PWS tasks during the feeding times (to include as patrons/units rotate through the facility). Additionally, the Offeror’s staffing shall clearly demonstrate they can accommodate fluctuating workloads within a band of meals, minimize personnel turnover, and allow for cross-training and cross-utilizing of personnel to perform the requirements of the PWS.

There were no other technical subfactors. So “technical capability” depends entirely on the accept-

ability of a staffing plan.

Given that technical acceptability was to be based on “technical capability” and past performance, and that those factors seem to be responsibility-related factors—see FAR 9.104-1(c), (d), and (e)—and were to be evaluated on a pass-or-fail basis rather than comparatively, then a determination that the offeror with the lowest price is technically unacceptable might require referral of the offeror to the Small Business Administration for Certificate of Competency consideration pursuant to FAR Subpart 19.6. See FAR 15.101-2(b)(1). Although that FAR subparagraph mentions only past performance, the rule applies to all responsibility-related factors. See *FORMATION OF GOVERNMENT CONTRACTS* 6-42 to 6-45 (5th ed. 2023). That is an old rule that could prompt a protest, delay award, or even result in overturning of the award decision if not handled properly, a risk that could easily have been avoided. See FAR 15.101-1.

Proposal Preparation Instructions

The RFP instructed offerors to submit their proposals in four “volumes”:

- Volume I – Solicitation Documents;
- Volume II – Technical;
- Volume III – Past Performance; and
- Volume IV – Price.

The solicitation documents were to include:

1. a completed SF 1449;
2. representations, certifications, and other statements of offerors;
3. a statement of offeror Exceptions/Assumptions;
4. a Mission-Essential Contractor Services Plan;
5. a Property Management Plan; and
6. a Randolph-Sheppard Act subcontracting plan.

Page limits did not apply to any of those six documents.

The instructions for the technical volume, which was limited to 100 pages, were as follows:

(1) The Technical Volume shall be clear, concise, and include sufficient detail for effective evaluation and for substantiating the validity of stated claims in the Offeror’s proposal. The responses will be evaluated against the Technical Capability Factor and Subfactor defined in the Addendum to 52.212-2 Evaluation-Commercial Items. Offerors are cautioned that “parroting” of the Technical requirements or the PWS with a statement of intent to perform does not reflect an understanding of the requirement or the capability to perform. Statements that the offeror understands, can, or will comply with the PWS (including referenced publications or technical data); and phrases such as “standard procedures will be employed” or “well known techniques will be used” etc., will be considered unacceptable. Offerors are responsible for including sufficient details to permit a complete and accurate evaluation of each proposal. Offerors shall assume that the Government has no prior knowledge of their technical capabilities and past experience and will base its evaluation on the information presented in the offeror’s proposal. See Table 1 for page limits associated with the proposal.

(2) The Technical proposal will be evaluated against the Technical Capability Factor and Subfactor defined in the Addendum to 52.212-2 Evaluation-Commercial Items. The section shall be prepared in an orderly format and *in sufficient detail to enable the Government to make a thorough evaluation of the contractor's technical competence and ability to comply with the contract task requirements specified in the PWS.* [Emphasis added.]

(3) The volume shall be organized according to the following general outline.

Tab A – Table of Contents

Tab B – List of Tables and Drawings

Tab C – Cross Reference Matrix

Tab D – Factor 1 Technical Capability

(4) Additional information specific to Tab D of the Technical Volume follows:

TAB D. Technical Capability.

Subfactor 1 – Staffing Plan. The staffing plan shall include proposed staffing by labor categories to perform the required services in each building listed in the PWS and Solicitation Attachment F – Estimated Workload. Offerors shall utilize the Solicitation Attachment H – Staffing Matrix, for depicting their staffing. Offerors are only required to complete the Staffing Matrix for [contract line-item numbers (CLINs)]/SubCLINs within the Pricing Matrix that contain estimated quantities.

In addition to completing the Staffing Matrix, offerors shall provide rationale for their staffing for the applicable dining facilities to specifically address the following:

(a) Explain the logic for the staffing ([full-time equivalents (FTEs)] x labor categories) for not only during serving times, but for hours before and after serving times;

(b) Rationale for staffing to ensure successful continuous operations of all PWS tasks during feeding times (to include as patrons/units rotate through the facility).

Rationale needs to include their methodology for accommodating fluctuating meals within the bands, crossutilization [sic] of personnel and minimizing employee turnover.

To provide a common basis for offeror staffing plans, the RFP included an attachment that provided historical workload data in terms of the numbers of persons served at the two dining facilities.

One question about the technical proposal is whether the 100-page limitation was an indication of the agency's expectations about the amount of descriptive and explanatory material that offerors should submit in order to be competitive. The instructions did not ask any specific questions. Would a 25-page technical proposal be considered too sparse on its face? There likely would be no way for prospective offerors to find out. Contracting Officers are usually noncommittal when responding to questions of that kind.

In addition to the instructions for the technical volume, the RFP instructed the offerors as follows:

TAB E. Mission-Essential Contractor Services Plan – Offerors shall submit a Mission-Essential Contractor Services Plan IAW DFARS Provision 252.237-7024, Notice of Continuation of Essential Contractor Services. *The Mission-Essential Contractor Services Plan will not be included in the source selection evaluation or be considered in the basis for award. However, Failure to submit and negotiate a Mission-Essential Contractor Services Plan acceptable to the Contracting Officer will make the offeror ineligible for award of a contract.* [Emphasis added.]

The DFARS requires the submission of such plans with offers. But given that the agency does not intend to evaluate the plan as part of the source selection, and that there will be a phase-in period, why not seek a deviation allowing the agency to obtain the plan after contract award? How hard could it be?

The RFP also required offerors to submit a property management plan:

TAB F. Property Management Plan (PMP) – Offerors shall submit a PMP IAW FAR Clause 52.245-1, Government Property. The PMP is to provide an overview of “how” the contractor intends to manage Government Property in its possession in accordance with FAR 52.245-1 requirements. The PMP shall also include any customary commercial practices, voluntary consensus standards, or industry leading practices the contractor plans to use in managing Government Property. *The PMP will not be included in the source selection evaluation or be considered in the basis for award. However, Failure to submit and negotiate a PMP acceptable to the Contacting Officer will make the offeror ineligible for award of a contract.* [Emphasis added.]

Given that the PWS indicated that there would be no Government-furnished property, it is unclear why the agency wanted a property management plan prepared in accordance with FAR 52.245-1.

The vague instructions about the content and organization of the information offerors were to submit in their Technical Proposal, Mission Essential Contractor Services Plan, and Property Management Plan raise a question. If the Government wants real head-to-head competition, then instead of giving vague instructions about proposal content and receiving varied responses, why not ask specific questions that demand specific answers? Why leave offerors uncertain about what, exactly, the Government wants to know about staffing, mission essential services, and property management? Why not develop a questionnaire, ask specific questions, and limit answers to numbers of words or pages per answer? We think such an approach would be more focused, structured, and efficient than telling offerors to describe and explain a “staffing plan.” Of course, developing specific questions would require agencies to think about what they want to know, which is hard work. So, in a procurement like this, why not skip all the written material and conduct oral presentations and Q&A sessions, or just Q&A sessions?

Another issue with the RFP under study is whether the agency expected offeror staffing plans, mission essentials services plans, and property management plans to be *promises*—commitments to do or refrain from doing specific things—or just information to be used only for contractor selection purposes? The distinction is obviously important.

Observations

The Fort Wainwright RFP is poorly designed in format and content.

1. Why no explanation of how the IDIQ feature will work?
2. Why no table of contents in either the RFP or the attached PWS?
3. Why no clearly discernable model contract?
4. Why were the contract line items and the PWS not harmonized?
5. Why did the PWS not address phase-in and program management?
6. Why were myriad Government documents included in a PWS for a commercial service?
7. Why were those documents included without tailoring?
8. Why were solicitation provisions and contract clauses intermingled?
9. Why not seek permission to obtain a mission-essential contractor service plan during phase in if the plan will not be evaluated as part of the source selection?

10. Why ask for a property management plan if there is to be no Government-furnished property?

The 37-day deadline for “clear, concise, and detailed” proposals and plans seems very tight given the sheer voluminousness of the requirement documents and the requirement for a technical proposal and plans. We wonder why the agency imposed such a tight deadline. It is rather obviously advantageous to an incumbent contractor, if there is one. In fact, several of the features of the RFP seem advantageous to an incumbent.

If the service really is commercial, why not abstain from the essay-writing contest? Why not select the contractor based on experience, past performance, and price and get all the plans during phase-in? Since the contract was to be IDIQ, the phase-in period could provide the minimum quantity. And if the contractor could not produce acceptable plans within the phase-in period the agency could decline to issue task orders and try one of the other competitors, extending the incumbent for a short time if necessary.

Conclusion

Competing for a Government contract can be an ordeal. The RFP under review, though bad, was not the worst that we have seen. We have seen many that were much worse. But requiring the preparation and submission of “clear, concise, and detailed” proposals to provide a service that must comply with thousands of pages of documents was ridiculous. The RFP is neither clear nor concise, but it is detailed in all the wrong ways. Asking offerors to submit such proposals without the opportunity to discuss that material with the prospective customer first is absurd. But that is the Government’s competitive contracting system, and issuing such RFPs is all too common.

Does the system encourage innovative firms to do business with the Government? We have been told that it does not, and we don’t see why it would, or should, but we do not know. American businesses are nothing if not bold, aggressive, and willing to take risks.

Does the system yield best value in actual contract performance? We do not know. No one does. But whatever the system does, it could do it in less time and at less expense. And while rule changes would help, and should be made, better practice is possible even without them.

Rules alone are not what make the competitive system the mess that it is. The RFP we have reviewed is not deficient because of rules, but because of workforce ignorance and incompetence. The system will not get better until that problem is solved, no matter how many rules we have. If it is solved, the rules won’t be as much of a problem. *VJE*