

EXPLOITING ACQUISITION REFORM FOR NEW BUSINESS CAPTURE

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AGENDA

I. Opening Remarks/Introduction

II. Acquisition Reform Initiatives

- Shift to Performance Specifications
- Traditional Procurements
- FAR 15 and the New Way of Doing Business
- Risk Mitigation and Containment
- “Past Performance”

III. Questions & Answers

PERFORMANCE SPECIFICATIONS INCREASE CONTRACTOR RISK

- Inherently shifts greater risk from government to contractor
 - Greater levels of risk on “bet the company” programs
 - No longer assert that contract requirements were met by showing MilSpecs were religiously followed
- Precludes contractors from “getting healthy” from ECPs on work around solutions and changes during performance (implied MilSpec warranty)
- Performance Specification = employment of a “Total Systems Performance Responsibility” (“TSPR”) clause (Blanket Warranty)
- Current performance risks under the implicit TSPR are increased by
 - Evolving customer prerogative (undefined systems)
 - Evolving performance solutions of interfacing sister contractors
 - Stepping up to increased liability: Contractor drafts own SOW

- **Pre-empt, contain, and share increased contract/tort risk with customer and teaming partners to ensure profitable new business capture**
PRESENT: TRADITIONAL NEGOTIATED PROCUREMENTS
- Offerors routinely expected discussions and submission of BAFOs
- Offerors previously submitted initial proposals with intentional ambiguities in key technical/business details
- Discussions provided true balance of “technical discriminators” v. price sensitivity
- Then, BAFOs = genuine offers to prevent “auctioning” and “technical leveling”
- This incremental strategy kept the successful offeror’s
 - Keep pricing options open, and
 - Generally ensured that not too much money was “left on the table” between its price and the next-ranked proposal upon award (15% normal drop)

With FARA, significant shift in the competitive range dynamic from “When In Doubt Keep Them In,” to “When In Doubt Throw Them Out”

FUTURE: FAR 15 REWRITE

- Constriction of the competitive range to an “efficient number”
- “Competitive range” now becomes “competitive few”
- Consequently, contractors must prepare their initial proposals on “bet the company” programs as “**First and Final Offers**” (win 1/5)
- Contractors now bid according to “perceived” technical discriminators and “perceived” price sensitivity
- “Perceptions” of customer discriminators and price sensitivity will drive contractors to assume non-beneficial risks (impact on budgeted B&P is obvious -- ↑↑↑)
 - Changes particularly critical for service contractors (reliance on rapid cash flows)
 - Not as significant for production contractors and OEMs (maintain substantially larger IR&D and B&P pools)
 - Accrued acquisition reform savings from reduced cycle times can be re-invested into other company programs, used to support wholly funded R&D, or accelerate cash flow to increase shareholder value

PRE-EMPT/SHARE RISK VIA RISK MITIGATION PLANS

- The new constriction of the competitive range on initial proposals fosters early drafting of risk-mitigation plans (encourage use of IPTs)
 - Maintain Customer Goodwill
 - Total Systems Performance Responsibility clauses
 - “Interface Agreements” for future undefined systems
 - “Associated Contractor Agreements”
 - “Requirements Creep”
 - Accelerate definitization of Teaming Agreements (50¢/\$1)
 - Hazards are even greater in classified and developmental programs (mission-unique requirements, “need to know” sister programs, integration requirements, or software-intensive development complexities)

PAST PERFORMANCE

Performance on current contracts = Strong indication on how you will perform on future contracts

- Mission Statement: Equitable Review and Evaluation
- Past Performance as an Evaluation Factor and its Impact on the Procurement Process From Differing Perspectives
- Past Performance Procedures and Strategies

Mission Statement

- Acquisition reform “accelerants” = Shift to “First and Final Offers”
- Past performance will be mandatorily evaluated on initial proposals (as much as 50% of award criteria)
- Insulate offerors from dangers posed by “adverse” past performance “report cards”
- Exploit strong commercial/government past performance for competitive advantage

Historical Developments

- Agencies historically could evaluate past performance, but were NOT REQUIRED to do so
- Contractors “bought in” on developmental phases to enhance customer goodwill where there were insufficient RDT&E funds available (\$1 RDT&E:\$10 FRP & life cycle)
- CO’s new “20/20 hindsight” impedes, as a matter of law, contractors’ ability to win subsequent Full-Rate Production competition, plus unrelated programs

Mandatory “Significant” Evaluation Factor

- Past performance data has been mandatorily evaluated in procurements greater than \$1 million since **July 1, 1995** (CO determines weight of past performance in solicitation)
- Past performance data evaluated for three years preceding issuance of solicitation (likely that agencies will request series of contracts (e.g., last 3), rather than allowing offeror to selectively identify well-performed contracts)
- Evaluated in the areas of (no definitive standards defining past performance):
 - quality and cost control
 - timeliness of performance
 - contracting/business relationship & customer (end-user) satisfaction
 - divergent concerns (and interpretations) of government officials, the CO, the COTR, SETAs, etc.
- Encourage COs to exercise their discretion and allow offerors to submit information regarding problems encountered on past programs and steps taken to remedy -- Helps achieve “best-value” -- (Beware of the “other sources known to the government” = Competitors)

- Agency must provide evaluation to contractor and allow minimum of 30 days to respond. Limited review for subsequent disputes at level above CO (e.g., PCO), although agency retains final decision as to such conflict

Past Performance Close-Out

- Past performance “report cards” on existing procurements will be issued at contract “completion” by the CO, or annually for multi-year contracts
 - Proposed DFARS rule defines date of “contract completion” as date of close-out
- ⇒ All contracts not “completed” more than three years prior to solicitation will be considered for past performance evaluation in subsequent procurements
- Consequently, past performance evaluations could well include more than a decade of open contracts that have not been closed out due to lingering administrative issues, such as
 - cost overruns on stale, fixed-price development contracts

- schedule slippage

PAST PERFORMANCE DISRUPTS EXISTING BUSINESS DEVELOPMENT STRATEGIES

- Contractors “bought in” on FFPK development to enhance customer goodwill where insufficient RDT&E funds available (\$1 RDT&E: \$10 FRP & life cycle)
- Retroactively penalizes greater levels of technical risk where innovative technology was discriminator for award of developmental phase
- Avoid mandatory adverse evaluations where cost ceilings were overrun:
 - Avoid blanket rebuttal in initial proposals
 - Inventory past performance as relates to forecasted procurements
 - Re-visit potential of asserting declaratory claims, pursuing ADR or ROMs

- Avoid the **“one-size-fits all” approach**, and work with offerors to tailor past performance evaluations to acquire true **“best-value”** for the government

BUSINESS PARTNERS IMPACT PAST PERFORMANCE EVALUATIONS

- Thorough review of **all existing relationships** with business partners to determine whether they should be **maintained, severed, or restructured** (50¢ on the dollar flows through to subcontractors)
- Failure to promptly reassure teaming partners, or mutually act to beneficially restructure such relationships, will
 - foster atmosphere of suspicion
 - invite potentially unfounded default terminations
 - cultivate contractor disputes at all tiers
- Screen subcontracting plans to ensure strong past performance records, compliance with RFP requirements, and accordance with Administration's current emphasis on SDBs
- Acquired entity's past performance history now legally taints acquiring party

Cost Overruns or Schedule Slippage

- **CREATE THE PASSIVE PAPER TRAIL**
 - letters to the government describing problems encountered and corresponding responses
 - internal memoranda regarding the issue and remedial actions taken
 - records of all contacts made with government officials
- Use resultant information to extinguish poor “report card”
- Paper trail enables customer to save face and rectify cost or schedule impacts
- **CRITICAL:** Contractors can use this data to take the necessary steps to
 - obtain consideration
 - demonstrate problems were GOVERNMENT-caused
 - maintain profitable business relationship with the government
 - submit REAs, only in the appropriate circumstances
 - **ensure proper assessment of government liability**
 - **avoid downgrading of performance ratings**

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