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government contract analysis and advice monthly from professors ralph c. nash and john cibinic

Author: Ralph C. Nash, Professor Emeritus of Law, The George Washington University
Contributing Authors: Vernon J. Edwards and Nathaniel E. Castellano

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¶ 3 POSTSCRIPT II: Our Competitive System

Vernon J. Edwards

In *Our Competitive System: Does It Work*, 36 NCRNL ¶ 70, Ralph asked whether our system of competitive contract award "works" to induce leading edge companies in the private sector to do business with the Government. He stated, "The general consensus seems to be that the current system doesn't do a very good job in this regard."

Assuming the seeming consensus to be true, Ralph provided a possible explanation:

> For many years Government agencies have identified their requirements in great detail, written a specification or work statement laying them out, prepared a Request for Proposals, and conducted a head-to-head competition to select the winning contractor. The companies that have regularly participated in this process have adapted by creating dedicated proposal preparation teams and creating the numerous internal systems required to meet all of the requirements of the RFP. They also have become accustomed to staying prepared to commence work a year or more after they have submitted their proposal if they win the competition.
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> What commercial company would participate in this type of competition? The only counterpart we can think of in the commercial world is the design-bid-build model used in procuring commercial construction projects but, even there, many owners have gone to the design-build model. But commercial companies selling products or services are not geared up for this process and would be ill-advised to spend their money in an attempt to enter such a competition. As best we can tell, most commercial companies have decided not to play this game.

What Is The "Game"?

The "game" to which Ralph referred is the acquisition procedure variously known as *competitive proposals, competitive negotiation*, or *source selection*. In specific cases it may include the *fair opportunity* process used in multiple award task and delivery order contracting. For the purposes of this article the game does not include sealed bidding, simplified acquisition, or the placement of orders against General Services Administration Federal Supply Schedules.

The game's general procedures include (1) "full and open competition" or some more limited extent of head-to-head proposal-based competition; (2) publication of a Request for Proposals that

specifies Government requirements, evaluation criteria, and proposal preparation instructions; (3) unbiased proposal evaluation; and (4) contractor selection based on either (a) quality/price tradeoffs, (b) identification of the lowest-price technically-acceptable proposal, or (c) identification of the most highly rated proposal with a fair and reasonable price. The defining feature of this game is the requirement for competing offerors to prepare a "technical" or "management" proposal, or both, that describes what they are going to do or deliver and how they are going to do or deliver it if awarded the contract. The outcome of the competition will turn on the Government's evaluations of the competing proposals and the proposed prices. See *"Proposals" & "Offers": They're Not the Same*, 37 NCRNL ¶ 52.

All of that is hopefully done within a reasonable time, referred to as procurement administrative lead time (PALT), and at a reasonable expense. But all too often it is not. Proposal preparation is often challenging, time-consuming, and expensive. The same goes for proposal evaluation. Important source selections have produced torrents of paper, taken years to complete, and resulted in serial protest litigation, stays, preliminary injunctions, contract terminations, performance delays, and even program cancellations.

What Are The Rules?

The competitive proposals process is prescribed in general terms by statute. See 10 USCA § 3201, *Full and open competition*, which applies to the Department of Defense:

> (a) **In general**.—Except as provided in sections 3203, 3204(a), and 3205 of this title 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—
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> (1) shall obtain full and open competition through the use of competitive procedures in accordance with the requirements of this section and sections 3069, 3203, 3204, 3205, 3403, 3405, 3406, 3901, 4501, and 4502 of this title and the Federal Acquisition Regulation; and
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> (2) shall use the competitive procedure or combination of competitive procedures that is best suited under the circumstances of the procurement.

Then, see 10 USCA § 3301, *Basis of award and rejection*:

> (a) **Award**.—The head of an agency shall evaluate sealed bids and competitive proposals and make an award based solely on the factors specified in the solicitation.
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> (b) **Rejection**.—All sealed bids or competitive proposals received in response to a solicitation may be rejected if the head of the agency determines that such action is in the public interest.

Similar provisions (worded slightly differently) appear in Title 41 of the U.S. Code, which applies to most civilian agencies. See 41 USCA § 3301; 41 USCA. § 3701.

The statutes are implemented by the Federal Acquisition Regulation, Title 48 of the Code of Federal Regulations, Chapter 1, by agency FAR supplements, and by other agency issuances, such as the *Department of Defense Source Selection Procedures* (Aug. 20, 2022), https://www.acq.osd.mil/dpap/policy/policyvault/USA000740-22-DPC.pdf.

How Were Those Rules Developed?

From the late 18th century until 1947, Congress required agencies to publicly advertise their requirements and procure what they needed by soliciting competitive sealed bids and awarding contracts to the low, responsive, responsible bidder. That process was known as *advertising* or

formal advertising and is now called *sealed bidding*, which is how we will refer to it henceforth. Any process other than sealed bidding was called *negotiation*. Congress permitted agencies to make small buys on the *open market*, as agencies do today through what is called *simplified acquisition*. Agencies could use negotiation only in emergencies, such as war. See Wittie, *Origin and History of Competition Requirements in Federal Government Contracting* (2003), https://www.reedsmith.com/-/media/files/perspectives/2003/02/origins-and-history-of-competition-requirements-in/files/origins-and-history-of-competition-requirements-in/fileattachment/wittiepaper.pdf.

During World War II, Congress suspended the use of sealed bidding and required agencies to award contracts through negotiation. At the end of the war, Congress realized that even in peacetime sealed bidding was not always suitable for procuring complex products and services for the military, either because the products or services were urgently needed or because they could not be fully specified in advance. So, Congress passed the Army Services Procurement Act of 1947, Pub. L. No. 80-413, 62 Stat. 21 (1948), which, while retaining the general requirement to use sealed bidding, permitted contracting by negotiation when any of 17 specified exceptional circumstances were found to exist. Another law, the Federal Property and Administrative Services Act of 1949, Pub. L. No. 81-152, 63 Stat. 377 (1949), made similar provisions for civilian agencies. However, Congress expected that the use of negotiation would be relatively rare.

The DOD promulgated a regulation to implement the Army Services Procurement Act—the Armed Services Procurement Regulation. The military services, primarily the Air Force and the Navy, began developing selection board competitive tradeoff procedures for use in research and development and major system procurements and lowest-price technically acceptable selection procedures for other competitive negotiations. Then, in the mid-1950s, Congress learned that while most DOD procurement actions were conducted using sealed bidding, most DOD dollars were obligated through negotiation. That came as something of a shock—even though it was largely due to the Korean War—because Congress did not trust negotiation to produce fair and reasonable prices and the DOD could not provide a satisfactory explanation of exactly what Contracting Officers did during "competitive negotiations."

Seeking to persuade Congress that matters were under control and there was no need for legislation, the DOD began amending its regulations about competitive negotiation to specify the competitive negotiation process more clearly. In 1961, it published regulations applicable to competitive negotiated procurements that required COs, with some exceptions, to conduct "written or oral discussions" with offerors in a "competitive range" and to allow them to submit proposal revisions.

But the DOD's new regulations did not satisfy Congress, which in 1962 passed the Truth in Negotiations Act, Pub. L. No. 87-653, 76 Stat. 528 (1962), which required either adequate price competition or the submission and certification of cost or pricing data and made written or oral discussions a statutory requirement. Throughout the 1960s and 1970s, competitive negotiations continued to dominate DOD procurements. The DOD continued to tinker with its regulations, but Congress continued to be unhappy about what it considered to be excessive use of negotiation, and the General Accounting Office—now the Government Accountability Office—began issuing decisions on bid protests about competitive negotiations, fleshing out the regulations with its "case law." And no rule prompted more protests than the rule about discussions. Confusion about what constitutes proper discussions continues to this day.

What Were The Origins Of The Game?

We think the game dates to the Air Corps Act of 1926, Pub. L. No. 69-446, 44 Stat. 780 (1926). As stated above, the general rule was to procure by sealed bidding. But the Wright Brothers made their first airplane flight in 1903 and sold their first airplane to the U.S. military in 1908 in a phony sealed-bid procurement conducted by the Army. See Edwards, *The True Story of the Wright Brothers Contract* (July 2002), https://www.wifcon.com/reading.html. Airplanes were used as weapons during World War I, and by 1920, the Army and Navy were developing new military aircraft. It was soon realized that sealed bidding was not well adapted for the procurement of aircraft design and development. So, in 1926, Congress, authorized the Army and Navy to conduct design competitions and negotiate contracts with the winners. The statute described design competitions as follows:

> SEC. 10. (a) That in order to encourage the development of aviation and improve the efficiency of the Army and Navy aeronautical materiel the Secretary of War or the Secretary of the Navy, prior to the procurement of new designs of aircraft or aircraft parts or aeronautical accessories, shall, by advertisement for a period of thirty days in at least three of the leading aeronautical journals and in such other manner as he may deem advisable, invite the submission in competition, by sealed communications, of such designs of aircraft, aircraft parts, and aeronautical accessories, together with a statement of the price for which such designs in whole or in part will be sold to the Government.
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> (b) The aforesaid advertisement shall specify a sufficient time, not less than sixty days from the expiration of the advertising period, within which all such communications containing designs and prices therefor must be submitted, and all such communications received shall be carefully kept sealed in the War Department or the Navy Department, as the case may be, until the expiration of said specified time, and no designs mailed after that time shall be received or considered. Said advertisement shall state in general terms the kind or aircraft, parts, or accessories to be developed and the approximate number or quantity required, and the department concerned shall furnish to each applicant identical specific detailed information as to the conditions and requirements of the competition and as to the various features and characteristics to be developed, listing specifically the respective measures of merit, expressed in rates per centum, that shall be applied in determining the merits of the designs, and said measures of merit shall be adhered to throughout such competition. All designs received up to the time specified for submitting them shall then be referred to a board appointed for that purpose by the Secretary of the department concerned and shall be appraised by it as soon as practicable and report made to the Secretary as to the winner or winners of such competition. When said Secretary shall have approved the report of said board, he shall then fix a time and place for a public announcement of the results and notify each competitor thereof; but if said report shall be disapproved by said Secretary, the papers shall be returned to the board for revision or the competition be.decided by the Secretary, in his discretion, and in any case the decision of the Secretary shall be final and conclusive. Such announcement shall include the percentages awarded to each of the several features or characteristics of the designs submitted by each competitor and the prices named by the competitors for their designs and the several features thereof if separable.
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> (c) Thereupon the said Secretary is authorized to contract with the winner or winners in such competition on such terms and conditions as he may deem most advantageous to the Government for furnishing or constructing all of each of the items, or all of any one or more of the several items of the aircraft, or parts, or accessories indicated in the advertisement, as the said Secretary shall find that in his judgment a winner is, or can within a reasonable time become, able and equipped to furnish or construct satisfactorily all or part, provided said Secretary and the winner shall be able to agree on a reasonable price. If the Secretary shall decide that a winner can not reasonably carry out and perform a contract for all or part of such aircraft, parts, or accessories, as above provided, then he is authorized to purchase the winning designs or any separable parts thereof if a fair and reasonable price can be agreed on with the winner, but not in excess of the price submitted with the designs.

According to an official history:

> The design competition feature of the Air Corps Act was an outgrowth of a procedure favored by Representative McSwain, a most active member of the House Military Affairs Committee. By this device the congressman hoped not only to stimulate the inventive genius of the country but also to protect the public from abuse. Every phase of the competition was to receive the fullest publicity. To assure the board's objectivity, its conclusions, expressed as numerical ratings, were to become a matter of public record and subject to challenge by losing competitors, who were provided with formal machinery of appeal. The design competition, McSwain hoped, would provide the government with a means of garnering the best in aeronautical advances without limiting the field to a few big aircraft firms.

See Holley, Jr., Buying Aircraft: Materiel Procurement for the Army Air Forces 90(1989).

The statute even provided for protests:

> (h) If, within ten days after the announcement of the results of said competition, any participant in the competition shall make to the Secretary of War or the Secretary of the Navy a reasonable showing in writing that error was made in determining the merits of designs submitted whereby such claimant was unjustly deprived of an award, the matter shall at once be referred by the Secretary of the department concerned to a board of arbitration for determination and the finding of such board shall, with the approval of the said Secretary, be conclusive on both parties. Such board of arbitration shall be composed of three skilled aeronautical engineers, one selected by the said Secretary, one by the claimant, and the third by those two, no one of whom shall have been a member of the board of appraisal in that competition.

There you have the prototype for today's tradeoff process source selections. For a comprehensive account of the development and types of competitive source selection processes and their effectiveness see Peck and Scherer, The Weapons Acquisition Process: An Economic Analysis 324–85 (Harvard 1962).

A Notorious Source Selection Reflects The Nature Of The Process

In 1963, the Air Force conducted a competition for a new aircraft, known as the "TFX" or Tactical Fighter Experimental," using what they called a "source selection process." The TFX source selection was one of the great ancestors of today's source selections. The selection decision was extremely controversial, both technically and politically, and is probably the most comprehensively and thoroughly investigated source selection decision in U.S. history. The U.S. Senate conducted hearings about it over the course of several months. The transcript fills 10 volumes. The process described therein, although large in scale, is essentially the same process used today under FAR Subpart 15.3 to procure not only R&D and weapon and space systems, but also routine technical and nontechnical products and services. Here is how the Senate report described it:

> The Air Force Source Selection Process
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> The proposals of the prospective contractors were delivered to the Government on December 6, 1961, and thereupon an evaluation group at Wright Field began to analyze them. This group was composed at various times of from 100 to 200 or more men who were divided into teams in these specific fields: Operations, technical matters, logistics, and management. These teams were composed of the top aircraft experts in these fields within the Air Force, Navy, and NASA. They spent about 6 weeks carefully examining each contractor's proposed design in the four fields. Their findings then were brought together in a comprehensive evaluation report, which was to be used as the guide for source selection deliberations. This general method of evaluation of proposals is used by the Air Force on all new aircraft programs.
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> The evaluation report was forwarded to the Systems Source Selection Board, composed of representatives of the Air Force Systems Command (in charge of engineering the new plane), the Air Force Logistics Command (supplies), and the Tactical Air Command (the ultimate user). The Navy also was represented

> on the SSSB because of Navy participation in the program. The SSSB made the final overall evaluation and specific recommendations, and then forwarded its findings to the senior officers of the three commands mentioned above.
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> In turn, these commanders individually recommended a winning source to the Air Force Council (composed of the general officers who were the Deputy Chiefs of Staff), who in turn passed their recommendations on to the Chief of Staff of the Air Force and the Chief of Naval Operations. In the TFX case, and indeed in all major procurements, this decision was passed on to the civilian Secretaries of the services and then forwarded to the Secretary of Defense for review and concurrence. The Secretary of Defense, of course, had the ultimate authority and responsibility for the decision.

TFX Contract Investigation, S. Rep. No. 91-1496, at 10 (1963). That, in outline, describes today's routine source selection process.

Watershed Legislation—The Competition In Contracting Act Of 1984

By the early 1980s, it had become clear that sealed bidding was not well adapted for the procurement of many of the important buys that agencies, military and civilian, needed to make for complex products, services, and information technology. Thus, in 1984, Congress passed the Competition in Contracting Act, Pub. L. No. 98-369, div. B., tit. VII, § § 2701–2753, 98 Stat. 494, 1175 (1984), which eliminated the strict preference for procurement by sealed bidding and the statutory exceptions to that preference, and allowed agencies to use negotiation at will if they sought and obtained "full and open competition." This was a watershed event, because competitive negotiation gave agencies more discretion when selecting contractors, and now agencies could use it to buy all kinds of products and services. See Cohen, *The Competition in Contracting Act*, 14 Pub. Cont. L. J. (1983). Agencies began using competitive negotiation to buy all kinds of services, even things like guard, janitorial, and grounds maintenance services, which had formerly been procured by sealed bidding. And what competitive negotiation process did they use? They adopted the time-consuming and costly competitive proposals/source selection board procedures that had been developed in the 1960s for complex research and system development procurements. Why? Because that's all they knew.

The enactment of CICA made a lot of procurement officials very happy about their new discretion, but it did not make them think hard enough and clearly enough about contractor selection procedures, and there was no Government procurement "think tank" to help them out. Instead CICA prompted agency officials to send their COs to training about how to conduct "best value" source selections, and all such training described the competitive proposals/evaluation board procedures developed for R&D and systems acquisition. Neither did the Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243 (1994), prompt them to think *deeply* about fast, efficient, and inexpensive ways to buy commercial items. Thus, a costly and time-consuming process of proposal solicitation, preparation, and evaluation became the model for almost all source selections, including those for commercial services. And that process came to be managed by personnel who received little if any training about planning, evaluation, and decision-making.

So while the military services and the National Aeronautics and Space Administration had asked for proposals to describe the proposed approach to conducting research or system design and development, agencies began asking for descriptions of the proposed approach even for simple products and services. At one point in 2016, a frustrated General Mark Milley, then Army chief of staff, complained about the acquisition process being used to buy new 9mm pistols. He was quoted as saying: "We are not exactly redesigning how to go to the moon, right? This is a pistol and argu-

ably it's the least lethal and important weapon system in the Department of Defense inventory." Parsons, *Milley: Pistol Program A Perfect Example Why Service Chiefs Deserve Acquisition Authority*, DEFENSE DAILY (Mar. 14, 2016), https://www.defensedaily.com/hub_updates/milley-pistol-program-a-perfect-example-why-service-chiefs-deserve-acquisition-authority/. The Army issued its RFP in August 2015. It took them until August 2016 to establish a competitive range. They awarded a contract in January 2017. The Government Accountability Office decided the bid protest in June 2017, *Glock, Inc.*, Comp. Gen. Dec. B-414401, 2017 CPD ¶ 180, 2017 WL 2719339. All of that was for just the first phase of the acquisition. See also Congressional Research Service, *The Army's Modular Handgun Procurement*, IF10911 (June 19, 2018). The 351-page RFP may be seen at https://graylinegroup.com/wp-content/uploads/2017/06/W15QKN15R0002-RFP_Final.pdf.

Since 1993, Ralph, John Cibinic, and I have asserted that such a process is little more than an expensive and time-consuming essay-writing contest and explained why we think that is so. See, e.g., *Streamlining Source Selection by Improving the Quality of Evaluation Factors*, 8 N&CR ¶ 56, in which we first asserted that source selections had become essay-writing contests:

> RFPs typically include two broad categories of "technical" or "management" evaluation factors. The first category relates to factual matters about offeror capability and includes such factors as experience, past performance, key personnel qualifications, capability of facilities, and product specifications. The second category relates to offerors' descriptions, promises, or predictions about what they will do, achieve, or deliver in the future. It includes descriptions of their plans, procedures, "design concepts," and promises or predictions about their performance or the performance of their products. This category includes such factors as "understanding the problem," "soundness of approach," and "merits of the proposed design."
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> When an RFP includes a complete description of the Government's requirements and terms and conditions, the evaluation factors constitute little more than a test of the offerors' knowledge and rhetorical skill. The offerors' technical and management proposals will play little or no role in contract formation. They will simply provide information for the Government to use in evaluating and comparing the offerors. The Government assumes that the technical and management proposals will indicate the offerors' relative capabilities and prospects for success. Thus, RFPs that include such factors effectively compel offerors to compete in essay-writing contests. Source-selection decisions based on these criteria too often reflect the ability of an offeror to write a good essay rather than its ability to do the work.…The reaction of competent contractors to such requirements is entirely predictable. See an article in the proceedings of the fifth annual conference of the Association of Proposal Management Professionals, which was held in Washington, D.C. [in May 1994], suggesting that companies develop reusable "plans" and "[total quality management (TQM)] blurbs" as a means of winning these essay-writing contests.

Today, such proposals might be prepared with the assistance of ChatGPT. Whose understanding would be demonstrated by such a proposal?

Does Our Competitive System "Work"?

The answer to Ralph's question depends on how you understand the word "work." If the question means does it produce contracts, then the answer is *Yes, usually*. If it means does it deliver contracts within a reasonable time and at reasonable expense, then the answer is *Sometimes*. If it means does it produce best value, the answer is *Who knows?* Bottom line: The process is needlessly complex, costly, and time-consuming, but most members of the workforce do not know enough to be able to fix those problems, and the Office of Federal Procurement Policy, the Defense Acquisition University, and the Federal Acquisition Institute appear to have nothing to offer in the way of advice and assistance.

In an article in the November/December 2023 issue of FOREIGN AFFAIRS, *The Dysfunctional Superpower*, former Secretary of Defense Robert M. Gates reviews the near-term challenges and threats facing our country. At the end of the article, he sums up what he thinks Congress and the President must do to prepare us. Among those recommendations is the following: "The Pentagon, for its part, must fix its sclerotic, parochial, and bureaucratic acquisition processes, which are especially anachronistic in an era when agility, flexibility, and speed matter more than ever." Gates's recommendations did not go far enough. It is not just a Pentagon problem.

Our entire Government depends heavily upon contracts and contractors to fulfill its obligations to the public. If trouble comes, and it will, sooner or later, in one form or another, whether another pandemic, a war, a natural disaster, a cyberattack, or something else, all responding agencies, not just the DOD, will need an acquisition system that is agile, adaptable, and fast. The current competitive system will not work as well as it could and should. It is not just a matter of rules. It is also a matter of know-how.

Historically, when big-time trouble comes, Congress throws out the rules so contracts can be awarded more quickly. When the trouble has passed, it conducts hearings, complains about fraud, waste, and abuse, and then enacts burdensome new rules. But instead of doing that, why not redesign the system now, so that it is always ready for trouble. *VJE*