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VIRTUAL ACQUISITION OFFICE™ AT A GLANCE

December 24, 2014

VAO Webinar Questions & Answers:

Back to Basics – Negotiation and Source Selection

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On November 20, 2014, ASI Government hosted the third Virtual Acquisition Office™ (VAO) webinar in our "Back to Basics" series. The webinar focused on negotiations with offerors in both competitive and noncompetitive environments under Federal Acquisition Regulation (FAR) part 15 rules, as well as achievement of the ultimate goal of selecting the best value source. A number of questions were received during the webinar, and the ASI Government answers are provided below.

Proposal Evaluation Process and Competitive Range Determination

Q Can you share some best practices for determining the highest rated proposals for a competitive range based on your previous acquisition experiences?

A The rating of proposals is necessarily specific to the acquisition, but it must always be driven by the stated proposal content requirements and evaluation factors and subfactors set forth in the solicitation. Each of the proposals received should be evaluated following the procedures outlined in the source selection plan to ascertain its compliance with the solicitation's requirements and to assess the proposed approach's ability to fulfill the agency's needs. VAO's December 2011 *Advisory*, "12 Keys to Successful Source Selections," describes best practices spanning the entire source selection process, all of which contribute to a high quality, successful source selection process. However, two of these best practices (cited below) help to ensure the proposal evaluation process allows the source selection official(s) to determine which proposals are the highest rated and to be reasonably confident that the proposal ratings accurately reflect the prospects for the selected offer to be the best value for meeting the agency's needs:

- Structure the Source Selection Team Appropriately for the Acquisition (#3)
- Conduct Just-in-Time Source Selection Evaluation Team Training before Proposals are Received (#5)

While the *Advisory* provides a wealth of information about best practices that help determine the "most highly rated" proposals, these two practices in particular help ensure that proposal evaluators are able to be effective in assessing each proposal, i.e., to ensure the proposals that emerge as the most highly rated have been consistently assessed and that the assessments accurately reflect how each proposal met—or did not meet—the solicitation criteria.

Q One offeror's response to a solicitation for a cost plus fixed fee contract was highly rated, but with a minor issue with individual prices in the offer. If updated, the contractor still would represent the best value. If the price variance is extremely low, could we still award without discussions using the proposal provided?

A The answer depends on the specifics of the situation. As long as the solicitation stated that the government reserved the right to award without discussions, the government may do so based on the initial proposal evaluation results. So the question then revolves around the nature and seriousness of the pricing issues mentioned.

It is notable that the agency expects that clarifying information will not disturb the initial rankings, under which there apparently was a successful offeror. This gives rise to the possibility of using a "clarification" exchange per FAR 15.306(a) to resolve any uncertainty arising from the identified pricing issues. However, keep in mind that this

venue may *not* be used to obtain an actual revision to the proposal. Any resultant award must cite cost and fee amounts as stated by the offeror in its proposal, rather than a government-assessed most probable cost derived from a cost realism analysis or a value different from the clearly intended offer amounts in the initial proposal.

If the "update" needed from the offeror in question would constitute a proposal revision, then under FAR part 15 rules, the agency could not award to that offeror without establishing a competitive range, conducting meaningful discussions with all offerors in the competitive range, and receiving and evaluating final proposal revisions, which presumably would include the necessary update to the pricing of the offer under discussion.

Meaningful Discussions on Pricing Issues

Q During negotiations, do you share the independent government cost estimate (IGCE) with offerors in the competitive range? I thought the IGCE was procurement sensitive information?

A The IGCE is properly considered procurement sensitive information, but unless prohibited by agency policy, the IGCE or subsets of information from the IGCE may be shared with offerors in the competitive range—*provided* it is shared with *all* offerors in the competitive range. This is to prevent any competitive advantage that might arise as a result of unequal sharing of information. There is no FAR-level prohibition against sharing an IGCE (except for construction contracts), and it well may be in the government's interest to share some or all of the IGCE information, particularly when the government's source selection team determines it may enhance the ability of each offeror to provide its best value solution to the government.

This is particularly germane to ensuring discussions on price are "meaningful" without being able to share comparative information from competing offers. If the contract type will be fixed-price and a cost or price realism analysis has not been conducted, and since competing prices generally cannot be shared with other offerors, there may be little to discuss with respect to price other than to compare the offeror's price to the government's anticipated and estimated reasonable price.

The government's estimate of a reasonable price may exist in the form of the budget allocation, the bottom line value estimate of the IGCE, or even a separately developed estimate. Indeed, these often are the same value due to agency collaboration and internal quality control processes. At any rate, except when constrained by agency policy or regulation, the government team is free to make such information available at any point in the process, as long as it is made available equally to all interested parties.

Two ASI publications discuss this principle based on prior research findings:

- An April 26, 2012, inquiry response on disclosing government budget estimates
- The October 2009 *Advisory*, "Acquisition Savings Plans: Ideas for Creating Savings through More Effective Acquisition Practices," which discusses releasing government budgetary or other estimates

Both of these publications discuss disseminating a government price estimate earlier in the acquisition process, when "interested parties" essentially includes all of industry. At the point in the process cited in the question—i.e., during negotiations—a competitive range has been established and only those firms that remain within the competitive range would be considered "interested parties." Thus, pertinent government estimates, which may be only the bottom line of the IGCE, may be shared with firms in the competitive range. Each firm can then assess that estimate versus the best price that it is able to offer.

Negotiations and Low-Price Technically Acceptable (LPTA)

Q It is my understanding that a competitive range is established only for source selection using the trade-off process and not for LPTA. Is this correct?

A You may establish a competitive range for LPTA. FAR 15.306, "Exchanges with Offerors after Receipt of Proposals," applies to any source selection process being conducted under FAR part 15 rules, including the LPTA process. Note that FAR 15.101-2(b)(4) explicitly cites the applicability, stating that "[e]xchanges may occur (see 15.306)."

Q You discussed situations in which an offeror could potentially be allowed to correct deficiencies in its technical proposal. How is this not allowing revision of the proposal?

A Exactly right. The corrections contemplated would indeed be proposal revisions and would be made after—and as a result of—discussions held with offerors that had been included in the competitive range, i.e., final proposal revisions. The discussions would, of course, need to be "meaningful" with all offerors and include dis-

cussion of each offeror's deficiencies discerned via the proposal evaluation process.

Q If the solicitation in an LPTA acquisition is clear in indicating that any offeror that is deemed technically unacceptable on any one factor will be excluded from further consideration, how do you establish a competitive range? *All* that are technically acceptable should be considered, right?

A Yes, all firms whose offers are technically acceptable on all factors may remain in consideration via inclusion in the competitive range if negotiations will be conducted, given the solicitation provision you postulated. However, as is always the case in an acquisition, the specific answer regarding a competitive range determination is situationally dependent; in this case, it depends as much as anything on the nature of the specific proposed prices.

We believe the most likely reason for an agency opting to use such a provision would be to gain efficiency and increase the likelihood of awarding without discussions. In this case, it seems likely that one or more of the technically acceptable offers is offering a reasonable price, i.e., one that meets, for example, the adequate price competition standards/characteristics described at FAR 15.403-1(c)(1). If so, then the contracting officer/source selection official may determine to proceed to award without discussions.

Alternatively, the contracting officer, after looking at the actual proposed prices, could determine that the FAR 15.403-1(c)(1) requirements have not been met and that all of the initially offered prices are unreasonably high or unaffordable and that establishment of a competitive range is appropriate. If so, under the noted solicitation provision, the competitive range could consist of all technically acceptable offers from responsible firms. In addition, the contracting officer may determine, in accordance with the LPTA's terms and evaluation factors, that only those offerors whose prices are within a certain dollar range of the government's expected reasonable price would stand a reasonable chance of being selected for award after submission of a final proposal revision (FPR), i.e., could be determined to be among the most highly rated proposals. In essence, this would be using price alone for purposes of ranking per FAR 15.101-2(b)(3) and consistent with the LPTA acquisition approach. At this point, discussions could consist of written advice to each firm in the competitive range that their proposals have been found to be technically acceptable and requesting an FPR with the firm's best price. This situation also could lend itself to a reverse auction conducted among the offerors in the competitive range.

The bottom line is that the LPTA process—employed when the agency has determined there is a well-defined minimum standard of technical acceptability and no value to the agency can be realized from potentially paying a premium price for additional technical quality or innovation, etc., via a trade-off—does lead to efficiencies in the source selection process via reduced instances of complex, time-consuming, and resource-intensive negotiations. However, use of LPTA does not prohibit agencies from holding discussions as appropriate to obtain the best value solution industry has to offer for meeting their requirements.

Q We look at technical acceptability first, without looking at price; those that are technically acceptable move on to next step (no competitive range per se). If lowest price is over the government estimate, then we discuss, get more funds, or call it bid bust.

A We believe your approach is fully within the spectrum of possible appropriate approaches. As we interpret it, you are describing a process in which you make your selection based on the original offered prices or, if affordability is an issue, open up "discussions" only for purposes of price discussion. We agree this may be appropriate for various acquisition scenarios. It would be particularly appropriate when the solicitation states that offerors will receive no further consideration if their initial proposals are not fully technically compliant. It may also be reasonable without such a provision, depending on the nature of the deficiencies identified in those offers evaluated to be not fully technically compliant.

We should note, however, that if you ever had a situation in which no offeror was fully technically acceptable, technical discussions could be helpful but would have been precluded by the terms of the solicitation. There's nothing wrong with what you describe, just keep in mind that there are additional flexibilities available that may be useful in some situations.

Q How do you eliminate offers that are technically acceptable from the competitive range? I can see this for trade-off but not for LPTA. It seems like you would have a lot of protests.

A As implied in the above answer, it may well be reasonable and prudent for both the offeror and the agency to exclude some offerors whose initial proposed

prices—submitted in a competitive environment in which award without discussions was a possibility—are so high that they are not competitive. It would not be reasonable to include them in the competitive range if you did not expect them to be able to reduce their price and be selected for award. ♦